Supreme Court of India
K.K. Modi vs K.N. Modi & Ors on 4 February, 1998
Author: M S V.Manohar.
Bench: Sujata V. Manohar, D.P. Wadhwa

PETITIONER:
K.K. MODI

Vs.

RESPONDENT:
K.N. MODI & ORS.

DATE OF JUDGMENT: 04/02/1998

BENCH:
SUJATA V. MANOHAR, D.P. WADHWA

ACT:

HEADNOTE:

JUDGMENT:

[WITH C.A.No. 614 Of 1998 (Arising out of S.L.P. (C) No. 18711 of 1997} and T.C.{C} No. 13.97] J U D G M E N T Mrs. Sujata V.Manohar. J.

Leave granted in Special Leave Petition Nos. 14905 and 18711 of 1997.

The present litigation has arisen on account of dispute between Seth Gujjar Mal Modi's five sons - K.K.Modi, V.K. Modi, S.K.Modi. B.K.Modi and U.K.Modi on the one hand (hereinafter referred to as `Group B') and Kedar Nath Modi, the younger brother of Seth Gujjar Mal Modi and his three sons - M.K.Modi and D.K.Modi (hereinafter referred to as `Group A') on the other hand. The Modi family owns or has a controlling interest in a number of public limited companies. They also own various assets. Differences and disputes have arisen between Kedar Nath Modi and his sons constituting Group A and the sons of late Gujjar Mal Modi constituting Group B on the other hand. To resolve these differences, negotiations tool place with the help of the financial institutions which had lent money to these companies, and through whom substantial public funds had ben invested in the companies owned and/or controlled by these two groups. Representatives of several banks, Reserve Bank of India and financial institutions were also invited to participate. Ultimately, on 24th of January, 1989, a Memorandum of Understanding was arrived at between Group A and Group B. Under the Memorandum of Understanding so arrived at, it is agreed between the parties that Group

A will manage and/or control the various companies enumerated in Clause 1. One of the companies so included is Modipon Ltd. minus Indofil (chemical division) and selling agency. Under Clause 2, Group B is entitled to manage, own and/or control the companies enumerated in that clause. One of the companies so included is Modipon Ltd. minus Modipon Fibre Division. The agreement also provides for division of assets which are to be valued and divided in the ration of 40:60 - Group A getting 40% of the assets and Group B getting 60% of the assets. The shares of the companies are required to be transferred to the respective groups after their valuation. Under Clause 3, valuation has to be done by M/s S.B. Billimoria & Company, Bombay. Clause 5 provides for companies which are to be split between the two groups as per the Memorandum of Understanding. The division has to be done under Clause 5 by a scheme of arrangement to be formulated by M/s Bansi S. Mehta & Company, Bombay after taking into consideration the valuation done by M/s. S.B. Billimoria & Company, Bombay. Units of a company to be given to each group are to be given along with assets ad liabilities. Clause 6 provides for interim arrangements which are to be made in respect of the three companies which are being sp[lit - these being Modi Industries Ltd., Modipon Ltd. and Modi Spinning and Weaving Mills Company Ltd. We are not concerned with the other clauses, except to note that the date for carrying out valuation, the date of transfer the appointment of independent Chairmen of these companies which are to be split and certain other matters specified in the Memorandum of Understanding shall be done consultation with the Chairman, Industrial Finance Corporation of India (IFCI).

Clause 9 provides as follows:-

"Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc, in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

Pursuant to the Memorandum of Understanding, M/s S.B. Billimoria & Company gave reports between January and March 1991. M/s Bansi S. Mehta & Company who were required to provide a scheme for splitting of the three companies by taking into account the valuation fixed by M/s S.B. Billimoria & Company, also sent various reports between November 1989 and December, 1994. The members of both the Groups were dissatisfied with these reports. They sent various representations to the Chairman and Managing Director of the Industrial Finance Corporation of India Ltd. in view of Clause 9 of the Memorandum of Understanding.

The Chairman and Managing Director, Industrial Finance Corporation of India formed a Committee of experts to assist him in deciding the questions that arose. The Committee of Experts and the Chairman, IFCI had discussions with both the groups. Meetings were also held with the Chairman of the concerned companies who were independent Chairmen. The discussions took place form 12th of March 1995 to 8th of December, 1995.

