

---

**(1970) 10 RAJ CK 0008**

**In the Rajasthan High Court**

**Case No : Company Petition No. 11 of 1967**

B. Gopal Das, Bombay and Others

APPELLANT

Vs

Kota Straw Board (P) Ltd., Kota

RESPONDENT

---

**Date of Decision : 21-10-1970**

**Acts Referred:**

Arbitration Act, 1940 — Section 2  
Companies Act, 1956 — Section 389

**Citation : AIR 1971 Raj 258**

**Hon'ble Judges : P.N. Shinghal, J**

**Bench : Single Bench**

**Advocate : S.K.M Lodha, for the Appellant; K. Garg, for the Respondent**

**Final Decision : Dismissed**

---

## **Judgement**

P.N. Shinghal, J.—In connection with the petition which has been filed by the three petitioners for the winding up of the Kota Straw Board (Private) Limited, Kota hereinafter called "the respondent Company", an application has been made by the respondent Company u/s 34 of the Arbitration Act for stay of the proceedings. The question for decision therefore is whether that application should be allowed?

2. It will be sufficient to state, for purposes of the present controversy, that the petition for winding up has been made with the allegation that the respondent Company is unable to pay its debts within the meaning of Clause (e) of Section 433 of the Companies Act and that it is just and equitable that it should be wound up under Clause (f) of that section. In substance, the petitioners have alleged that the Company should be deemed to be unable to pay its debts within the meaning of Section 434(1)(a) of the Companies Act. The respondent Company has, in its turn, made the aforesaid application u/s 34 of the Arbitration Act on March 25, 1968 and the question whether it should be allowed has arisen in these circumstances.

3. It has been argued by Mr. Lodha, learned counsel for the petitioners, that Section 389 of the Companies Act, 1956, which gave the right to a Company to refer its differences to arbitration, has been deleted by the Companies (Amendment) Act, 1960, and that any plea that there was an arbitration agreement between the respondent Company is no longer permissible and should be rejected. I am not persuaded, however, that this argument is correct. An arbitration agreement is a contract to submit the differences between the parties to a tribunal of their choice, and as a Company has a legal personality of its own, and has the power to enter into a contract, there is no reason why it should not be able to enter into an agreement to submit its differences with the other party, to arbitration out of court. In this view of the matter. Section 389, as it stood before its deletion by the Companies (Amendment) Act, 1960, did not confer any additional right on a Company apart from its ordinary contractual right, and its deletion in 1960 cannot be a matter of any consequence so far as the authority to enter into an arbitration agreement is concerned and does not, at any rate, justify the argument that a company is precluded from making an arbitration agreement because of its deletion. This view finds support from the observations made by their Lordships of the Supreme Court in *Societe De Traction Et D'electricite Societe Anonyme Vs. Kamani Engineering Company Ltd.*,

4. Having put aside this argument of Mr. Lodha, I shall proceed to examine whether there was an arbitration agreement in the present case? Mr. Garg, learned counsel for the respondent Company, has in this connection, relied on paragraph 10 of the respondent Company's letter Ex. 2 dated January 16, 1964. That paragraph, it is admitted, is similar in the case of all the petitioners, and reads as follows:--

"(10). That in case of any dispute arising between us, the matter may be referred to arbitration mutually agreed upon and acceptable by you and us."

5. The question is whether this paragraph is an "arbitration agreement" within the meaning of Clause (a) of Section 2 of the Arbitration Act? That clause defines "arbitration agreement" as follows,--

"(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

It is by now well settled that the question whether a particular agreement amounts to an arbitration agreement or not depends on the intention of the parties to make a submission to arbitration. The law in this respect has been stated as follows in *Russell on the Law of Arbitration*, 17th Edition, at page 23,--

"The essential requirement is that the parties should intend to make a submission to arbitration."

