

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. 118/2004 & I.As. 4225/2005 & 57/2007

JOINT INVESTMENT (P) LTD. .... Petitioner  
Through Mr. V.P. Singh, Senior Advocate  
with Mr. Ajay Verma, Mr. Vinay  
Vaish and Ms. Divya Suman,  
Advocates

versus

ESCORTS LTD. .... Respondent  
Through Mr. Darpan Wadhwa with  
Ms. Sheena Iype Advocates

% Date of Decision : 26<sup>th</sup> May, 2010

**CORAM:**  
**HON'BLE MR. JUSTICE MANMOHAN**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

## **J U D G M E N T**

### **MANMOHAN, J (ORAL)**

1. The only issue that arises for consideration in the present proceedings is whether the decision dated 11<sup>th</sup> December, 2003 rendered by Mr. Y.H. Malegam is an arbitral award or an expert's decision. The petitioner who has filed the present petition under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") and who has continued to proceed with the case despite being offered to elect between the present petition and a suit, has yet submitted that the impugned decision is not an arbitral award but an expert's decision.

2. The relevant facts of this case are that in 1969, the Escorts Limited Employees Senior & Supervisory Staff Superannuation Trust (in short “EL Trust”) was formed with a defined contribution scheme to provide pensionary benefits to certain senior employees of respondent-Escorts Limited.

3. On 30<sup>th</sup> September, 1996, the Automotive Division of Escorts Limited was hived off into a separate company called Escorts Mahle Limited (in short “EML”). The newly formed company was a joint venture between the respondent and Mahle GmbH, Germany. The respondent’s employees were transferred to EML with continuity of service, and after the date of transfer amongst other liabilities, the said employees’ pension liability became the responsibility of EML. In fact, on 20<sup>th</sup> December, 1996, EML entered into a Participating Agreement with EL Trust and agreed to be bound by its terms, rules and practices thereof.

4. On 31<sup>st</sup> March, 1998, the actuarial valuation showed that EL Trust was solvent and had a surplus on that date.

5. In September, 2002 Goetze India Limited (in short “GIL”) purchased all the shares of EML. In fact, on 13<sup>th</sup> May, 2003 EML merged with GIL after the scheme of merger was approved by this Court.

6. As from 2002 the actuarial valuation showed a substantial deficit, both GIL and respondent entered into a Memorandum of Understanding

(in short “MOU”) on 29<sup>th</sup> May, 2003. The relevant portion of the said MOU reads as under :-

*“(1) Both the parties agree to resolve the following two pending issues amicably. The two issues are:*

*(a) Settlement of Superannuation Fund due to GIL Senior Staff Superannuation Trust in respect of employees of GIL who were earlier employees of Escorts Pistons Ltd. (formerly Escorts Mahle Ltd.) or of EL. The liability will be based upon the (i) calculations of the Actuary, M/s. Watson Wyatt, (ii) the participation Agreement and (iii) any other applicable document/statute.*

*(b) Settlement of amounts due to GIL by Escorts Auto Components Ltd, not exceeding Rs.25.00 lacs.*

*(2) It will be the endeavour of both the parties i.e. EL and GIL to resolve all the above outstanding issues to their mutual satisfaction before 30th June, 2003. Any amount referred to hereinabove which remains unpaid by EL on 30.6.2003 would be adjusted from the payments of Rs.7.11 crores due on 30.6.2003 and Rs.7.11 crores due on 30.11.2003 by Mr. Anil Nanda to EL, mentioned above, and Mr. Anil Nanda shall fully discharge his liability to pay the balance amount. The above cheques will not be withheld for any other reason.”*

7. Since GIL was not satisfied with the report of Actuary, M/s. Watson Wyatt India Pvt. Ltd., both petitioner and respondent signed a Letter Agreement dated 1<sup>st</sup> July, 2003 under which the respondent agreed to make an on-account payment of Rs. 7 Crores, subject to final calculation and assumptions made/taken by the Actuary and accepted by Mr. Malegam.