On 8th of December 1995, the Chairman, IFCI gave his detailed decision/report. In his covering letter of 8th of December, 1995, the Chairman and Managing Director, Industrial Finance Corporation of India Ltd. has described this report as his decision on each dispute raised or clarification sought. He has quoted in his covering letter that since that memorandum of

Understanding has already been implemented to a large extent during 1989 to 1995, with the decisions on the disputes/clarifications gives by him now in the enclosed report, he has hoped that it would be possible to implement the remaining part of the Memorandum of Understanding. He has drawn attention to paragraph 9 of his report where he has said that it is now left to the members of Groups A and B to settle amongst themselves the family matter without any further reference to the Chairman and Managing Director of the Industrial Finance Corporation of India. In paragraph 7 of the letter he has stated that on the basis of the total valuation of Modi Group assets and liabilities and allocation thereof between Groups A and B the decisions given by him in dated 8.12.1995. The averments and prayers in this suit were substantially the same as those in the arbitration petition. In one paragraph, however, in the plaint, it was stated that the same reliefs were being claimed in a suit in the event of it being held that the decision of the Chairman and Managing Director, IFCI was not an arbitration award but was just a decision.

In arbitration petition O.M.P. No. 58 of 1996 the present appellants also applied for interim relief by I.A 4550 of 1996. By an ad-interim order in O.M.P. No. 58 of 1996 and I.A 4550 of 1996 dated 24th of May, 1996, the Delhi High Court stated the operation of the "award" dated 8.12.1995 and directions of the Chairman, Modipon Ltd. as set out in the said order. The High Court also restrained respondents 6 and 7 (Group A) from selling and/or transferring and/or disposing of, in any manner, the shares held by them in Godfrey Phillips India Limited until further orders. From this ad-interim order a special leave petition was preferred by the respondents which was dismissed by this Court on 3.6.1996 on the ground that it was only an ad interim order.

Interim application I.A 4550 of 1996 in Arbitration Petition O.M.P. No. 58 of 1996 was heard and disposed of by the Delhi High Court by its impugned judgment dated 11th of February, 1997. A learned Single of the Delhi High Court held b y the said judgment that the decision of the Chairman and Managing Director, IFCI dated 8.12.1995 cannot be considered as an award in arbitration proceedings. The parties did not have any intention to refer any disputes to arbitration. All the disputed were settled by the Memorandum of Understanding dated 24th of January, 1989 and what remained was only the valuation of shares and division of the three companies as agreed to in the Memorandum of Understanding. In order to avoid any disputes, the parties had agreed that the Chairman and Managing Director, IFCI would issue all clarifications and give his decision in relation to the valuation under Clause 9 of the Memorandum of Understanding. The arbitration petition, according to the learned Single Judge, was, therefor, not maintainable, since the decision impugned was not award within the meaning of the Arbitration Act, 1940. Under the circumstances he dismissed the interim application I.A 4550 of 1996 in arbitration petition O.M.P. No.58 of 1996. By t he said order he posted the hearing of a similar interim application I.A 5112 of 1996 in Suit No. 1394 of 1996 on 26th of March, 1997.

Another interim application being I.A 2293 of 1997 in arbitration petition O.M.P. No. 58 of 1996 was heard by the learned Single Judge on 13th of March, 1997. The learned Single Judge passed an interim order to the effect that until further orders, no testing of the Modipon Board shall be held for considering any matter.

On 6th of September, 1997 Suit No. 1394 of 1996 filed by Group B, interim application in the suit being I.A. 5112 of 1996 in arbitration petition O.M.P. No. 58 of 1996 were heard together and decided by the learned Single Judge b y his judgment and order of the same date i.e. 6th of September, 1997. The learned Single Judge held that the entire exercise of filling Suit No. 1394 was an abuse of the process of the Court. According to him the allegations in the arbitration petition and in the plaint in the suit were identical. Both proceedings were instituted on the same date. The learned Single Judge struck down the plaint under order VI Rule XVI of the code of Civil Procedure and dismissed the suit. By the same order, he also dismissed I.A. 5112 of 1996 in the suit and I.A. 2293 of 1997 in the arbitration petition.

Being aggrieved b y the above judgment and order dated 6th of September, 1997, the present appellants filed an appeal before the Division Bench of the Delhi High Court being R.F.A. (OS) 41 of 1997. The appellants also made an interim application being C.M. 1270 of 1997 in R.F.A (OS) 41 of 1997. The Division Bench of the Delhi High Court, by its order dated 15th of September, 1997, admitted the appeal being R.F.A (OS) 41 of 1997. It also disposed of by the same order, C.M. 1270 of 1997 by passing an order reviving the order passed by the learned Single Judge on 13.3.1997 by which the learned Single Judge had directed that pending further orders no meeting of the Modipon Board should b e held to consider any matter.

