Supreme Court of India
M.P. Rajya Tilhan Utpadak ... vs M/S Modi Transport Service on 11 May, 2022
Author: Sanjiv Khanna
Bench: Hon'Ble Dr. Chandrachud, Sanjiv Khanna, Surya Kant

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1973 OF 2022

M.P. RAJYA TILHAN UTPADAK SAHAKARI
SANGH MARYADIT, PACHAMA,
DISTRICT SEHORE AND OTHERS

VERSUS

M/S. MODI TRANSPORT SERVICE

JUDGMENT

SANJIV KHANNA, J.

The legal issue arising in the present appeal is whether the parties had agreed that the subject matter of the suit or a part thereof should be referred to arbitration under Section 21 of the Arbitration Act, 1940.1

2. On 03rd September 1993, the respondent before us - M/s. Modi Transport Service,2 a partnership firm, had filed a civil suit in the Court of the District Judge, Sehore Camp, Astha, Madhya Pradesh, Signature Not Verified Digitally signed by Sanjay Kumar 1 We are examining the provisions of the Arbitration Act, 1940 and consequently, the observations and Date: 2022.05.11 16:20:43 IST Reason: the findings recorded should not be without proper appreciation of the principles applied to the proceedings under the Arbitration and Conciliation Act, 1996. 2 'The plaintiff', for short.

for the settlement of accounts of transportation of coal undertaken by them according to the agreement dated 01st October 1990 and the supplementary agreement dated 13th December 1991, with M.P. Rajya Tilhan Utpadak Sahkari Sangh Maryadit, Pachama, District Sehore, Madhya Pradesh (the first defendant). The General Manager and Managing Director of the said Sahkari Sangh were impleaded as second and third defendants.3 The plaintiff had also prayed for a grant of the amount due and payable by the defendant and the amount spent by the plaintiff on the security of the defendant's goods and all other amounts (sic) with interest @ 2%.4

3. The plaint, in brief, states that the plaintiff had transported coal on the delivery orders issued by the defendant from the coal mines to the defendant's plant. The plaintiff had no connection with the

quality or any deficiency in the quality of the coal. The plaintiff, as per directions, had loaded the coal from the coal mines of Western India Coalfields Limited. The plaintiff's sole responsibility was to deliver the coal on time at the defendant's plant. By communication dated 05th June 1992, the defendant had informed that the plaintiff would be paid transportation charges at Rs.1.42p. per tonne per kilometre till the finalisation of the new agreement. The order would 3 Collectively three defendants are referred to as 'the defendant', for short. 4 Interest period was not specified.

remain in force for at least six months. The plaintiff, as required, had furnished a bank guarantee of Rs.1,00,000/- (rupees one lakh only) for six months. Thereafter, the defendant had refused to pay transportation charges @ Rs.1.42p. per tonne per kilometre. Further, the defendant had made deductions from the bills raised on the basis of the actual tonnage of coal delivered, though the plaintiff, as per the agreement, was entitled to a 1% variation or exemption on the quantum of coal loaded at the coal mine. Accordingly, transport charges were payable per ton per kilometre as loaded at the collieries and not on the quantity actually delivered as long as the shortfall was within 1%. The defendant had also made false and wrong deductions on account of the high moisture content in the coal. Interest was charged and deducted from the bills of the plaintiff by the defendant. Subsequently, the defendant had issued a telegraph asking the plaintiff not to transport coal. The plaintiff had to arrange for a plot to store the coal for which he had to pay a rent of Rs.10,000/- (rupees ten thousand only) per month and incur security expenses of Rs.5,000/- (rupees five thousand only) per month for up to five months.

4. The defendant contested the suit by filing a detailed written statement. As per the defendant, it was an essential duty of the plaintiff to lift the coal offered only on being satisfied that the coal was of good quality. The plaintiff had lifted good quality coal from the collieries against the release orders of the defendant, but low quality of coal was delivered to the defendant. The defendant was cheated. The representatives of the plaintiff were informed about the low quality of coal on account of excessive moisture, and stone and dust being mixed with the coal. The truck drivers had showered water on the coal to intentionally increase the weight of the coal before delivery. Letter dated 05th June 1992 in this regard was issued by the defendant to the plaintiff. The plaintiff was to be paid transportation charges for the coal actually accepted at the plant of the defendant and not for the coal which was not delivered. As per clause 11 of the agreement, shortage up to 1% per truck was the maximum limit, whereas the plaintiff had claimed that 1% shortage should be allowed even when there was no difference between the dispatched and delivered weight. The price of coal was deducted and recovered from the plaintiff when the shortage was in excess and beyond the 1% allowable limit. There were delays in the delivery of coal, sometimes extending to more than a month from the dispatch date. Accordingly, the defendant had made deductions on account of wrong and fraudulent acts due to which the defendant had suffered losses. The plaintiff was also liable to pay interest as the defendant had suffered due to blockage of funds. The defendant was not liable to pay any demurrage or rent charges for the plot and, in fact, such charges were never paid. The plaintiff had not delivered and kept huge quantity of coal for six to seven months after the coal was lifted from the coal mines. Other defences raised related to incomplete documentation and excess freight charges by the wrong declaration as to the place from where the coal was lifted. The letter dated 05th June 1992 enhancing the rate to Rs.1.42p. per tonne per kilometre was withdrawn/cancelled retrospectively vide the letter dated 30th September 1992. The letter dated