8. On 1<sup>st</sup> August, 2003 respondent filed a fact sheet along with some relevant documents before Mr. Malegam. Thereafter, on 11<sup>th</sup>

December, 2003, Mr. Malegam gave his decision. At request of respondent, Mr. Malegam even clarified his decision vide letter dated 2<sup>nd</sup> January, 2004. Ultimately on 15<sup>th</sup> March, 2004, the present petition was filed.

9. Mr. V.P. Singh, senior learned counsel for petitioner submitted that the decision of Mr. Malegam was not an arbitral award and that the present petition had been filed by way of abundant precaution to protect the petitioner's interest. According to him, the Letter Agreement dated 1<sup>st</sup> July, 2003 did not constitute an arbitration agreement between the parties. He stated that the issue whether any amount was payable by EL fund to GIL fund was never in dispute. According to him, what was to be decided by Mr. Malegam was the quantification of equitable interest which was to be transferred in respect of erstwhile EML employees who had joined GIL. Mr. Singh stated that for this purpose the Actuary made some calculations/assumptions and Mr. Malegam, being an expert, was appointed to cross check the same and confirm the said equitable interest. According to him, parties agreed that on-account payment made to the GIL was "*subject to the final calculation assumptions made/taken by the Actuary M/s. Watson Wyatt India Pvt. Ltd., accepted by Mr. Malegam.*"

10. Mr. Singh further submitted that no arbitrator could be straight-jacketed in the manner as done in the letter dated 1<sup>st</sup> July, 2003 as an arbitrator has to judicially decide a dispute after following a fair

procedure. He also pointed out that interaction and the correspondence between the parties *inter se* as well as with Mr. Malegam bore testimony to the fact that no one understood or had agreed for Mr. Malegam to act as an arbitrator or “judicially” decide the issue. In support of his submission, Mr. Singh relied upon a judgment of Supreme Court in ***K.K. Modi Vs. K.N. Modi & Ors.*** reported in (1998) 3 SCC 573 wherein it has been held as under :-

*33. In the present case, the Memorandum of Understanding records the settlement of various disputes as between Group A and Group B in terms of the Memorandum of Understanding. It essentially records a settlement arrived at regarding disputes and differences between the two groups which belong to the same family. In terms of the settlement, the shares and assets of various companies are required to be valued in the manner specified in the agreement. The valuation is to be done by M/s S.B. Billimoria & Co. Three companies which have to be divided between the two groups are to be divided in accordance with a scheme to be prepared by Bansi S. Mehta & Co. In the implementation of the Memorandum of Understanding which is to be done in consultation with the financial institutions, any disputes or clarifications relating to implementation are to be referred to the Chairman, IFCI or his nominees whose decision will be final and binding. The purport of clause 9 is to prevent any further disputes between Groups A and B. Because the agreement requires division of assets in agreed proportions after their valuation by a named body and under a scheme of division by another named body. Clause 9 is intended to clear any other difficulties which may arise in the implementation of the agreement by leaving it to the decision of the Chairman, IFCI. This clause does not contemplate any judicial determination by the Chairman of the IFCI. He is entitled to nominate another person for deciding any question. His decision has been made final and binding. Thus, clause 9 is not intended to be for any different decision than what is already agreed upon between the parties to the dispute. It is meant for a proper implementation of the settlement already arrived at. A judicial determination, recording of evidence etc. are not contemplated. The decision of the Chairman, IFCI is to be binding on the parties. Moreover, difficulties and disputes in implementation may not be between the parties to the Memorandum of Understanding. It is possible that the valuers nominated in the Memorandum*

*of Understanding or the firm entrusted with the responsibility of splitting some of the companies may require some clarifications or may find difficulties in doing the work. They can also resort to clause 9. Looking to the scheme of the Memorandum of Understanding and the purpose behind clause 9, the learned Single Judge, in our view, has rightly come to the conclusion that this was not an agreement to refer disputes to arbitration. It was meant to be an expert's decision. The Chairman, IFCI has designated his decision as a decision. He has consulted experts in connection with the valuation and division of assets. He did not file his decision in court nor did any of the parties request him to do so.*

