# Telemecanique And Controls (India) ... vs La Telemecanique Electrique Sa And Ors. on 6 March, 2002

## Equivalent citations: 98(2002)DLT481

## Author: Mukundakam Sharma

## Bench: Mukundakam Sharma

JUDGMENT

Mukundakam Sharma, J.

1. This petition is filed by the petitioner against the respondents under Section 33 of the Indian Arbitration Act, 1940 challenging the existence, validity and/or effect of the Arbitration Agreement Clause 18 contained in the Technical Services Agreement dated 28th November, 1984 and also of the Arbitration Clause contained in Condition No. 11 of the General Terms and Conditions of Acknowledgement of Orders of the respondent No. 1 contending, inter alia, that not only the said Clause 18 and Condition No. 11 are invalid, non-existent and ineffective but, the same also was superseded by a subsequent and fresh Arbitration Agreement entered into by and between the petitioner and the respondent No. 1 as recorded in the Minutes of the Board Meeting of the petitioner held on 16th December, 1988 and, therefore, the reference made by the petitioner to the respondent No. 2 is bad and invalid.

2. The petitioner/Company is a Public Limited Company and is engaged in the business of manufacture of "contractors", "relays" and "add-on-blocks". The respondent No. 1 is a Company incorporated under the laws relating to Companies in France the respondent No. 3 is also a Public Limited Company and is engaged in the business of manufacturing electro-mechanical switchgear and associated products. The respondent No. 2 is the International Chamber of Commerce, Court of Arbitration.

3. Pursuant to negotiations held between the respondent No. 1 and respondent No. 3, a Memorandum of Understanding was executed on 9th December, 1983 by and on behalf of the respondents No. 1 and 3 followed by Promotion Agreement and Shareholders Agreement dated 22nd February, 1984 for manufacture of switch gear, control gear and allied products in India by the petitioner which was a new joint venture Company to be incorporated by the respondents No. 1 and 3. Subsequent to the said Agreements, the petitioner was incorporated and thereafter the Technical Information Agreement was entered into on 28th November, 1984 in between the petitioner and the respondent No. 1 in terms of which, the respondent No. 1 agreement to transfer and deliver to the petitioner technical information in its possession for manufacturing the aforesaid products. A Technical Services Agreement was also executed on 28th November, 1984, whereby the respondent

No. 1 agreed to render technical services to the petitioner in the manner set out in the said Agreement for a consideration set out in Article 6 of the said Agreement. Article 18 of the said Agreement contains an Arbitration Agreement for reference of disputes and differences arising there under to the respondent No. 2 which reads as follows:-

> Article 18 - Arbitration "18.1 All disputes, arising in connection with or the interpretation of this AGREEMENT which cannot be settled amicably between the parties, shall be finally settled by Arbitration conducted in conformity with the Rules of Conciliation and Arbitration of the International Chamber of commerce, Paris. Judgment upon the award rendered may be entered in any Court having jurisdiction or application may be made to such Court for a judicial acceptance of the award and n order of enforcement, as the case may be."

4. A name license Agreement dated 8th February, 1985 was also entered into which entitles the petitioner to use the word "TELEMECANIQUE" as part of its corporate name. An Agency Agreement was also executed on 1st November, 1985 which also contains an Arbitration Clause which reads as follows:-

> Article 18 - Arbitration "Any dispute or difference arising out of construction, interpretation and execution of the present contract will be finally settled according to the Rules of Conciliation and Arbitration of the Paris International Chamber of Commerce, by one or several Arbitrators who, in compliance with these Rules, will settle the matter according to the terms of the French Laws and jurisdiction."

5. The products to be manufactured by the petitioner were to be manufactured in accordance with and in conformity with the technical information and designs to be provided by the respondent No. 1. Consequently, the components required for the manufacture of the said products were components of the special design of the respondent No. 1 which until indigenously manufactured in India in accordance with and as envisaged in the First Memorandum of Understanding was to be procured from the supplied by the respondent No. 1. The said Memorandum of Understanding contains detailed year-wise figures of the various components for the said product which was to be supplied by the respondent No. 1 for the manufacture of the said products with a determined formula on the basis of which the respondent No. 1 would charge for the components so as to achieve costings for the said products.

6. During the process of carrying on business by the petitioner, the respondent No. 1 supplied to the petitioner the components required by the petitioner for which the respondent No. 1 raised invoices for the said components at prices quoted in the said invoices. According to the petitioner the said prices raised in the invoices by the respondent No. 1 for the components were not in accordance with the pricing formula stipulated in the First Memorandum of Understanding and were higher and, therefore, the petitioner on the basis of the said invoices was made liable to pay much larger amounts by way of customs duty on the import of the said components and accordingly the petitioner withheld payment for the said supplies of components by the respondent No. 1, particularly in view of the fact that the petitioner faced a crisis by virtue of an unanticipated rise in

customs duty which had to be incurred by it on import of components. It is alleged by the petitioner in the petition that to overcome the said difficulty and to decide upon the method, schedule and amount of payment to be made by the petitioner to the respondent No. 1 for the components supplied by the respondent No. 1, discussions were held amongst them as a result of which a Second Memorandum of Understanding was executed between the petitioner and the respondent No. 1 on 12th December, 1986 by and under which it was agreed that the respondent No. 1 would arrange a bridging loan of Rs. 20 million out of which a sum of Rs. 13 million could be utilised for payment to the petitioner for components supplied by the respondent No. 1 and the balance could be utilised for payment of customs duty on uncleared components. In the said Memorandum of Understanding, it was also envisaged that the prices invoiced by the respondent No. 1 for the components supplied would be reviewed by the respondent No. 1. It is, however, the case of the petitioner that the Second Memorandum of Understanding could not be implemented since in spite of the commitment under the First Memorandum of Understanding and in the Second Memorandum of Understanding, the respondent No. 1 failed to revise its invoices to the pricing formula set out in the First Memorandum of Understanding.