05th June 1992 was issued on wrong facts based on the rate quoted by a sister concern of the plaintiff in a tender floated in June 1992. Subsequently, the sister concern had voluntarily reduced the rate to Rs.1.32p. per tonne per kilometre. In fact, the plaintiff and their sister concern had quoted three different rates in a short period of time to misguide and confuse the General Manager (Plant) of the defendant who had issued the letter dated 05th June 1992. The plaintiff did not raise any objection to the letter dated 30th September 1992 and had continued to transport and deliver coal post the issue of the letter. The plaintiff had accepted the cancellation of the letter dated 05th June 1992. Furnishing of the bank guarantee of Rs.1,00,000/- (rupees one lakh only) for six months was not on account of an increase in rates but on account of the fact that the contract for transportation of coal by the plaintiff has been extended up to December 1992.

5. As stated above, the plaintiff had not quantified the amount payable therein and had sued for settlement of accounts regarding the quality of coal transported. They had also prayed for the interest @ 2% which, it appears, was the amount claimed as payable per month. For valuation, the plaint had fixed the value of the suit at Rs.1,00,000/- (rupees one lakh only) and a court fee of Rs.8,180/- (rupees eight thousand one hundred eighty only) was paid with the statement that excess court fee could be deposited after the amount was quantified. However, a number of contestations inter se parties were raised like the rate and quantification of the transport charges, lapses and alleged failure by the plaintiff on different accounts, the deductions made by the defendant and the plaintiff's liability to pay interest on excess payments made.

6. During the pendency of the said suit, the plaintiff had filed an application before the First Additional District Judge, Sehore, which reads:

> "COURT: FIRST ADDITIONAL DISTRICT JUDGE, SEHORE (M.P.) CIVIL SUIT NO. 16B/93 M/s Modi Transport Service .....Plaintiff Versus M.P. Rajya Tilhan Sangh etc. .....Defendant Application for appointment of Arbitrator/Commissioner
>
> 1. Present Suit has been filed by the plaintiff against the Defendants for settlement of accounts. In view of the pleadings made by the Plaintiff, documents produced on record and pleadings and documents of Defendant, it is prima facie clear that there is a dispute between both the parties is in respect of accounts. For the purpose of conducting enquiry regarding accounts after giving opportunity of hearing to both the parties, it is necessary in the interest that after appointing a Competent Chartered Accountant as Panch/ Commissioner in the present case he may be directed to submit report after conducting audit of Accounts. Since, the transaction took place between both the parties are much higher, therefore, it is necessary to handover the aforesaid work to a Chartered Accountant.
>
> Therefore, it is prayed that by allowing the present Application, and after appointing Sh. Sushil Kumar Mantri, Chartered Accountant, Sehore as Panch/ Commissioner as proposed by the plaintiff, kindly direct him to Submit Report before the Hon'ble Court after conducting Audit of the Accounts.

Sehore, dated 23.12.1994 Sd/- illegible Plaintiff Through Counsel" The application was signed and moved by the plaintiff. It was not signed and moved by the defendant.

7. On 23rd December 1994, the date on which the application was filed and first listed, the First Additional District Judge, Sehore, passed the following order:

"COURT OF THE FIRST ADDITIONAL DISTRICT JUDGE, SEHORE (M.P.) Civil Suit No. 16B/93 Plaintiff along with Shri Badnairkar and Shri Amit Agrawal, Advocate Opposite Parties along with Shri S.K. Verma, Advocate This case is fixed for evidence today, but an application has been submitted on behalf of the plaintiff to the effect that in this case accounts have to be settled between the parties and this work can be done only by a well- educated chartered accountant. In such a situation, if this matter is handed over to a chartered accountant for decision, then both the parties will not have any objection. A copy of this application was given to Mr. Verma. He has no objection to being appointed as Panch in this case. In the application itself, it has been proposed to appoint Shri Sushil Kumar Mantri, Chartered Accountant, Sehore as Panch of the case, on which no party has any objection. Hence the application is accepted. The fee of the arbitrator will be payable according to the fee prescribed in the schedule of the Arbitration Council of India immediately, if the Arbitrator demands fee, both the parties should pay half the fee to the arbitrator before settlement of the matter. The final liability of the fee will depend on the settlement of the fees of the case. A notice to this effect on behalf of the Sessions Court for appointment of the arbitrator. The arbitrator should present his decision within the stipulated period by giving notice to the parties concerned and this matter should be placed before me at the appointed time after being presented in the Arbitration Court.