11. On the other hand, Mr. Darpan Wadhwa, learned counsel for respondent submitted that from the facts of the case, it would be apparent that there was a clear dispute between the parties with regard to the issue of amount of funds to be transferred, if any, from EL Trust to GIL Trust with respect to the erstwhile employees of EML. He stated that the parties entered into the MOU after clearly formulating their dispute and their respective positions. He submitted that the finding of the Actuary was, an expert determination. However, according to him, as the dispute with regard to calculations persisted even after the Actuary's findings/calculations, the same was referred to arbitration of Mr. Malegam by way of the arbitration agreement dated 1<sup>st</sup> July, 2003.

12. Mr. Wadhwa submitted that the Letter Agreement dated 1<sup>st</sup> July, 2003 fulfilled all tests of an arbitration agreement as it contemplated reference of present dispute for arbitration; a clear intent to finally settle such dispute by Mr. Malegam; an agreement to be bound by the decision; and parties being *ad idem* with regard to the issue of

reference. In this connection, Mr. Wadhwa placed reliance upon Sections 2(1)(b) and 7 of Act, 1996.

13. According to Mr. Wadhwa, reference could not be treated as an expert determination as expert determination had already been done by the Actuary, which was still disputed by the parties and reference was not for avoidance of disputes but rather for resolution of disputes. He also placed reliance upon GIL's letter dated 3<sup>rd</sup> December, 2003 in which GIL had asked Mr. Malegam to adjudicate the disputes and render an award. Consequently, according to Mr. Wadhwa, the parties themselves understood the process to be an arbitration process.

14. Mr. Wadhwa also submitted that the Supreme Court in *K.K. Modi*'s case (supra) was distinguishable on facts as in that case all disputes between the parties had been settled much prior in time and the CMD, IFCI was only to implement the decision arrived at between the parties. He further pointed out that Clause 9 of Memorandum of Understanding executed by the Modi family members entitled CMD, IFCI to even nominate another person for deciding any dispute with regard to implementation. Mr. Wadhwa lastly submitted that when the word 'decision' is used, it subsumes adjudication of all disputes by an arbitrator.

15. Having heard the parties, I am of the opinion that the role of an arbitrator and an expert is different. If a person is appointed, owing to his skill and knowledge of a particular subject, to decide any questions,

whether of fact or of value, by the use of his skill and knowledge and without taking any evidence or hearing the parties, he is not, prima facie, an arbitrator. If, on the other hand, a person is appointed with the intention that he should hear the parties and their evidence and decide in a judicial manner, then he is an arbitrator, although mere absence of a hearing, provided it does not result in any unfairness to the parties, will not necessarily invalidate an award. Obviously this must depend on the intention of the parties, subject-matter of the dispute and the terms of any written pleadings or submissions to the arbitrator.

16. In fact, according to Russell, an arbitrator's task is to determine disputes referred to him on the basis of evidence and submissions before him according to the law chosen by the parties or other considerations agreed by them or determined by him, but within the general obligation of an impartial fair resolution without unnecessary delay or expense. The most significant distinction between an arbitrator and an expert is that, an expert need not act judicially. This has two effects, namely, an expert can apply his own expertise to decide the question referred and further the expert is not bound to give each party an opportunity to put its case and to deal with other material. (See *paras 4-002 and 4-003 of Russell on Arbitration, 22<sup>nd</sup> Edition.*)

17. Even though the judgment in *K.K. Modi's* case (supra) is distinguishable on facts, the test to determine whether an impugned decision is an expert's decision or an arbitrator's award, has been

clearly spelt out therein. Some of the relevant observations of the Supreme Court in the said judgment are reproduced 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 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.*

xxx                      xxx                      xxx                      xxx

*19. In Russell on Arbitration, 21st Edn., at p. 37, para 2-014, the question how to distinguish between an expert determination and arbitration, has been examined. It is stated,*