7. Subsequently another Memorandum of Understanding was entered into between the respondent No. 1 and the respondent No. 3 on 22nd April, 1987. Relevant stipulations therein reads as followed:-

> "(i) TE would give TC an immediate grant of five million French francs (which was equivalent to Rs. 1.17 crores) which money would be utilised by TC for payment to TE.
>
> (ii) That in future effective April, 26, 1987 TE would charge TC for components supplied at prices based on a revised formula which was difference from the formula for calculation of prices under the first MOU."

As the petitioner was suffering heavy losses due to charging higher prices for components supplied by the respondent No. 1 and increased customs duty to be paid by the petitioner on the higher prices charged, the matter was discussed in the Board Meeting of the petitioner on 16th December, 1988, wherein it was recorded that the Managing Director clarified that as against the amount unjustly claimed by the respondent No. 1, the respondent No. 1 owed much larger amounts to the petitioner on account of extra burden caused to it due to the respondent No. 1 not maintaining the price of components as originally agreed in the Memorandum of Understanding, on account of loses incurred by the Company because of the respondent No. 1 deliberately withholding supplies of components, as also for damages due to loss of business resulting from the respondent No. 1 failure to supply components. In the aforesaid Minutes of the Board Meeting, it was further recorded as follows:-

> "The nominees of the financial institutions suggested that a third party like Institute of Chartered Accountants be assigned the task of verifying the claims and counter claims between TE and TC. The Managing Director welcomed this suggestion. Mr. Rene Alletru said that a meeting between the Managing Director, Director

> (Technical) and the TE nominees was proposed to take place after the Board Meeting and he hoped that an agreement might be reached between the parties, failing which a third party may be mutually agreed between the parties within two seeks by proposing four names from both sides to arrive at a mutually agreeable person or firm to decide the claims and counter claims between TE & TC. The Board agreed and directed the Managing Director to take immediate steps in this regard to have the issues resolved by a third party before the next meeting, in case no settlement was reached."

8. In the meeting of the Board of Directors of the petitioner held on 16th March, 1989, the aforesaid Minutes were ratified and confirmed. It is stated that in both the aforesaid Board Meetings, representatives of the respondent No. 1 were present and the said discussions in the meeting was recorded in writing and resolutions were adopted in their presence. It is alleged by the petitioner that in view of the aforesaid discussion and resolution in the Board Meetings, the Arbitration Clause, if any, was superseded and a new Arbitration Clause came into existence in terms of the aforesaid discussions and resolution in the Board Meetings. It is further alleged that even in spite of the aforesaid position, respondent No. 1 unilaterally took a decision and referred certain disputes to the respondent No. 2 for adjudication in view of which the present petition was filed in this Court.

9. While issuing notice on the petition, an interim order was passed restraining the respondents No. 1 and 2 from proceeding further with the reference made and pending before the International Chamber of Commerce. Mr. T.R. Andhyarujina, senior counsel appearing for the petitioner in support of the contentions made in the petition drew my attention to the various documents placed on record and the respective pleadings of the parties and on the basis thereof raised the following three points for my consideration:-

> (1) There was no Arbitration Agreement in respect of price of components supplied by the respondent No. 1 to the petitioner and also in the Name license Agreement and, therefore, all the disputes in respect of or arising out of the said Agreements cannot be decided by the International Chamber of Commerce in absence of any such arbitration Clause.
>
> (2) The disputes arising out of or in respect of the Arbitration Agreement in the Technical Services Agreement and the General Terms and Conditions of Acknowledgement of Orders cannot be the subject matter of Arbitration of International Chamber of Commerce as the said Arbitration agreements were superseded and supplemented in writing by the Resolution adopted in the Board Meeting dated 16th December, 1988.
>
> (3) In any case, the respondent No. 1 has abandoned the reference made to the International Chamber of Commerce by filing a suit in this Court registered as Suit No. 2629/2001 and also by subsequently resuming trade relations with the petitioner.

I, therefore, proceed to discuss the aforesaid three issues indepth which have arisen for my consideration in the light of the arguments advanced by Mr. T.R. Andhyarujina, the senior counsel appearing for the petitioner and Mr. Mukul Rohtagi, the Additional Solicitor General of India, appearing for the respondent No. 1 and also in light of the pleadings and documents placed on record.

Point No. 1.