S.L.P.(Civil) No. 18711/1997 is filed before us from this impugned order of 15th of September, 1997. Thus we have before us S.L.P. (Civil) No. 14905/1997 from the judgment and order of the learned Single Judge of the Delhi High Court dated 11.2.1997 in I.A 4550 of 1996 in arbitration petition O.M.P. No. 58 of 1996. We h ave also before us S.L.P. (Civil) No. 18711 of 1997 from the order of the Division Bench of the Delhi High Court dated 15.9.1997 in C.M. 1270 of 1997 under which the interim order of 13.3.1997 is revived. By consent of parties, R.F.A. (OS) 41 of 1997 has also been transferred to us being T.C.(civil) No. 30 of 1997 for consideration. All these three proceedings have been heard together. During the pendency of S.L.P. (Civil) No. 18711 of 1997, in I.A. No.3 we have b y our ad-interim order dated 18.11.1997 varied t he interim order of 13th of March, 1997 to the following effect:

> "Until further orders no meeting of the Modipon Board shall be held for considering any matter relating to decision of the C.M.D., IFCI dated 8.12.1995 or concerning the sale of shares held in Godfrey Philip India Limited."

Thereafter, on 7th of January, 1998 after hearing both sides, the following order has been passed in I.A.No.3 in S.L.P (Civil) No. 18711/97, in terms of the minutes :-

> "For a period of eight weeks from today, neither Mr. K.K. Modi nor Mr. M.K. Modi will acquire directly or indirectly any further shares of Modipon Limited nor take any steps that would in any way directly or indirectly destablise the control and management of the Fibre Division of Modipon Limited by Mr. K.K.Modi and of the Chemical Division of Modipon Limited by Mr. M.K.Modi.
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> Liberty to apply for variation if circumstances change."

The present proceedings raise two main question :

Question 1: Whether Clause 9 of the Memorandum of Understanding dated 24th of January, 1989 constitutes an arbitration agreement; and whether the decision of the Chairman, IFCI dated 8th December, 1995 constituted an award? and Question 2: Whether Suit No. 1394/1996 is an abuse of the process of court?

Question No.1:

Mustill and Boyd in their book on "Commercial Arbitration", 2nd Edition, at page 30, point out that in a complex modern State there is an immense variety of tribunals, differing fundamentally as regards their compositions, their functions and the sources from which their powers are derived. Dealing with tribunals whose jurisdiction is derived from consent of parties, t hey list, apart from arbitral tribunals, persons (not properly called Tribunals) entrusted by consent with the power to affect the legal rights of two parties inter see in a manner creating legally enforceable rights, but intended to do so by a procedure of ministerial and not a judicial, nature (for example, persons appointed by contract to value property or to certify the compliance of building works with a specification). There are also other tribunals with a consensual jurisdiction whose decisions are intended to affect the private rights of two parties inter see, but not in a manner which creates a legally enforceable remedy (for example, conciliation tribunals of local religious communities, or persons privately appointed to act as mediators between two disputing persons or groups). Mustill and Boyd have listed some of he attributes which must be present for an agreement to be considered as an arbitration agreement, though these attributes in themselves may not be sufficient. They have also listed certain other consideration which are relevant to this question, although not conclusive on the point.

Among the attributes which must be present for an agreement to be considered as an arbitration agreement are :

> (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to t he agreement, (2) That the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the Court or from a statute, the terms of which make it clear that the process is to be an arbitration, (3) The agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal, (4) That the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides, (5) That the judgment of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly, (6) The agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.

The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an

opportunity to put them forward; Whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.

In Russell on Arbitration, 21st Edition, at page 37, paragraph 2-014, the question : How to distinguish between an expert determination and arbitration, has been examined. It is stated, "Many cases have been fought over whether a contract's chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words of the disputes clause. If specific words such as 'arbitrator', 'arbitral tribunal', 'arbitrator' are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive although not always conclusive..... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately chose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert'..... An arbitral tribunal arrives at its decision on the evidence and submission of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion....."

