

# Dispute Resolution Hotline

April 02, 2018

## REFERRING PARTIES TO ARBITRATION? ORAL CONSENT BETWEEN COUNSELS NOT ENOUGH, HOLDS SUPREME COURT OF INDIA

- Jurisdictional pre-condition for reference to arbitration is that the parties should seek a reference or submission to arbitration
- In the absence of an arbitration agreement, a court can refer parties to arbitration only with written consent of the parties by way of a joint application
- Oral consent given by counsels for parties without a written memo of instruction does not fulfill the requirements under Section 89 of the Code of Civil Procedure, 1908

### INTRODUCTION

The Supreme Court ("**Court**") in the case of Kerala State Electricity Board and Anr. ("**State Board**") Vs. Kurien E. Kathilal and Anr. ("**Contractor**") had occasion to rule on whether parties could be referred to arbitration based on mere oral consent given by the counsels representing parties - without there being any written instructions to that effect.

Hearing an appeal against an order of the Kerala High Court ("**High Court**") which had referred the parties to arbitration merely on the counsels' oral consent, the Court set aside the said order, *inter alia* holding that when there was no arbitration agreement between the parties, the High Court ought not to have referred the parties to arbitration without a joint memo or a joint application between the parties.

### BACK-GROUND

The State Board entered into an agreement in 1981 with the Contractor for construction of a dam in the state of Kerala. After commencement of work, the Government of Kerala issued a notification in 1983 by which the minimum wages payable to certain categories of workers were revised upwards with effect from the date of the notification. The Contractor accordingly claimed labour escalation charges from 1983 to 1984 as well as certain claims for additional work done. What followed was lengthy and protracted litigation in the High Court of Kerala.

So far as the claim on additional work was concerned, with the consent of the counsel for both parties, and without existence of an arbitration agreement or written instructions provided by the parties, the High Court referred the parties to arbitration. Pursuant to such reference, an arbitral award came to be passed in favour of the Contractor.

The State Board preferred an appeal against the decisions of the High Court before this Court.

### ISSUE

Whether the High Court was correct in referring the parties to arbitration upon the oral consent of the parties' counsels, in the absence of any written instructions thereto?

### JUDGMENT

The Court, in exercise of its powers under Article 136 of the Constitution of India ("**Article 136**"), chose to re-appreciate all facts and materials on record considering that public money was involved and that the findings of the High Court would otherwise result in excessive hardship to the State Board. On the High Court's decision to refer the parties to arbitration (for the Contractor's claim on additional work done), the Court observed that the jurisdictional pre-condition for reference to arbitration under Section 7 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") is that parties should seek a reference to arbitration. So far as reference of a dispute under Section 89 of the Code of Civil Procedure, 1908 ("**CPC**") is concerned, the Court considered that the same can be done only when parties agree for settlement of their dispute through arbitration - in contradistinction to other methods of alternative dispute resolution stipulated under Section 89 of the CPC.

In light of the above, the Court held that in so far as reference of the parties to arbitration is concerned, oral consent given by the counsel without a written memo of instructions does not fulfill the requirement under Section 89 of the CPC. Placing reliance on the judgments of the Supreme Court in *Afcons Infrastructure Ltd. & Anr. V. Cherian Varkey Construction Co. (P) Ltd. & Ors*<sup>1</sup> and *Shailesh Dhairyawan v. Mohan Balkrishna Lulla*<sup>2</sup>, it held that in the absence of an arbitration agreement, the court can refer parties to arbitration only with written consent of parties either by way of a joint memo or a joint application.

The Court also observed that the impugned order of the High Court referring parties to arbitration could not be sustained on other grounds as well as the impugned order contained adverse observations on the State Board,

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causing prejudice to the rights of the State Board in pursuing the matter before the arbitral tribunal. The Court thus proceeded to set aside the Judgment of the High Court as well as the arbitral award passed pursuant to its directions.

ANALYSIS

A ruling that recognizes express written instructions or memo by both parties to refer disputes to arbitration goes a long way in upholding party autonomy, which is the essence of alternative dispute resolution. By holding that in the absence of an arbitration agreement, only express written instructions would allow the counsels to give consent to reference to arbitration, the Court has given teeth to Section 7 of the Arbitration Act, requiring that an arbitration agreement must be in writing in order to be valid. This also substantiates requirements of Section 8 where parties are required to file the arbitration agreement in court while seeking reference to arbitration. The Court has rightly considered that referring parties to arbitration has serious consequences as once parties are so referred, proceedings fall outside the stream of civil courts and will not be bound by the CPC or the Indian Evidence Act. Also, once the award is passed, it would be set aside only on limited grounds.

This case is also a demonstration of the extent to which the Supreme Court may exercise its jurisdiction under Article 136 under which normally it would not re-appreciate the evidence and findings of fact. However, where findings of the High Court are perverse or likely to result in excessive hardship, the Supreme Court would not decline to interfere merely on the ground that the findings in question are findings of fact. Given the fact that a dispute was referred to arbitration without any written instructions by the parties - leading to an adverse arbitral award against one party- the Court in exercise of its powers under Article 136 even proceeded with setting aside the arbitral award. This judgment should do away with the practice of High Court Judges referring parties to arbitration based merely on oral consent provided by the Counsels.

– Siddharth Ratho, Kshama A. Loya & Vyapak Desai  
You can direct your queries or comments to the authors

<sup>1</sup> (2010) 8 SCC 24  
<sup>2</sup> (2016) 3 SCC 619

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