10. The Agreement for Technical Services was executed between the respondent No. 1 and the petitioner wherein it was recorded that the petitioner requested the respondent No. 1 to render technical services in India and in France to enable the petitioner to manufacture "contractors", "relays" and "add-on-blocks", which the respondent No. 1 agreed to do subject to the conditions mentioned in the said Agreement. Article 10 of the said Agreement deals with 'Legend' when it states that subject to the provisions of the Agreement, the respondent No. 1 permitted the petitioner to use the legend "Manufactured in India in collaboration with TELEMECANIQUE of France" on the products and in its catalogues, illustrative literature or other publicity material.

Article 18 thereof is the Arbitration Clause to which reference is already made. Article 20 reads as follows:-

> "Article 20 - Entire Agreement.
>
> 20.1 This AGREEMENT sets forth the entire AGREEMENT and understanding between the parties as to the subject matter hereof.
>
> 20.2 No modifications, amendments or supplements to this AGREEMENT shall be effective for any purpose unless in writing and signed by each party and approved by the Government of India."

11. Reference could also be made to the General Terms and Conditions of sale issued by the respondent No. 1 to the petitioner under which goods were sent to the petitioner. Condition 11 thereof reads as follows:-

> "11. Arbitration In the event of any dispute or difference whatsoever shall arise between TELEMECANIQUE and the PURCHASER upon, in relation to, or in connection with and under the contract either of us may give the other notice in writing of the existence of such question, dispute or difference and the same shall be finally settled under the Rules and Conciliation and Arbitration of the International Chamber of Commerce at Paris, by one or more arbitrators appointed in accordance with its ruling, and in compliance with and under the interpretations of the law of Frances."

Clause 1 thereof provides that all contracts for the sale of goods concluded between the respondent No. 1 and the purchaser are unless otherwise expressly agreed by the respondent No. 1 in writing

and that subject to the terms and conditions which followed and which cancel and supersede any conditions of purchase stipulated in the customers purchase order or other prior correspondence related thereto. It was also stated that no alteration to any order would be recognised by the respondent No. 1 unless made by the purchaser in writing and confirmed by the respondent No. 1 in the same way. It was also provided that the contract would be deemed to be accepted and binding on the issue by the respondent No. 1 of an acknowledgement of order notwithstanding that such acknowledgement is not specifically so titled. Clause 12 thereof provided that any modification or variation of the foregoing conditions would be made in writing and signed by all the parties to the contract and that in the case of any dispute, the version of conditions written in French would be the binding version and would be interpreted under the Law of France.

12. Counsel appearing for the petitioner submitted that the aforesaid conditions in the confirmatory order could not have been made applicable to the case of the petitioner as the price element factor for the components supplied by the respondent No. 1 to the petitioner were governed by the provisions of the Memorandum of Understanding arrived at between the respondent No. 1 and the respondent No. 3 which is also corroborated by the subsequent action on the part of the respondent No. 1 in granting bridging loan to the petitioner. He further submitted that so far the Name license Agreement is concerned, there was no Arbitration Clause and, therefore, any dispute arising out of the same could not be a subject matter of arbitration. Therefore, the specific contention of the counsel appearing for the petitioner that the price of components and use of the word "TELEMECANIQUE" as a part of its corporate name are not covered by Arbitration Clause requires an indepth consideration. According to the petitioner, the price of components are subject matter of the Memorandum of Understanding dated 9th December, 1983, 12th December, 1986 and 4th April, 1987. It is also the contention of the counsel appearing for the petitioner that the General Terms and Conditions of Acknowledgement of Orders were not applicable to the petitioner and the price of components would have to be determined under and in accordance with the Memoranda of Understanding.

13. In view of the submission of the counsel appearing for the petitioner, it would be necessary to examine the nature and effect of the three Memoranda of Understanding arrived at. Copies of the aforesaid Memoranda of Understanding are placed on record. A perusal of the same shows that the First Memorandum of Understanding was signed between the Telemecanique and Controls and Switch Gears on 9th December, 1983. Therefore the said Memorandum of Understanding was between the respondent No. 1 and the respondent No. 3. After the aforesaid Memorandum of Understanding was executed, the respondent No. 1 was incorporated as a separate legal entity. The said Memorandum of Understanding records that pursuant to the agreement between the respondent No. 1 and the respondent No. 3 and subject to the approval of the Registrar of Companies, the joint venture Company under the name of Telemecanique and Controls (India) Limited would be incorporated. The said Memorandum of Understanding does not contain any Arbitration Agreement. The said Memorandum of Understanding refers to a pricing formula but the said Agreement being in between the respondent No. 1 and the respondent No. 3, the same cannot be interpreted as also an agreement or understanding with the petitioner. It is also the case of the petitioner that the Second Memorandum of Understanding was not given effect to. So far the Third Memorandum of Understanding dated 24th April, 1987 is concerned, the same cannot strictly be

said to be an understanding between the petitioner and the respondent No. 1 as the same was also in between the respondent No. 1 and the respondent No. 3. The same also does not lay down any formula for charging prices for the components but only states that solely with a view to mitigate loses currently being incurred by the petitioner, the respondent No. 1 agreed to reduce the prices of components manufactured by the respondent No. 1 itself by 15% from the prices shown in the price list.