The authorities thus seem to agree that while there are no conclusive tests, by and large, one can follow a set of guidelines in deciding whether the agreement is to refer an issue to an expert or whether the parties have agreed to resolve disputes through arbitration.

Therefore our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and support of the agreement. There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide Section 2 Arbitration Act 1940 and Section 7 Arbitration and Conciliation Act, 1996).

In the case of Smt. Rukmanibai Gupta v. Collector, Jabalpur & Ors. [(1980) 4 SCC 556], this Court dwelt upon the fact that disputes were referred to arbitration and the fact that the decision of the person to whom the disputes were referred was made final, as denominative of the nature of the agreement which the court held was an arbitration agreement.

In the case of State of U.P. v. Tipper Chand [(1980) 2 SCC 341], a clause in the contract which provided that the decision of the Superintending Engineer shall be final, conclusive and binding on

all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions was contoured as not being an arbitration clause. This Court said the there was no mention in this clause of any dispute, much less of a reference thereof. The purpose of the clause was clearly to vest the Superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.

In the case of Cursetji Jamshedji Ardaseer Wadia & Ors. v. Dr. R.D.Shiralee [AIR 1943 Bombay 32] the test which was emphasised was whether the intention of the parties was to avoid disputes or to resolve disputes. In the case of Vadilal Chatrabhuj Gandhi v. Thakorelal Chimanlal Munshaw [55 Bombay Law Reporter 629] the emphasis was on judicial enquiry and determination as indicative of an arbitration agreement as against an expert opinion. The test of preventing disputes or deciding disputes was also resorted to for the purpose of considering whether the agreement was a reference to arbitration or not. In that case, the agreement provided that the parties had agreed to enter into a compromise for payment of a sum up to, but not exceeding, Rs. 20 lacs, "which shall be borne and paid by the parties in such proportions or manner as Sir Jamshedji B.Kanga shall, in his absolute discretion, decide as a valuer and not as an arbitrator after giving each of us summary hearing." The court said that the mere fact that a judicial enquiry had been held is not sufficient to make the ultimate decision a judicial decision. The court held that Sir Jamshedji Kanga had not to decide upon the evidence led before him. He had to decide in his absolute discretion. There was not to be judicial enquiry worked out a judicial manner. Hence this was not an arbitration.

In the case of State of West Bengal & Ors. v. Haripada Santra [AIR 1990 Calcutta 83], the agreement the Superintending Engineer of the Circle shall be final The court relied upon the fact that the reference was to disputes between the parties on which a decision was required to be given by the Super intending Engineer. Obviously, such a decision could b e arrived at b y the Superintending Engineer only when the dispute was referred to him by either party for decision. He was also required to act judicially and decide the disputes after hearing both parties and after considering the material before him. It was, therefore, an arbitration agreement.

In the case of Jammu and Kashmir State Forest Corporation v. Abdul Karim Wani & Ors. [(1989) 2 SCC 701 para 24], this Court considered the agreement as an agreement of reference to arbitration. It has emphasised that (1) the agreement was in writing; (2) It was a contract at present time to refer the dispute arising out of the present contract; and (3) There was a valid agreement to refer the dispute to arbitration of the Managing Director, Jammu and Kashmir State Forest Corporation. The Court observed that endeavor should always be made to find out the intention of the parties, and that intention has to be found out by reading the terms broadly and clearly without being circumscribed.

The decision in the case of Rukmanibai Gupta (supra) has been followed by this Court in the case of M.Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited & Ors. [(1993) 3 SCC 137 para 8], Commenting on the special characteristics of an arbitration agreement this court h as further observed in the above case that arbitration agreement embodies an agreement between the parties that in case of a dispute such dispute shall be settled by arbitrator or umpire of their own constitution or by an arbitrator to be appointed by the court in an appropriate case. "It is pertinent

to mention that there is a material difference in an arbitration agreement inasmuch as in an ordinary contract the obligation of the parties to each other cannot, in general, be specifically enforced and breach of such terms of contract results only in damages, The arbitration clause, however, can b e specifically enforced by the machinery of the Arbitration Act.....".

The Court has further observed that it is to b e decided whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, depends on the intention of the parties to be gathered from the relevant documents and surrounding circumstances.