Dated: 23.12.1994"

8. Pursuant to the said order, the court sent the following letter dated 23rd January 1991 to S.K. Mantri, Chartered Accountant, Sehore:

"COURT OF FIRST ADDITIONAL SESSIONS
JUDGE, SEHORE (M.P.)

Sr. No 11/ Sehore Dated – 23.01.1995

To,
Sh. S.K. Mantri
Chartered Accountant
Sehore.

In Suit No. 11/93 of this Court titled Modi Transport Vs. Tilhan Sangh, you have as appointed as Panch. You by conducting audit of all the disputed records (Accounts) of both the parties, kindly

send your Report by 22.04.1995.

On receiving your Remuneration Report, payment will be made to you in the Court.

Sd/-

(Satish Chandra Dubey) First Additional District Judge, Sehore (M.P.)"

9. On 28th March 1995, S.K. Mantri appeared before the court and applied for an extension of the date to submit the report, which time was extended. Another order dated 22nd April 1995 states that the panch decision was not submitted and that the panch must present the award within the stipulated period by giving notice to the parties concerned. Thereafter, the court passed a number of orders recording the presence of the parties and that they sought time to arrange the vouchers and the records. Time was also given to verify the papers, which were checked in the court in front of the parties' representatives. Order dated 18th May 1995 records that photocopy and laboratory analysis records had been placed on record. Order dated 19th May 1995 refers to the account summary submitted by the plaintiff regarding the pending bills and amounts for the previous years. Information in that regard was sought from the defendant. Therefore, it is clear that the proceedings remained pending before the court. The suit was not treated as disposed of and decided in view of the order dated 23rd December 1994.

10. On 22nd June 1995, S.K. Mantri submitted his report before the court stating that an amount of Rs.24,03,300/- (rupees twenty four lakhs three thousand three hundred only) was due and payable by the defendant to the plaintiff. This amount included interest of Rs. 9,43,007/- (rupees nine lakhs forty three thousand seven only) computed @ 24% per annum on different amounts between 23rd February 1993 to 31st May 1995. He held that the plaintiff is entitled to get Rs.1.42p. per tonne per kilometre. He held that "in my opinion the reduction of one per cent per truck should be followed (sic- allowed) by a reduction in contract for excess reduction". Claim of the defendant for a deduction on account of moisture and low quality coal was not justified in the absence of evidence. Lastly, the plaintiff would be entitled to receive rent and security charges, but because of lack of a clear provision and a specific prayer, the amount could only be decided by the court. Significantly the second paragraph of the report as to the basis on which it was prepared reads:

> "That the report has been prepared on the basis of records (accounts) which have been presented to me by the plaintiff and the opposition till date 31.05.95, which is presented before your goodself."

11. Order dated 22nd June 1995 passed by the court mentions that the arbitrator has presented his report and documents along with the list. If the parties have any objections regarding the arbitral report, then they should appear on the next date.

12. The defendants filed objections, inter alia, on different grounds challenging the report, which objections were decided by the court of Additional District Judge, Sehore, vide order dated 16th May 1996. He held that S.K. Mantri had been appointed as an arbitrator as provided under Section 21 of

the Arbitration Act. The defendant's contention that S.K. Mantri was appointed as a commissioner under Order XXVI Rule 9 of the Code of Civil Procedure, 19085 was rejected. Further, the objections to the award filed on 01st November 1995 were beyond 30 days and barred by limitation. Counsel for the defendant was present in the court when the arbitrator submitted the award in the court on 22nd July 1995. The allegation of misconduct on the ground that S.K. Mantri was a 5 'the Code', for short.

Chartered Accountant of the defendant, who was actually involved in the preparation of accounts, was overruled as this objection was not raised when S.K. Mantri was appointed as an arbitrator. Order dated 23rd December 1994 appointing S.K. Mantri as an arbitrator had attained finality as it was not challenged by the defendant.