14. In terms of the submissions of the counsel appearing for the parties, it is crystal clear that disputes have arisen between the parties in respect of price of components and also relating to use of the word "TELEMECANIQUE" as a part of the corporate name. The only question that is to be decided is whether the said disputes are covered by an Arbitration Clause or not.

15. Condition No. 11 in the General Terms and Conditions of Acknowledgement of Orders provides that in the event of any dispute of difference whatsoever arising between the respondent No. 1 and the purchaser in relation to, or in connection with and under the contract, either of the two parties may give the other notice in writing of the existence of such question, dispute or difference and the same would be finally settled under the Rules and Conciliation and Arbitration of the International Chamber of Commerce at Paris and in accordance with and in compliance with and under the interpretations of the law of France.

16. Counsel appearing for the petitioner submitted that the said Clause was written in the reverse side of the order and is not binding on the petitioner. It was also submitted by him that the price of components were a part of the Memorandum of Understanding which was approved by the Government of India and, therefore, there cannot be any variation of the price of component which, if done, would be contrary to the approval given by the Government of India. It was, however, submitted by the counsel appearing for the respondent No. 1 that the petitioner accepted all the components sent through the aforesaid others which contained condition No. 11 and that the petitioner never raised any objection as against the aforesaid Arbitration Clause while accepting the goods sent by the respondent No. 1 to the petitioner and, therefore, the petitioner is bound by the terms of the said orders which contains an Arbitration Clause.

17. It is indicated from the records placed before me that the petitioner accepted the goods sent by the respondent No. 1 to the petitioner under the aforesaid orders but, subsequently, raised the issue of charging of higher price for the component consequent to which the petitioner has alleged that it had suffered a huge loss. But none of the aforesaid documents on which counsel appearing for the petitioner placed reliance indicates that the petitioner at any stage raised any objection about the existence of an Arbitration Clause in the said orders. The petitioner received the goods sent vide those orders but did not object to the existence of the Arbitration Clause therein. There cannot be any denial of the fact that there is a dispute pending between the parties in respect of price of components charged by the respondent No. 1 from the petitioner for which certain loans and grants were also given by the respondent No. 1 to the petitioner to tide over the difficulties faced by it. But, all the aforesaid documents indicate that the petitioner never raised any objection as against existence of an Arbitration Clause in the said orders. As the petitioner accepted the goods sent by the respondent No. 1 pursuant to the aforesaid orders, Clause 11 shall have application and also shall

govern the disputes arising between the parties in respect of the price of components.

18. The First Memorandum of Undertaking did provide a price formula but the same was entered into between the respondent No. 1 and the respondent No. 3. But when the components were sent by the respondent No. 1 to the petitioner by the aforesaid confirmatory orders, they charged the price of the components at their own rate and not at the rate as mentioned in the First Memorandum of Understanding. The confirmatory orders contain an Arbitration Clause, which was not objected to by the petitioner. The goods sent by those orders were received and later on objections were taken by the petitioner against the price charged from them by the respondent No. 1. Therefore, disputes arise between the parties with regard to price element which shall have to be decided in terms of the Arbitration Clause in the confirmatory orders.

19. So far the Name license Agreement is concerned, the same provides for withholding of use of the word "TELEMECANIQUE" as a part of its corporate name in the event of a breach of the Agreement for Technical Services and termination thereof. Relevant portion of the said Agreement is extracted hereinbelow:-

> "WHEREAS :
>
> A. Telemecanique has agreed to subscribe to the extent of thirty-eight per cent of the share capital in CT or TC (TELEMECANIQUE & CONTROLS INDIA LTD) B. Telemecanique has agreed to CT changing its name by using the word "Telemecanique" as part of its corporate name but subject to the condition that shall enter into an agreement in terms of these presents.
>
> NOW THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO as follows:
>
> 1. Telemecanique hereby grants to CT a non-exclusive non-assignable license and permission to use the word "Telemecanique" as part of its corporate name.

2(a) Telemecanique shall be entitled by giving six months notice in writing expiring on any date to CT revoke the license and permission granted in Clause (1) thereof in the event of:

> (i) CT committing a breach of the Agreement for Technical Information or Technical Services.
>
> (ii) Telemecanique terminating the Agreement for Technical Information or Agreement for Technical Services pursuant to Article 10.1 and 17.1 of the respective Agreements;

..... ..... ..... .....

(b) On Telemecanique revoking the license in accordance with Sub-clause (a) hereof CT forthwith take effective steps in this behalf and shall within 180 days from the date of receipt of such notice:

> (i) discontinue the use of the word "Telemecanique" as part of its corporate of trade name;' ..... ..... ..... ....."

20. Counsel appearing for the petitioner, however, submitted that this Agreement was entered into between the parties much after the execution of the Agreement for Technical Services and, therefore, the Arbitration Clause 18 of the Agreement for Technical Services shall have no application to in the matter relating to the Name license Agreement. It is also submitted by him that there is no Arbitration Clause in this Agreement and, therefore, the respondent No. 1 could not have sought for an injunction from the International Chamber of Commerce seeking an injunction from the said authority as regards the corporate name. Counsel appearing for the respondent No. 1, however, submitted that the language used in Clause 18 is very wide. It was submitted t hat s reference is made in the Name license Agreement to the Agreement for Technical Information or Technical Services on breach of which, it is provided that the said Agreements could be terminated and upon such termination/revocation of the license, the petitioner was to take effective steps to discontinue the use of the word "TELEMECANIQUE" as a part of its corporate name. Relying on the same, counsel submitted that the disputes raised in connection with the use of the corporate name is, therefore, inter-connected and inter-related with that of the Agreements for Technical Services and, therefore, the said Clause 18 would and can govern the dispute in relation to name also.