The decisions in the case of State of U.P. Tipper Chand (supra) and Rukmanibai Gupta (supra) have also been cited with approval by this Court in the case of State of Orissa & Anr. v. Damodar Das [(1996) 2 SCC 216]. In this case, t his Court considered a clause in the contract which made the decision of the Public Health Engineer, "final, conclusive and binding in respect of all questions relating to the meaning of specifications, drawings, instructions..... or as to any other question claim, right, matter of thing whatsoever in any way arising out of or relating to the contract, drawings, specifications, estimates..... or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the completion or the sooner determination thereof the contract." This Court held that this was not an arbitration clause. It did not envisage that any difference or dispute that may arise in execution of the works should be referred to the arbitration of an arbitrator.

A long line of English cases starting with In Re Carus- Wilson and Greene [1986 (18) Queen's Bench Division 7] have also been cited before us. In Re Carus-Wilson and Green, on the sale of land, one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation for which purpose, each party should appoint a valuer and the valuers should, before they proceed to act, appoint an umpire. The court said that such valuation was not in the nature of an award. The court applied the tests which we have already referred to, namely, (1) Whether the terms of the agreement contemplated that the intention of the parties was for the person, to hold an enquiry in the nature of a judicial enquiry, hear the respective case of the parties and decide upon evidence laid before him, (2) Whether the person was appointed to prevent differences from arising and not for settling them when they had arisen. The court held the agreement to be for valuation. It said that the fact that if the valuers could not agree as to price, an umpire was to be appointed would not indicate that there were any disputes between the parties.

In the case of Sutcliffe v. Thackrah [1974 (1) AER 859], the clause in question provided that at specified intervals the architect should issue interim certificates stating the amount due tot he builders in respect of work properly executed. There was a separate arbitration clause. The question was whether the function of the architect was sufficiently judicial in character for him to escape liability in negligence. The House of Lords was not directly concerned with the question whether the architect was acting as an arbitrator or a valuer. It was required to decide whether the architect, who had not taken sufficient care in certifying the amount payable, should be held liable in negligence. And the court said that when a professional man was employed to make a valuation, and to his knowledge, that valuation was to be binding on his principal and another party under an agreement

between them, it did not follow that because he was under a duty to act fairly in making his valuation, he was immune from liability for negligent valuation. A similar question arose in connection with valuation of shares by auditors in the case of Arenson v. Casson Beckman Rutely & Co. [1975 (3) AER 901]. The House of Lords said that an auditor of a private company who, on request, valued the shares in the company in the knowledge that his valuation was to determine the price to be paid for the shares under a contract of sale, was liable to be sued by the seller or the buyer if he made the valuation negligently. These two case do not directly assist us in the present case.

In the case of Imperial Metal Industries (Kynoch) Ltd. v. Amalgamated Union of Engineering Workers [1979 (1) AER 847], the contract between the parties included a clause to the effect that persons in the employment of the contractor were required to be paid fair wages as per Fair Wages Resolution. A trade union complained that the conditions of the Fair Wages Resolution were not being observed b y the employers. This dispute was referred to the Central Arbitration Committee. The Court said that even though the Committee was acting as arbitrators, they were not doing so pursuant to arbitration agreement as defined in the Act because the arbitration was required to be between the parties to the parties to the agreement about a matter which they had agreed to refer to arbitration. In the present case, the Union was not a party to the contract.

In the present case, the Memorandum of Understanding records the settlement of various dispute as between Group A and Group B in terms of the Memorandum of Understanding. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of Clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of he IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, Clause 9 is not intended to be for any different decision that what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the Valuers nominated in the Memorandum of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also escort to Clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind Clauses 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer

disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so.

Undoubtedly, in the course of correspondence exchanged by various members of Groups A and B with the Chairman, IFCI, some of the members have used the words "arbitration" in connection with Clause 9. That by itself, however, is not conclusive. The intention of the parties was not to have any judicial determination on the basis of evidence led before the Chairman, IFCI. Nor was the Chairman, IFCI required to base his decision only on the material placed before him by the parties and their submissions. He was free to make his own inquiries. He had to apply his own mind and use his own expertise for the purpose. He was free to take the help of other experts. He was required to decide the question of valuation and the division of assets as an expert and not as an arbitrator. He had been authorise to nominate another in his place. But the contract indicates that he has to nominate an expert. The fact that submissions were made before the Chairman, IFCI, would not turn the decision- making process into an arbitration.

The Chairman, IFCI has framed issues before answering them in his decision. These issues have been framed by himself for the purpose of enabling him to pinpoint those issues which require his decision. There is no agreed reference in respect of any specific disputes by the parties to him.