13. The first appeal preferred by the defendant before the High Court has been dismissed vide the impugned judgment dated 19th September 1996. The High Court has affirmed the trial court's view that during the pendency of the suit, the matter was referred to arbitration in terms of Section 21 of the Arbitration Act. S.K. Mantri, Chartered Accountant, was appointed as an arbitrator with the parties' consent. The fee was payable to S.K. Mantri as per the prescribed arbitration schedule. The objection that S.K. Mantri was the Chartered Accountant of the defendant, was rejected as it could not be said that he had acted in an unfair manner. That apart, the objections were filed beyond the prescribed period of 30 days.

14. Defendant, namely, M.P. Rajya Tilhan Utpadak Sahkari Sangh Maryadit, Pachama, District Sehore, Madhya Pradesh and the General Manager and Managing Director of the Sahkari Sangh have accordingly filed this appeal before us.

15. Section 21 of the Act, reads as under:

"21. Parties to suit may apply for order of reference:-

> Where in any suit all the parties interested agree that may matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference." The first condition for invoking Section 21 is that the parties to the suit must agree that any matter of difference between them shall be referred to arbitration. All interested parties must agree and apply to the court where the suit is pending to obtain an order of reference to arbitration. The subject matter of the reference must be any of the matters between the parties to the suit. Entire subject matter of the suit may not be referred to arbitration. Parties may agree to only refer a part or portion of the dispute to arbitration. The expression 'agree' is significant and expressive as to when a court can exercise jurisdiction under Section 21 of the Act. Word 'agree' means any arrangement or understanding or action in concert.6 The Indian Contract Act,1872 states that an agreement may be oral or in writing, albeit the command of Section 21 of the Act is that the parties should apply to the court in writing for an order of reference.

In the context of Section 21, the court can refer a dispute/difference subject matter of a suit when the parties mutually agree to 6 See Section 2 of the Contract Act which vide clause (a) defines proposal, clause (b) which defines when proposal is accepted, clause (e) which states that every promise and every set of promises, forming the consideration for each other, is an agreement and clause (h) which states that an agreement enforceable by law is a contract Clause (h) also has two sub-clauses. arbitration. There must be a joining or meeting of minds between the parties to go for arbitration in respect of a subject matter in a pending suit. Felthouse v. Bindley7 states that the parties agree when they wilfully agree to perform certain acts or refrain from doing something. The parties should be agreed about the subject matter at the same time and in the same sense.

16. Interpreting Section 21 of the Act, a Full Bench of the Punjab and Haryana High Court in Firm Khetu Ram Bashamber Dass v. Kashmiri Lal8 has held:

> "Thus, before any matter involved in a suit pending in a Court can be referred to arbitration (a) there must be an agreement amongst all the parties interested that any matter in dispute between them in the suit shall be referred to arbitration; (b) if they come to such an agreement, then they have to make an application in writing to the Court concerned; and (c) thereafter, the Court has to pass an order referring the dispute to the arbitrator agreed upon between the parties.
>
> There can be no manner of doubt that if there is no agreement between all the parties who are interested in the case and if the application is not made on behalf of them all, the reference made by the Court is bad and the award based on such a reference is invalid in law.

This view has been consistently taken by all the High Courts. In Negi Puran Singh v. Hira Singh and others, while dealing with provisions of Civil Procedure Code, 1882, similar to sections 21 and 23 of the Arbitration Act, Stanley, C.J. and Banerji, J., of the Allahabad High Court held that if there was no application signed by all the parties who were interested in the settlement of the suit, the reference and the award given, thereafter, would be invalid. The same view was taken 7 (1862) 142 ER 1037 8 1959 SCC OnLine Punj 102 in Haswa v. Mahbub and another, by another Division Bench of the same Court. In Gopal Das v. Baij Nath, Sulaiman, J., (as he then was), referred to a number of decisions of Allahabad and Calcutta High Courts and observed as follows:— "*** it is necessary that all persons who are interested in the matter which is in difference between the parties and which is going to be referred to arbitration, should join. Although it is not absolutely necessary that they should all sign the application made to the Court, it is necessary that they should agree to the reference." See also Tej Singh and another v. Ghase Ram and others , In Ram Harakh Singh v. Mumtaz Hasain, the question of acquiescence and ratification was also considered.