21. I have considered the rival submissions of the counsel appearing for the parties in that regard. Clause 18 of the Technical Services Agreement which is extracted above would indicate that it is in the widest possible terms. It Categorically states that all disputes arising in connection with or the interpretation of the Agreement for Technical Services which cannot be settled amicably shall be finally settled by Arbitration conducted in conformity with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris. The Name license Agreement dated 8th February, 1985 permitted the respondent No. 1 to cancel, terminate and revoke the license of the petitioner committing a breach of the Agreement for Technical Information or Technical Services and upon such termination, the petitioner was obliged to discontinue the use of the word "TELEMECANIQUE" as a part of the corporate or trade name. As the petitioner has failed to discontinue the use of the word "TELEMECANIQUE" even after revocation/cancellation of the license by the respondent No. 1 on the alleged grounds of breach of Agreement for Technical Services, a dispute arises between the parties. Such dispute is inter-connected and inter-related with the dispute of the Agreement for Technical Services as a breach of the terms and conditions of the said Agreement is alleged and, therefore, Clause 18 thereof which is in the widest possible term would govern and also cover the disputes arising out of the Name license Agreement.

22. In Renusagar Power Co. Ltd., v. General Electric Company and Anr.; , similar clause as that of Clause 18 came up for consideration before the Supreme Court. While dealing with such expressions, four propositions were laid down by the Supreme Court in the said decision in paragraph 25 of the said judgment in the following manner:-

"25. Four propositions emerge very clearly from the authorities discussed above:

1. whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not primarily depends upon the terms of the clause itself; it is a question of what the parties intend to provide and what language they employ.

2. Expressions such as "arising out of" or "in respect of" or "in connection with" or "in relation to" or "in consequence of" or "concerning" or "relying to" the contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

3. Ordinarily as a rule an arbitrator cannot clothe himself with power to decide the question of his own jurisdiction (and it will be for the Court to decide those question) but there is nothing to prevent the parties from investing him with power to decide those question, as for instance, by a collateral or separate agreement which will be effective and operative.

4. If, however, the arbitration clause, so widely worded s to include within its scope questions of its existence, validity and effect (scope), is contained in the underlying commercial contract then decided cases have made a distinction between question as to the existence and/or validity of the agreement on the one hand and its effect (scope) on the other and have held that in the case of former those questions cannot be decided by the arbitrator, as by sheer logic the arbitration clause must fall along with underlying commercial contract which is either non-existence or illegal while in the case of the latter it will ordinarily be for the arbitrator to decide the effect or scope of the arbitration agreement, i.e., to decide the issue of arbitrability of the claims preferred before him."

In paragraph 26 of the judgment, it was observed by the Supreme Court that since the parties to the underlying Commercial Contract have used the expressions "arising out of" or "related to the contract" in the arbitration clause contained in the Contract, there could be no doubt that the parties clearly intended to refer the issue pertaining to the effect (scope) of the arbitration agreement to the Court of Arbitration of I.C.C. In my considered opinion, the ratio of the aforesaid decision is squarely applicable to the facts of the present case.

23. So far the dispute with regard to the Name license Agreement is concerned, the underlying contract was the Agreement for Technical Services. Revocation of the Name Licensing Agreement was due to alleged breach in the Technical Services Agreement. Clause 18 of the said Agreement uses the expressions "arising out of" or "relating to" the contract and, therefore, disputes being inter-related and inter-connected, the same Arbitration Clause would also govern the disputes in the present case arising out of the Name license Agreement. In that view of the matter, the first contention of the counsel appearing for the petitioner that there is no Arbitration Agreement so far the price of components is concerned and in the Name license Agreement is found to be without

merit and is rejected. Therefore, the first issue framed in the present case is answered in favor of the respondent No. 1 and against the petitioner.

24. It was submitted by the counsel appearing for the petitioner that the Arbitration Clauses, if any, in the Agreements were superseded and supplemented by the subsequent Arbitration Agreement recorded in the Minutes of the Board of Directors Meeting held on 16th December, 1988 which was also ratified in the next meeting of the Board of Directors held on 16th March, 1989. It was also submitted by him that the representatives of the respondent No. 1 were present and took active part in all the deliberations in the aforesaid Board Meetings and they were also party to the aforesaid decisions and, therefore, the earlier Arbitration Agreements between the parties, if any, were replaced and/or superseded or supplemented by the subsequent action of the petitioner and the respondent No. 1 agreeing to the decide the claims through arbitration proceeding in India.