The finality of the decision is also indicative of it being an expert's decision though of course, this would not be conclusive. But looking at the nature of the functions expected to be performed by the Chairman, IFCI, in our view, the decision is not an arbitration award. The learned Single Judge was, therefor, right in coming to the conclusion that the proceedings before the Chairman, IFCI, were not arbitration proceedings. Nor was his decision an award. Appeal arising out of Special Leave Petition No. 14905 of 1997 is, therefore, dismissed with costs.

Question No. 2:

The next question which requires to be decided related to Suit No. 1394 of 1996. The learned Single Judge has struck off the plaint in the suit as being an abuse of he process of court. The appellants had filed this suit in the Delhi High Court on the same day as Arbitration Petition bearing O.M.P. No.58 of 1996. It challenges the same decision of the Chairman, IFCI which is challenged in the arbitration petition as an award.

The learned Single Judge has compared the plaint in the suit with the petition filed under the Arbitration Act. The prayers in the arbitration petition are for a declaration

(a) that the award of the C.M.D., IFCI, dated 8.12.1995 is illegal, bad in law and null and void; (b) that the directions given and actions taken by the Chairman, Modipon Ltd, in letters dated 22-1-1996, 5.2.1996, 17.4.1996 and 24.4.1996 and the scheme of arrangement drawn up by M/s S.S. Kothari & Co. are illegal and bad in law; (c) that the said award to the Chairman and Managing Director, IFCI and the said letters and directions of the Chairman, Modipon Ltd, and the said scheme of arrangement drawn by M/s S.S. Kothari & Co. be set aside; (d) for a perpetual injection

restraining the respondents from taking any action directly or indirectly in pursuance of or to give effect to the said award; (e) for a perpetual injection restraining respondent no .5 from passing any resolutions in terms of the proposed items 8 and 9 set out in the notice regarding the proposed Board Meeting of Modipon Ltd.; (f) for a perpetual injection restraining respondents 6 and 7 from selling or disposing of shares in Godfrey Phillips India Ltd. or from dealing with the said shares in a manner contrary to the scheme prepared by M/s Bansi S. Mehta & Co. and for further and other reliefs.

In the plaint in the suit, prayers (c), (d), (e), (f), (G) & (h) are identical with the prayers in the arbitration petition with small variations which are of no consequence. The remaining prayers are as follows: Prayer (a) is for a declaration that the Memorandum of Understanding dated 24.1.1989 is binding on both the plaintiffs and defendants and all parties are bound in law to act in conformity with the same. Prayer (b) is for a declaration that neither the Chairman, IFCI nor the Chairman, Modipon Ltd. had any power to alter, amend, or modify in any manner the scheme of separation drawn by M/s Bansi S. Mehta & Co. Prayer (i) is for an injection restraining the defendants from altering, amending or modifying the scheme of separation drawn up by M/s Bansi S.Mehta & Co. Prayer (j) is for a decree ordering and directing Modipon Ltd. to be split in accordance with the scheme of separation drawn up by M/s Bansi S. Mehta & Co. and prayer (k) is for a decree ordering and directing the implementation of the said Memorandum of Understanding dated 24.1.1989 in respect of Modipon Ltd, in such a manner that the control and a management of Chemical Division including the shares of Modi Group Company allotted to Group B held by Modipon Ltd, is vested in the plaintiff and the control and management of the remainder of the company including the Fibre Division is vested in the Group A. The paragraphs in the plaint and in the arbitration petition are verbatim that same to a substantial extent. The respondents have pointed out that paragraphs 1A to 54A in the petition are the same as paragraphs 1 to 54A in the plaint. The grounds which are set out in the petition as well as in the plaint are also substantially the same.

Mr. Nariman, learned senior counsel for the appellants, however, has drawn our attention to paragraph 55 of the plaint. In paragraph 55 it is stated as follows:

> "The plaintiff says and submits that as the said Ruling/Decision of the CMD, IFCI is an Arbitration Award within the meaning of the Arbitrator Act, 1940, the legality and validity of the same can be questioned and a prayer can be made for setting aside that said award only in an arbitration petition filed under Section 33 of the Arbitration Act, 1940. The Plaintiff is, therefore, filing along with the present suit an Arbitration Petition under the provisions of he Arbitration Act, challenging the legality and validity of the said award.
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> However, the present suit is also being filed in respect of he actions of third parties in pursuance of and to give effect to the said Award. Further, in the event of it being contended by any of the defendants herein, or it being held by this Hon'ble Court for any reason that the said Ruling/Decision of the CMD, IFCI is not an Arbitration Award, the legality and validity of the said Ruling/Decision is also being challenged in the present suit."