Following Gopal Das v. Baij Nath and Subba Rao v. Appadurai , Ghulam Hasan, J., held that the foundation of the jurisdiction of the Court is the consent of the parties and the subsequent ratification does not validate the reference which was void ab initio. Calcutta and Madras High Courts have also taken a similar view. The question was considered by a Full Bench of the Calcutta High Court in Laduram v. Nandlal, Mookerjee, J., at page 114 of the report observed as follows:—

"The foundation of jurisdiction here is the agreement amongst all the parties interested that the matters in difference between them shall be referred to arbitration. If all the parties interested do not apply and yet an order of reference is made, the order is illegal because made without jurisdiction. If an award follows on the basis of that reference, it is equally illegal, because it is founded upon a reference made without jurisdiction." See also Seth Dooly Chand v. Munuji and others and Khan Mohmed v. Chella Ram and another and Subha Rao v. Appadurai.

In Subha Rao v. Appadurai, Devadoss, J., while considering the provisions of para 1 of Schedule II, Civil Procedure Code,—which in substance is the same as section 21 of the Arbitration Act—observed as follows:— "What gives the Court jurisdiction to refer the matter to arbitration is consent of all the parties. Consent subsequently given cannot give jurisdiction to the Court which it did not possess at the time when it referred the matter to arbitration."

17. In our opinion, the aforesaid ratio expresses the correct position in law. Arbitration is an alternative to the court adjudication process by a private forum chosen by the parties. Normally reference can be made or even directed to the arbitrator only if a preexisting arbitration agreement subsists between the parties. In the absence of a preexisting arbitration agreement, the court has no power, authority or jurisdiction to refer unwilling parties to arbitration. Therefore, the word 'agree' in Section 21 of the Act refers to consensus ad idem between the parties who take a considered decision to forego their right of adjudication before a court where the suit is pending, and mutually agree to have the subject matter of the suit or part thereof adjudicated and decided by an arbitrator.

18. In the present case, the application dated 23rd December 1994 was moved by the plaintiff and it was not signed by the defendant. As per the heading, the application was for the appointment of a commissioner/arbitrator to conduct an 'enquiry' in respect of the accounts by a competent Chartered Accountant who shall act as a panch/Commissioner and submit a report after conducting an audit of the accounts. It was stated that the transactions between the parties are fairly large in number and, therefore, it is necessary to handover the aforesaid task to a Chartered Accountant. The application also states that for the enquiry regarding accounts an opportunity of hearing should be given to both the parties. Name of S.K. Mantri, Chartered Accountant, to act as panch/commissioner was proposed. The prayer in the application was that the panch/ commissioner would submit the report to the court after conducting an audit of the accounts. The application cannot be read as an application moved on a prior agreement or consensus for reference to arbitration.

19. In view of the aforesaid discussion, we cannot read the application dated 23rd December 1994 as an application by the parties under Section 21 of the Arbitration Act. First, it is not an application for reference of disputes to an arbitrator for adjudication but a request for the appointment of an expert, that is, a Chartered Accountant, who would examine the accounts and papers and submit the report to facilitate the court. The role assigned to S.K. Mantri is also clear from the letter of appointment dated 23rd January 1995 which states that S.K. Mantri has been appointed as a panch and would be conducting an audit of all disputed accounts of both sides, and that he should send a report to the court.9 The letter also mentions that "on receiving your remuneration report, payment would be made to you in the court". Secondly, the court's jurisdiction to finally decide was not

questioned or annihilated. In fact, the court always remained in the picture, exercised parley as an adjudicator having dominion over the subject matter of the suit.

20. However, the plaintiff has placed reliance on the order dated 23rd December 1994 to submit that the defendant had agreed to arbitration. It is, therefore, necessary for us examine the contents of the order. The first portion of the order records that the plaintiff has made an application for settlement of accounts and that the accounts can be examined only by a well-educated Chartered Accountant. A copy of the application had been handed over to the counsel for the defendant who had no objection "to being appointed as Panch in this case". This statement is somewhat vague, but we do not read the statement as an indication or affirmation that the defendant had agreed to the appointment of an arbitrator as an alternative and substitute to court adjudication. If it was so, this should have been clearly stated to enable the parties to respond and make statement. At best it was restricted to the appointment of 9 Distinction between an arbitrator and expert; and an arbitrator and a commissioner has been examined and discussed below.

an expert/commissioner who would examine the accounts and submit his report.

21. The second portion of the order dated 23rd December 1994 states that in the application name of Sushil Kumar, Chartered Account, as panch has been proposed to which no party had any objection. Thereafter, the order records the direction of the court that the fee of the arbitrator 'shall be as prescribed in the schedule of the Arbitration Council of India and if the arbitrator demands a fee the same should be equally shared by both the parties'. The last portion does not incorporate and does not refer to any agreement or even concession given by the defendant agreeing to arbitration as an alternative to court adjudication and decision. The court had not disposed of the suit by referring the subject matter or a part of the subject matter of the suit to arbitration. In our opinion the said order is for issuing a commission as the court had accepted an application filed by the plaintiff for verification of the accounts. The commissioner was to act as an expert or facilitator for the court and submit a report to the court to help the court adjudicate and finally decide the suit.