25. Counsel appearing for the petitioner fairly submitted that the petitioner has no objection to get all the disputes raised and pending between the parties adjudicated upon through the process of arbitration by appointing an independent arbitrator in India following the laws applicable in India. In support of the said contention, counsel appearing for the petitioner also referred to the contemporaneous documents exchanged amongst M/s. Price Waterhouse and the petitioner and also the respondent No. 1. Counsel appearing for the petitioner further submitted that at the Board Meeting of the Joint Venture Company held on 16th December, 1988, the Members of the Board which also included the representatives of the respondent No. 1 agreed to have the claims and counter-claims verified by an independent Body of the Chartered Accountants.

26. Counsel appearing for the petitioner also referred to the letter of the respondent No 1 dated 9th January, 1989, proposing four names out of which M/s. Price Waterhouse was chosen and, therefore, a new Arbitration Clause superseding the earlier Arbitration Clause came into being. In Support, reliance was placed on the decision of the Supreme Court in M. Dayanand Reddy v. A.P. Industrial Infrastructure Corporation Limited and Ors.; and also on Smt. Rukmanibai Gupta v. Collector, Jabalpur; . It was, however, the contention of the respondent No. 1 that for superseding the Arbitration Clauses both in the Agreement for Technical Services and the General Terms and Conditions of Acknowledgement of Orders, written agreements between the parties were required to be entered into and as the same was not done and, therefore, it cannot be said that the Arbitration Clause as appearing in the Agreement for Technical Services and the General Terms and Conditions of Acknowledgement of Orders were superseded by the Minutes of the Meeting of the Board of Directors. In support of the said contention, counsel relied upon the decision of the Supreme Court in the case of K.K. Modi v. K.N. Modi and Ors.; . In support of the aforesaid contention, the counsel also referred to me the letters exchanged in between the parties and with the Chartered Accountants. In context of the aforesaid submission of the counsel appearing for the parties, I proceed to decide the aforesaid issue which arises for my consideration.

27. Relevant Clauses of Agreement for Technical Services have been extracted above. Article 20.2 which is also extracted above specifically provides that no modifications, amendments or supplements to the Agreement would be effective for any purpose unless in writing and signed by each party and approved by the Government of India. Therefore, any proposal or Clause intending

to supersede the aforesaid Arbitration Clause or for any modifications, amendments or supplements, thereof, the same must be in writing and also must be signed by each party and also to be approved by the Government of India. Similarly in the General Terms and Conditions of Acknowledgment of Orders, there is a Condition No. 11 which is an Arbitration Clause which is followed by Clause 12 pertaining to modification which also has been extracted above. In terms of the same also any modification or variation of the conditions including Condition No. 11 would have to be made in writing and signed by all the parties to the Contract. Therefore, if the parties intended to supersede the Arbitration Agreements in Agreement for Technical Services and General Terms and Conditions of Acknowledgement of Orders, the same must be in writing and signed by the parties.

28. In support of his contention that there was supersession of the Agreement in accordance with the requirement, reliance was placed by the petitioner on the Minutes of the Board Meeting of the Board of Directors of the petitioner. The representatives of the respondent No. 1 were also shown to be present in the said Meeting as would appear from the Minutes of the said Meeting. Although the aforesaid recording of the Minutes indicate that the representatives of the respondent No. 1 were present, in my consideration opinion, the same could not in any manner be interpreted to say that any change, or any modification or supersession was approved and given in writing by the respondent No. 1. In order to supersede the Arbitration Agreement, there must be a specific Clause in writing and signed by both the parties indicating that the parties intended to supersede the earlier Arbitration Agreement and also intended to provide for a new and fresh Arbitration Agreement between the parties. The contents as appearing from the Minutes of the Board Meeting do not indicate that the respondent No. 1 had at any point of time intended to supersede the Arbitration Agreements in the Agreement for Technical Services and the General Terms and Conditions of Acknowledgement of Orders and the same is also not signed by the respondent No. 1. Presence of the representatives of the respondent No. 1. in the Meeting of the Board of Directors cannot lead to the conclusion that whatever is said by them is the decision of the respondent No. 1. Besides the language used in the Minutes and the contents of the letters to which reference shall be presently made would indicate that the respondent No. 1 also proved and established that the Board of Directors did not refer the disputes between the parties to be decided through the process of Arbitration by Chartered Accountants.

29. In the Minutes of the Meeting of the Board of Directors, it was clearly recorded that the nominees of the financial institutions suggested that a third party like the Institute of Chartered Accountants be assigned the task of verifying the claims and counter-claims between the petitioner and the respondent No. 1. Therefore, the nominees of the financial institutions who were also involved in the functioning of the respondent No. 1 intended that the claims and counter-claims should only be verified by a third party like the Institute of Chartered Accountants. The representatives of the respondent No. 1 said in the said Meeting that the Meeting between the Director (Technical) and the petitioner nominees would take place after the Board Meeting and he hoped that an agreement might be reached between the parties, failing which a third party may be mutually agreed between the parties within two weeks by proposing four names from both sides to arrive at a mutually agreeable person or firm to decide the claims and counter-claims between the petitioner and the respondent No. 1. It was also agreement to by the Board and directed the

Managing Director to take immediate steps in that regard to have the issues resolved by a third party before the next meeting, in case no settlement was reached. In this connection, reference could also be made to the letter dated 9th January, 1989 written on behalf of the respondent No. 1 to the petitioner wherein the respondent No. 1 indicated the suggestion of the Board of Directors of the petitioner that a third party should investigate the situation of the petitioner and the position of the two main shareholders in order to try and find a solution to the problem to which the petitioner was confronted with. The letter further states that any of the four parties mentioned therein should be designated to accomplish the aforesaid assignment. Therefore, what was intended was to investigate the situation of the petitioner and the position of the two main shareholders in order to find a solution to the problems to which the petitioner was confronted with.