He has submitted that in the event of it being held that Clause 9 of the Memorandum of Understanding is not an arbitration clause and the decision of the Chairman, IFCI, is not an award, it is open to the appellants to file a suit to challenge the decision. This is the reason why along with the arbitration petition, a suit has also been filed as an alternative method of challenging the decision of the Chairman and Managing Director, IFCI, is not an award. He has contended that filling a separate proceeding in this context cannot be considered as an abuse of he process of the court; and the learned Single Judge was not right in striking out the plaint under Order 6 Rule 16 of the Code of Civil Procedure.

Under Order 6 Rule 16, the Court may, at any state of he proceeding, order to b e struck out, inter alia, any matter in any pleading which is otherwise an abuse of the process of the court. Mulla in his treatise on the Code of Civil Procedure. (15th Edition, Volume II, page 1179 note 7) has stated that power under clause (c) of Order 6 Rule 16 of the Code is confined to cases where the abuse of he process of the Court is manifest from the pleadings; and that this power is unlike the power under Section 151 whereunder Courts have inherent power to strike out pleadings or to stay or dismiss proceedings which are an abuse of their process. In the present case the High Court has held the suit to be an abuse of he process of Court on the basis of what is stated in the plaint.

The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the court" thus: "This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation..... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

One of the examples cited as an abuse of the process of court is re-litigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to re-litigate the same issue which h as already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the court. Frivolous or vexatious proceedings may also amount to an abuse of the process of court especially where the proceedings are absolutely groundless. The court then has the power to stop such proceedings summarily and prevent the time of the public and t he court from being wasted. Undoubtedly, it is a matter of courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should also be satisfied that there is no chance of the suit succeeding.

In the case of Greenhalgh v. Mallard [19147 (2) AER 255] the e court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court, held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the

same transaction before the court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexation and an abuse of the process of court.

In Mcllkenny v. Chief Constable of West Midlands Police Force and another [1980 (2) AER 227], the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the court since it raised an issue identical to that which had been finally determined at the plaintiffs' earlier criminal trial. The court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppel.

In the present case, the learned Judge was of the view that the appellants had resorted to two parallel proceedings, one under the Arbitration Act and the other by way of a suit. When the order of interim injunction obtained by the appellants was vacated in arbitration proceedings, they obtained an injunction in the suit. The learned Single Judge also felt that the issues in the two proceedings were identical, and the suit was substantially to set aside the award. He, therefore, held that the proceeding by way of a suit was an abuse of the process of court since it amounted to litigating the same issue in a different forum through different proceedings.

The perception of the Learned Judge may be substantially correct throughout entirely so. Undoubtedly, if the plaint in the suit is viewed as challenging only the arbitration award, a suit to challenge the award would be re-litigating the issues already raised in the arbitration petition. The suit would also be barred under Section 32 of the Arbitration Act, 1940. Section 32 of the Arbitration Act, 1940 provides that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award b e set aside, amended, modified or in any way affected otherwise than as provided in this Act.

According to the appellants, however, the suit is not confined only to challenging the award or steps taken pursuant to the award by the Chairman, Modipon Ltd. in order to enforce it. According to the appellants, in the suit there is an alternative plea that if the impugned decision of the Chairman and Managing Director, IFCI is not considered as an awards, then that decision as a decision should be set aside. It is contended that the suit, in so far as it challenges the decision of the Chairman and Managing Director, IFCI, as a decision and not as an award is maintainable. In support, the e appellants have relied upon the submissions in paragraph 55 of the plaint which were have set out earlier.

The plaint in the suit, tot he limited extent that it challenges the decision as a decision, would not amount to abuse of the process of Court. We are not called upon to examine whether this alternative submission is supported by proper averments and whether there is a proper cause of action framed in the plaint in Support of such an alternative plea. This is a matter which the court hearing the suit

will have to examine and decide. But in the suit, the decision cannot be challenged as if it were an award and on the same grounds as if it were an award. The court will also have to consider the binding nature of such a decision particularly when no mala fides have been alleged against the CMD, IFIC. If ultimately it is found that even on the alternative plea, the claim is not maintainable the court may pass appropriate orders in accordance with law. But to the limited extend that the suit erased an alternative independent plea, it cannot be considered as re-litigation of the same issue or an abuse of the process of court.