22. We would elaborate these aspects and affirm our reasoning with reference to case law and statutory provisions.

23. This Court in Kerala State Electricity Board and Another v.

Kurien E. Kalathil and Another,10 had examined the question of reference to arbitration in a case where there was no arbitration agreement between the parties. The question that fell for consideration was whether the High Court was right to refer the parties to arbitration on oral consent given by the counsel without the written consent of the party whom he represents. In this context, reference was made to Section 89 of the Code and the decision of this Court in Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd.,11 which is to the following effect:

> "33. Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court under Section 89 of the Code. Such agreement can be by means of a joint memo

> or joint application or a joint affidavit before the court, or by record of the agreement by the court in the order-sheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration under Section 89 of the Code; and on such reference, the provisions of the AC Act will apply to the arbitration, and as noticed in Salem Bar (I), the case will go outside the stream of the court permanently and will not come back to the court."

24. Thereafter, Kerala State Electricity Board (supra), made a reference to a similar view expressed by this Court in Shailesh 10 (2018) 4 SCC 793 11 (2010) 8 SCC 24 Dhairyawan v. Mohan Balkrishna Lulla,12 which stated that resort to arbitration in a pending suit by the orders of the court would only be when parties agree for settlement of the dispute through arbitration. Thus, reference to arbitration is valid only when done by means of agreement between the parties.

25. On the question whether a counsel can give consent for arbitration on behalf of the parties, Kerala State Electricity Board (supra) referred to the decision in Byram Pestonji Gariwala v. Union Bank of India,13 which has settled the law that a counsel should not act on implied authority unless there is an exigency of circumstances demanding immediate adjustment of the suit by agreement or compromise and the signature of the party cannot be obtained without delay. Reference was made to paragraph 37 in Gariwala case (supra), which reads as under:

> "37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will 12 (2016) 3 SCC 619 13 (1992) 1 SCC 31 safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession."

26. The Kerala State Electricity Board (supra) decision rightly records that referring the parties to arbitration has serious civil consequences, substantial and procedural. Once an award is passed, it can be only challenged on limited grounds. When there was no arbitration agreement between the parties, without joint application the High Court ought not to have referred the matter to arbitration. This Court in Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd.14 emphasised that the arbitration agreement must contain a broad consensus between the parties that the disputes and differences should be referred to a private tribunal. Further, such a tribunal must be an impartial one.

27. In ITC Ltd. v. George Joseph Fernadez and Another,15 this Court had interpreted Section 2016 of the Contract Act, which provides that where both the parties to an agreement are under a mistake as to a matter of fact essential and integral to the agreement, the agreement is void. However, this does not apply if the mistake relates to an erroneous opinion as to the valuation of the thing that 14

(2003) 7 SCC 418 15 (1989) 2 SCC 1 16 20. Agreement void where both parties are under mistake as to matter of fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact. forms the subject matter of the agreement. A mistake as to the quality of an article or attributes on the other hand is a debatable question as it may not always lead to the conclusion that the contract is void. Further, this provision relating to the voidness of the contract does not apply to cases of a common mistake of fact, as distinguished from a mutual mistake made or entertained by each of the persons towards or with regard to each other. Where a party is mistaken as to the other's intention, though neither realises that the respective promises have been misunderstood, there is a mutual mistake. The ascertainment of whether or not there was a mutual mistake is to be ascertained by applying what reasonable third parties would infer from their words or conduct. The mistake or error must be such that it either appears on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject matter of the contract or was an inevitable inference from the nature of the contract that all parties so regarded it. A contract is void at law only if some term can be implied in both offer and acceptance, which prevents the contract from coming into force. These principles are relevant when the dispute arises as to the existence of a pre-existing arbitration agreement. Albeit in the case of Section 21, the requirement is even stricter – the "parties interested agree…in writing before the court", which is an inflexible mandate which requires that the parties must agree, or affirm an agreement before the court to refer the subject matter as agreed to arbitration.