30. A letter is also placed on record dated 10th January, 1989 written on behalf of the petitioner to the respondent No. 1 wherein it was indicated that the petitioner was approaching M/s. Price Waterhouse with a request to examine the claims and counter-claims inter se petitioner and the respondent No. 1 and to convey their views concerning such claims and counter-claims and that their findings in the matter would be placed before the Board of the petitioner in the next meeting.

31. There is a subsequent letter written on behalf of the petitioner to M/s. Price Waterhouse which is also placed on record. The said letter was written by Mr. R.N. Khanna, the Managing Director of the petitioner. By the said letter, the petitioner sent to M/s. Price Waterhouse the brief containing the salient features of the Memorandum of Understanding along with the difficulties arising between the petitioner and the respondent No. 1 requestion the said firm M/s. Price Waterhouse to peruse the said brief along with enclosures and to examine the claims and counter-claims between the parties and to give their considered views on the various queries listed in the said brief. The said firm was also requested to send their bill against their professional charges in lumpsum or stagewise.

32. All these communications when read along with the Resolution of the Board Meeting make it apparent and clear that by the aforesaid communications and the Resolution of the Board, a settlement was sought to be arrived at with regard to some of the differences between the parties. The said documents disclose that an effort was made to resolve the disputes and difference between the parties through negotiations with the help of financial institutions which had also lend money to the petitioner. The parties thereby sought to resolve the disputes, if possible, by appointing a third party.

33. For appreciating the aforesaid contention raised I may usefully refer to the decision of the Supreme Court in K.K. Modi (supra). In the said decision a Memorandum of Understanding was arrived at between the two groups of the family in respect of differences in family providing for implementation of such settlement to be done by the Chairman of the Financial Corporation which lent money to the family concern and also providing that in case of dispute regarding implementation of the matter, the same would be referred to the Chairman. In the context thereof, the Supreme Court came to deal with a question as to whether Clause 9 of the said Memorandum of Understanding constituted an Arbitration Agreement or not and whether the decision given by the Chairman of the Financial Corporation could be said to be an award or not. As is disclosed from the

aforesaid, it is crystal clear that the facts of the said case are almost similar to the facts of the present case. While answering the said question, the Supreme Court referred to the book on "Commercial Arbitration" written by Mustill and Boyd wherein it is pointed out that in complex modern State there is an immense variety of tribunals, differing fundamentally as regards their compositions, their functions and its sources from which their powers are derived. It is also written therein that there are also other tribunals with a consensual jurisdiction whose decisions are intended to affect the private rights of two parties inter se, 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). The Supreme Court also quoted some of the attributes which are required to be present for an agreement to be considered as an arbitration agreement as laid down by Mustill and Boyd. The said attributes have been approved by the Supreme Court and are listed in paragraph 17 and 18 of the said Judgment which are extracted hereinbelow:-

> "17. 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 the agreement, (2) That the jurisdiction of the tribunals to decide the rights of parties must derive either from the consent of the parties of 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 agreement 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.

18. 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."

Having discussed thus, the Supreme Court further held that 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 dispute through arbitration and, therefore, 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. It was also held that the nomenclature used by the parties may not be conclusive and one must examine the true intent and

purport of the agreement. Having held thus, the Supreme Court examined the facts of the said case and found that the Memorandum of Understanding recorded the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. The Supreme Court also laid down that the finality of the decision is also indicative of it being an expert's decision though of course, the same would be conclusive but looking into the nature of the functions expected to be performed by the Chairman, IFCI, in the decision given by him was not an arbitration award.