Dealing with the matter further, it has been observed at page 25 (*supra*) that "the parties must be *ad idem*". The present controversy has therefore to be resolved by an answer to the question whether the parties were *ad idem* on the

question of the submission of their differences to arbitration.

6. It will appear from the wordings of paragraph (10) of the respondent Company's own letter Ex. 2 (*supra*) to the petitioners, on which considerable reliance has been placed by the learned counsel for the respondent Company, that it has made use of the word "may". And a reading of the paragraph shows that it does not make it clear whether the option to refer the differences to arbitration is of the one party, against the other. At any rate, no such words have been used in that Paragraph as to show that an option has been given to any one of the parties in that respect. It will therefore appear that if the option is of both the parties, then both of them will have to agree to refer their differences to arbitration in pursuance of another agreement between them, so that the paragraph amounts to no more than an agreement to enter into an agreement and is quite ineffective. It may be mentioned that such a mutuality for a future agreement is reflected in the subsequent portion of paragraph (10) which provides for an agreement between the parties for purposes of arbitration. At any rate it cannot be said that the parties were *ad idem* on the question of referring their disputes to arbitration within the meaning of Clause (a) of Section 2 of the Arbitration Act so that it cannot be said that there is an arbitration agreement between them.

7. I may in this connection make a reference to the decision in *Jyoti Brothers Vs. Shree Durga Mining Co.*, In that case the word "can" was used in the relevant clause, which ran as follows.--

"In the event of any dispute arising out of this contract the same can be settled by Arbitration held by a Chamber of Commerce at Madras. Their decision shall be binding to. the Buyers and the Sellers".

It was held that the wordings of the clauses did not mean that the dispute shall be settled by arbitration, and that it only meant that, after the dispute had occurred, the parties may go to arbitration as an alternative method of settling the dispute instead of going to the courts. The view I have taken, therefore, finds support from the decision in this case.

8. The learned counsel for the petitioners has argued that as an arbitration agreement has the effect of ousting the jurisdiction of the Civil Courts, in the normal way, it should be construed strictly. He has placed reliance on *Tarachand v. Parasram* AIR 1930 Sind 202 which has been followed in *M.I. Shahdad v. Mohd. Abdullah Mir*. AIR 1967 J & K 120 and on the decision in *In re Sri-krishna Khanna* AIR 1934 Sind 29; *Hormusji & Daruwala v. District Local Board, Karachi* AIR 1934 Sind 200 ; *Re: Arbn. Seth Kerorimal Adwani Vs. Union of India (UOI)*, and *Teamco Private Ltd. Vs. T.M.S. Mani*, in support of his contention. I do not, however, think it necessary to express any opinion on the question whether an arbitration agreement is of such a special nature as to require a stricter construction of its terms than any other contract for, as has been stated, the relevant clause of the agreement relied upon by the respondent Company does

not amount to an arbitration agreement on any construction thereof.

9. Mr. Garg has cited Chhabildas Nandlal and Co. Vs. Damodar Khetsey and Co., in which the word "may" has been used in the relevant clause, and has argued that a similar construction should be placed on the aforesaid paragraph (10) of the respondent Company's letter Ex. 2. A reading of the judgment shows that the material portion of the agreement was as follows.

"Any complaint, claim, dispute, doubt or question (not otherwise settled by mutual consent) arising out of this indent, may at the instance of either party thereto be referred to arbitration to two European merchants with power, in the event of disagreement, to appoint an umpire."

It will thus appear that the word "may" was followed immediately by the words "at the instance of either party", so that there could be no doubt that the words amounted to an agreement between the parties that if either of them desired that any dispute arising out of the indent should be submitted to arbitration, it will be submitted to arbitration. That agreement therefore fell squarely within the definition of "arbitration agreement" contained in Section 2(a) of the Arbitration Act so that the case is clearly distinguishable.

10. As I have taken the view that there is no arbitration agreement between the parties, the application of the respondent Company u/s 34 of the Arbitration Act is rejected.