28. This Court in K.K. Modi v. K.N. Modi and Others,17 after referring to Mustill and Boyd in their book on Commercial Arbitration, pointed out that there is an immense variety of tribunals differing fundamentally as regards their composition, their functions and sources from which their powers are derived. Tribunals, including those which derive their jurisdiction from the consent of the parties, apart from the arbitration tribunal, may be persons who are not properly called tribunals, but by mutual consent entrusted with the power to affect the legal rights of two parties inter se in a manner creating legally enforceable rights to do so by a procedure of a ministerial but not judicial in nature, such as persons appointed by contract to value property or certify compliance of building works with the specification. Other examples given are of conciliation tribunals of local religious bodies or privately appointed persons to act as mediators. Such consent terms lack some of the attributes necessary for an arbitration agreement. The judgment enlists some 17 (1998) 3 SCC 573 of the attributes which must be present in an agreement to be considered as an arbitration agreement as:

> "17… (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 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 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."

29. K.K. Modi (supra) refers to Russell on Arbitration,18 which observes that whether a chosen form of dispute resolution is expert determination or arbitration is a matter of construction of a contract that involves an objective enquiry into the intention of the parties. Specific words like 'arbitrator', 'arbitration proceedings' or 'an expert and not an arbitrator' can be used to describe how the dispute resolver is to act. However, the words are persuasive, although not always conclusive. The authors on the distinction between 18 21st Edn., at page 37, para 2-014 arbitration and an expert's opinion have elucidated that an arbitral tribunal arrives at its decision based on the evidence and submissions of the parties by applying the law and its principles, whereas an expert decides on his own expert opinion, applying his own expertise.19

30. In Bharat Bhushan Bansal v. U.P. Small Industries Corporation Ltd,20 reference was made to S.K. Chawla's Law of Arbitration and Conciliation21 to highlight that an expert primarily acts on his knowledge and experience supplemented if he thinks fit by: (i) his own investigations; and/or (ii) material (which need not conform to the rules of 'evidence') put before him by either party. On the other hand, an arbitrator primarily acts on the material put before him by the parties. Determination by an expert would involve less to thorough investigation. Reference is also made to Hudson's Building and Engineering Contracts,22 which distinguishes a certifier and an arbitrator in a building contract observing that the certifier in a construction contract will often perform an administrative rather than a judicial function. Certifiers have been described as 19 Russel on Arbitration, 21st Edition 20 (1999) 2 SCC 166 21 Justice S.K. Chawla Law of Arbitration and Conciliation at Page 164. 22 See Eleventh Edition, Volume 1, in Paragraph 6.065 preventers of disputes in contradistinction with arbitrators, whose function can only arise once a dispute is in existence.

31. With regard to the significance and effect of the report submitted by an expert, this Court in Dayal Singh and Others v. State of Uttaranchal23 states that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. Simply put, an expert deposes and does not decide,24 his duty is to furnish the court with necessary scientific/technical criteria so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.25

32. There is also a distinction between the scope and functions of an arbitral tribunal and a commissioner appointed under Order XXVI 23 (2012) 8 SCC 263 24 Murari Lal v. State of M.P.

(1980) 1 SCC 704 25 Vide Lord President Cooper in Davis v. Edinburgh Magistrate, 1953 SC 34 quoted by Professor Cross in his Evidence.

Rules 9 and 1126 of the Code. For submission to arbitration, there must be an arbitration agreement or an agreement in terms of Section 21 of the Act that the difference or dispute between the parties for which they intend to be determined in a quasi-judicial manner. Commissioners are appointed by the court. Appointment may be with consent of the parties, or even when there is objection to the appointment. Preexisting agreement or the requirement that the parties agree before the court, as is mandatory in case of arbitration, is not necessary when a court directs appointment of a commissioner. In the case of a reference to a commissioner, all that the parties expect from the commissioner is a valuation/ examination of the subject matter referred, which he would do according to his skill, knowledge and experience, which may be without taking any evidence or hearing argument.27 In light of the aforesaid decisions, we would like to introduce the principle of a 26 9. Commissions to make local investigations.– In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

xx xx xx

11. Commission to examine or adjust accounts.– In any suit in which an examination or adjustment of the accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

27 Halsbury, Vol.1, Edn. 2 at Pg. 622 ‘facilitator’ which a court may appoint, be it a commissioner or an expert, for a specific purpose and cause for ascertainment of a fact which may be even disputed. In some cases, the commissioner may even hear the parties and give his expert opinion based on the material or evidence produced by the parties before the commissioner, as in this case when the court appointed a Chartered Account who as an expert was required to give his opinion on the statement on accounts to facilitate and help the court arrive at a fair and just decision. It was to save the court's time and cut delay in the decision by the court.