34. In my considered opinion, the ratio of the aforesaid decision of the Supreme Court in K.K. Modi (supra) is fully and clearly applicable to the facts of the present case. There cannot be any dispute on the legal principles laid down in M. Dayanand Reddy and Smt. Rukmanibai Gupta (supra). In the said cases, it was held by the Supreme Court that the language of the document is to be looked into for ascertaining about existence or non-existence of an Arbitration Clause. Therefore, in the light of the decisions of the Supreme Court, I examined the documents and proceed to record my reaction thereto. What was intended under the Resolution of the Board is to get an opinion from the Chartered Accountants with regard to the disputes and differences of the petitioner. The Resolution was adopted in the Meeting of the Board of the petitioner. The respondent No. 1 was not directly involved nor participated in the said proceedings but the representatives of the respondent No. 1 were present in the said Meeting. The language of the Board's Resolution of the petitioner does not disclose any clear intention on the part of the Board of Directors of the petitioner to substitute any earlier Arbitration Clause between the petitioner and the respondent No. 1 and to agree to a new Arbitration Clause governing both the petitioner and the respondent No. 1. There is no clear consent of the respondent No. 1 to any such intention of giving rise to a new Arbitration Clause between the parties. The Board's Resolution also does not disclose that the decision of M/s. Price Waterhouse would be binding on the parties of the Agreement. There was also no consent of the respondent No. 1 for substitution of any existing Arbitration Clause. The said Minutes of the Board Meeting also do not contemplate that the substantive rights of the parties would be determined by M/s. Price Waterhouse and that the same would be final and binding and could be enforceable in law. It also did not envisage that M/s. Price Waterhouse would act judicially after taking into account all the evidence produced by the parties. By the communications sent to the Chartered Accountant sending certain queries and asking it to give their views on it. Therefore, when the aforesaid Minutes of the Board of Directors of the petitioner are read along with the contemporaneous documents, it is crystal clear that the said Minutes do not give rise to any new Arbitration Clause between the parties and the same cannot be said to be binding on the respondent No. 1. Counsel for the petitioner strongly relied upon the expression 'decide' finding place in the Minutes of the Meeting of the Board dated 16th December, 1988 which according to the petitioner meant judicial decision which is final and binding. I have given my anxious consideration to the aforesaid submission also. However, in the context of my findings recorded above, I am of the firm opinion, that the use of the word expression 'decide' in the said Minutes did not at all contemplate giving a judicial pronouncement on the parties. Only because the word 'decide' is used in one place, the same alone cannot be the clinching issue and that all the other expressions in the said Minutes and the other documents which are contemporaneous in nature shall have no relevance and bearing at all. In this regard, reference may be made to the recent decision of the Supreme Court in Konkan Railway Corporation Ltd. and Anr. v. rani Construction Pvt. Ltd. (Civil Appeal Nos. 5880-5889 of 1997) disposed of on 30th January, 2002, wherein the Supreme Court also held that the use of the expression 'decision' in

Section 11 of the Arbitration and Conciliation Act, 1996, does not mean that the said decision is to be a judicial decision. In the context of the said provision it was held to be an administrative order. The Supreme Court has held thus:-

> "That the word 'decision' is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated."

In the light of the aforesaid decision, I reject the aforesaid contention of the counsel appearing for the petitioner.

35. It is, therefore, held that the proceedings before M/s. Price Waterhouse were not arbitration proceedings. No decision was also given by M/s. Price Waterhouse and, therefore, the said reference to M/s. Price Waterhouse shall not have any effect on the existing Arbitration Agreement between the petitioner and the respondent No. 3.

36. Having held thus, I am now required to answer the last point which was raised by the counsel appearing for the petitioner that the respondent No. 1 by its conduct abandoned the reference made to the International Chamber of Commerce and, therefore, the said reference including the Arbitration Agreement between the parties stands superseded.

Point No. 3.

37. In support of his contention, counsel appearing for the petitioner relies upon the action on the part of the respondent No. 1 of filing a fresh suit for the corporate name and also on the fact of the petitioner and the respondent No. 1 resuming their trade relationship and cooperation with one another.

38. It is disclosed from the records including the aforesaid Minutes of the Board Meeting of the petitioner and the subsequent correspondences and also during the period of pendency of the suit in this Court that the petitioner and the respondent No. 1 were trying to reach an amicable settlement during which period the petitioner and the respondent No. 1 continued their transactions which, however, cannot be interpreted as giving up all its claims by the respondent No. 1 for all intent and purposes either by abandoning the Arbitration Clause or of the reference made to the International Chamber of Commerce. The respondent No. 1 has already referred its claims to the International Chamber of Commerce and a notice was issued by the said International Chamber of Commerce to the petitioner to take steps pursuant to the said notice. At that stage, the present suit was filed wherein an interim order was passed staying further proceedings pending before the International Chamber of Commerce. It is also one of the contentions of the counsel appearing for the petitioner that by filing a suit for the name, the respondent No. 1 has given up its claim made in the reference to the International Chamber of Commerce Arbitration.

39. I have considered the aforesaid submissions in the light of the records available before me. The subsequent suit was filed by the successor-in-interest of the respondent No. 1 seeking for an injunction restraining the petitioner herein from using the name "TELEMECANIQUE" as a part of

its corporate name and carrying on the business in the said registered name. Only because a suit is filed by the successor of the petitioner in this Court, the same would not and cannot be termed as abandonment of the International Chamber of Commerce Arbitration. If there be any valid and existing Arbitration Agreement between the parties in respect of any matter, the dispute arising out of such Agreements which contain an Arbitration Clause would have to be resolved through the process of arbitration and a suit for the said purpose would not be maintainable. Therefore, only because a suit is filed in this Court seeking for certain reliefs which may have some bearing on the injunction prayed before the arbitration proceedings before the International Chamber of Commerce would not and cannot in any manner be interpreted as supersession and abandonment of the rights of the respondents No. 1 to approach the International Chamber of Commerce.

I find no merit in the aforesaid submissions of the counsel appearing for the petitioner and the aforesaid point, therefore is also answered in favor of the respondent No. 1 and against the petitioner.

40. Under the aforesaid circumstances all the points urged are answered against the petitioner. The petition is, therefore, found to be without any merit and stands rejected. The interim order passed by this Court on 5th January, 1990 stands vacated. The parties are left to bear their own costs. dusty.