In a proceeding under the Arbitration Act, the appellants could not have raised an alternative plea that in case the impugned decision is treated not as an award. but as a decision, the same is bad in law. This plea could only have been raised by filing a separate suit. Similarly in the suit, the appellants could not h ave raised an alternative plea that in case the impugned decision is considered as an award, the same should be set aside. For this purpose an arbitration petition was required to be filed. Therefor, the suit, if and to the extent that it challenges in accordance with law, the impugned decision as a decision, cannot be treated as an abuse of the process of the court.

Group A also contends that there is no merit in the challenge to the decision of the Chairman of IFCI which has been made binding under the Memorandum of Understanding. The entire Memorandum of Understanding including Clause 9 has to be looked upon as a family settlement between various members of the Modi family. Under the Memorandum of Understanding, all pending the Modi family forming part of either Group A or Group B have been finally settled and adjusted. Where it has become necessary to split any of the existing companies, this has also been provided for in Memorandum of Understanding. It is a complete settlement, providing how assets are to be valued, how they are to be dividing some of the specified companies has to be prepared and who has to do this work. In order to obviate any dispute, the parties have agreed that the entire working out of this agreement will b e subject to such directions as the chairman, IFCI may give pertaining to the implementation of Memorandum of Understanding. He is also empowered to give clarifications and decide any differences relating tot he implementation of the Memorandum of Understanding. Such a family settlement which settled disputes within the family should not be lightly interfered with especially when the settlement has been already acted upon by some members of the family. In the present case, from 1989 to 1995 the Memorandum of Understanding has been substantially acted upon and hence the parties must be held to the settlement which is in the interest of the family and which avoids disputes between the members of the family. Such settlements have to be viewed a little differently from ordinary contracts and their internal mechanism for working out the settlement should not be lightly disturbed. The respondents may make appropriate submissions in this connection before the High Court. We are sure that they will be considered as and when the High Court is required to do so whether in interlocutory proceedings or at the final hearing.

The appeal of the appellants from the judgment of the Learned Judge striking out the plaint is, therefore, partly allowed and the suit, to the extent that it challenges independently the decision of the Chairman and Managing Director, IFCI as a decision and not as an award, is maintainable in the sense that it is not an abuse of the process of the court. We make it clear that we are not examining the merits of the claim nor whether the plaint in the suit discloses a cause of action in this regard. The plaint leaves much to be desired and it is for the trial court to decide these and allied questions.

The plaint in so far as it challenges the decision as an award and on the same grounds as an award; or seeks to prevent the enforcement of that award by the Chairman, Modipon Ltd. or in any other way has been rightly considered as an abuse of the process of court since the same reliefs have already been asked for in the arbitration petition. The Transfer Case No.13 of 1997 is, therefore, partly allowed.

We also direct that all the defendants in he said suit who are supporting the Plaintiffs shall be transposed as plaintiffs along with the original plaintiffs since they have a common cause of action. For this purpose, the plaintiffs shall carry out necessary amendments in he causer title and any consequential amendments in he suit with four weeks of this order.

Pending the hearing and final disposal of the suit in he Delhi High Court and/or until any further orders are passed by the trial court if the exigencies of the situation then prevailing so require, no meeting of the Modipon Board shall be held for considering any matter relating to the decision of the CMD, IFCI dated 8.12.1995. Also the defendants in eh said suit (Group A) shall not sell any shares held in Godfrey Phillips India Ltd. provided the plaintiffs in the suit deposit in the Delhi High Court a sum of Rs.5 crores (Five Crores) within four weeks from the date of this order. In the event of their failure to deposit the said amount within the aforesaid period, the order restraining the defendants (Group A) from selling the said shares shall stand vacated. The amount so deposited shall be invested by the High Court in Fixed Deposits within Nationalised Banks pending further orders. The interim order of 7th January, 1998 will continue to operate in terms thereof. In the event of any change in the circumstances, the parties will be at liberty to apply to the High Court for any variation of this order. Appeals arising from Special Leave Petition Nos. 14905/97, 18711/97 and Transfer Case No. 13/97 are disposed of accordingly together with all interim applications.