33. Order XXVI Rule 9 of the Code gives wide powers to the court to appoint a commissioner to make local investigations which may be requisite or proper for elucidating any matter in dispute, ascertaining the market value of any property, account of mesne profit or damages or annual net profits. Under Order XXVI Rule 11, the court has the power to issue a commission in a suit, in which examination of adjustment of accounts is necessary, to a person as it thinks fit directing him to make such examination or adjustment. When a court issues such a commission to such a person, it can direct the commissioner to make such an investigation, examination and adjustment and submit a report thereon to the court. The commissioner so appointed does not strictly perform a ‘judicial act

which is binding' but only a 'ministerial act'. Nothing is left to the commissioner's discretion, and there is no occasion to use his judgment or permitting the commissioner to adjudicate and decide the issue involved; the commissioner's report is only an opinion or noting, as the case may be with the details and/or statement to the court the actual state of affairs. Such a report does not automatically form part of the court's opinion, as the court has the power to confirm, vary or set aside the report or in a given case issue a new commission. Hence, there is neither abdication nor delegation of the powers of functions of the court to decide the issue. Sometimes, on examination of the commissioner, the report forms part of the record and evidence.28 The parties can contest an expert opinion/commissioner's report, and the court, after hearing objections, can determine whether or not it should rely upon such an expert opinion/commissioner's report. Even if the court relies upon the same, it will merely aid and not bind the court. In strict sense, the commissioners' reports are 'non-adjudicatory in nature', and the courts adjudicate upon the rights of the parties.

34. By Act 18 of 2018, Section14A29 has been inserted in the Specific Relief Act, 1963. The provision states that without prejudice to the 28A. Nagarajan v. A. Madhanakumar 1996 SCCOnLine Mad 17 2914A. Power of court to engage experts.—(1) Without prejudice to the generality of the provisions contained in the Code of Civil Procedure, 1908 (5 of 1908), in any suit under this Act, where the court provisions of the Code in any suit under the Act in question where a court considers it necessary to get expert opinion to assess it on a specific issue involved in the suit, it may engage one or more experts and direct to report to it on such issue. The court may secure the expert's attendance for providing evidence, including the production of documents on the issue. The opinion or report of the expert would form part of the record of the suit as is the case with the commissioner's report. With the court's permission, the parties to the suit may examine the expert personally in the open court on any of the matters referred to him or as to his opinion or report or as to the manner in which he has made the inspection.

35. The matter referred to S.K. Mantri was limited to examination of the accounts. The issues and questions of dispute in the suit were far broader and wider. These included questions as to the agreed price or the rate of transportation in view of the letter dated 05th June 1992, which was withdrawn by letter dated 30th September 1992, considers it necessary to get expert opinion to assist it on any specific issue involved in the suit, it may engage one or more experts and direct to report to it on such issue and may secure attendance of the expert for providing evidence, including production of documents on the issue. (2) The court may require or direct any person to give relevant information to the expert or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. (3) The opinion or report given by the expert shall form part of the record of the suit; and the court, or with the permission of the court any of the parties to the suit, may examine the expert personally in open court on any of the matters referred to him or mentioned in his opinion or report, or as to his opinion or report, or as to the manner in which he has made the inspection. (4) The expert shall be entitled to such fee, cost or expense as the court may fix, which shall be payable by the parties in such proportion, and at such time, as the court may direct.] computation of the transportation costs payable to the plaintiff under the contract in case the coal delivered was within or beyond the 1% stipulation, whether or not the defendants were right in making deductions on account of bad quality coal, higher moisture content etc. whereby the weight of the coal had increased, delay in delivery on the part of the plaintiff, whether the

defendants are entitled to charge interest while making recoveries, etc. It is interesting to note that the S.K. Mantri himself did not decide whether or not the plaintiff is entitled to rent of the plot or security charges observing that this was an aspect for the court to decide. However, he forgot that his 'jurisdiction' was limited to checking and verifying accounts and not deciding any issue or questions beyond the accounts on issues and questions referred to above.

36. In view of the aforesaid discussion, we allow the present appeal and set aside the impugned order dated 19th September 2019 of the High Court affirming the order dated 16th May 1996 passed by the Additional District Judge, Sehore Camp Astha. It is held that the report of the Chartered Accountant is not an award and is to be treated as a report of a commissioner appointed by the Court under Order XXVI Rule 11 of the Code. Objections of the defendant to the said report will be considered in light of the aforesaid discussion and our findings, and after hearing both the sides the trial will proceed as per law. We clarify that the observations made in this judgment are for the disposal of the present appeal. The civil suit will be decided on merits without being influenced by any findings recorded by us that only relate to the limited aspect of the report dated 22nd June 1995 of the commissioner.

37. All pending applications are disposed of. There would be no order as to costs.

.....J.

(SANJIV KHANNA) .....J.

(BELA M. TRIVEDI) NEW DELHI;

MAY 11, 2022.