*“Many cases have been fought over whether a contract’s chosen form of dispute resolution is expert determination or arbitration. This is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties. First, there are the express words of the disputes clause. If specific words such as ‘arbitrator’, ‘arbitral tribunal’, ‘arbitration’ or the formula ‘as an expert and not as an arbitrator’ are used to describe the manner in which the dispute resolver is to act, they are likely to be persuasive*

*although not always conclusive.... Where there is no express wording, the court will refer to certain guidelines. Of these, the most important used to be, whether there was an 'issue' between the parties such as the value of an asset on which they had not taken defined positions, in which case the procedure was held to be expert determination; or a 'formulated dispute' between the parties where defined positions had been taken, in which case the procedure was held to be an arbitration. This imprecise concept is still being relied on. It is unsatisfactory because some parties to contract deliberately choose expert determination for dispute resolution. The next guideline is the judicial function of an arbitral tribunal as opposed to the expertise of the expert;.... An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law or if the parties agree, on other consideration; an expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides on his own expert opinion....”*

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

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

18. Consequently, in my opinion, this Court would have to determine as to what was the intention of the parties when they executed the Letter Agreement dated 1<sup>st</sup> July, 2003, namely, whether the intention of

the parties was to get the matter judicially adjudicated upon as opposed to determination on the basis of expertise of an expert. In my view, the intention of the parties has to be found out by reading the terms of the said Letter Agreement dated 1<sup>st</sup> July, 2003. Since the whole dispute hinges on the aforesaid Letter Agreement, the same is reproduced hereinbelow:-

*1<sup>st</sup> July, 2003.*

*Joint Investments Pvt. Ltd.  
(Designated Nominee of Mr. Anil Nanda),  
K-26, Jangpura Extn.,  
NEW DELHI*

*Dear Sir,*

*This has reference to our discussions on the transfer of share of funds to the Goetze India Ltd. Senior Staff Superannuation Trust (hereafter Goetze Trust) in respect of employees of erstwhile Escorts Mahle Ltd. from Escorts Limited Employees Senior & Supervisory Staff Superannuation Trust(hereafter EL Trust) and certain employees who were earlier in the employment of Escorts Ltd. and were transferred to Goetze (India) Ltd.*

*As agreed, we have requested the Administrator of EL Trust to instruct LIC of India to transfer a sum of Rs.7 crs. to Goetze Trust. The said payment of Rs.7 crs. is only an 'On Account' payment to Goetze Trust and is subject to the final calculation assumptions made/taken by our Actuary M/s. Watson Wyatt India Pvt. Ltd. accepted by Mr. Y.H. Malegam.*

*It has also been agreed between us that the decision of Mr. Y.H. Malegam, shall be final and binding on both the parties (to be communicated in writing) and that both of us shall ensure that in case any further amount is to be remitted by EL Trust, the same shall be remitted within 3 working days of the receipt of the decision of Mr. Y.H. Malegam. In the same way any refund to be made by Goetze Trust shall be made to EL Trust within 3 working days from the receipt of the decision of Mr. Y.H. Malegam in this regard.*

*It is also clearly understood and agreed between the parties that while the decision of Mr. Y.H. Malegam is final and binding on both the parties, they shall not be entitled to dispute or raise any doubts on his decision and shall not avoid payment in the guise of asking for further clarifications from Mr. Y.H. Malegam. They shall promptly act on his decision and ensure the payments as stated above.*

*Thanking you,*

*Yours faithfully,*

*For Escorts Limited*

*Sd/-*

*(G.S. Mathur)*

*Vice President – Law & Company Secretary.*

(emphasis supplied)

19. In my opinion, the aforesaid Letter Agreement did not contemplate any judicial determination or adjudication of dispute. The intention of the parties was that Mr. Malegam should check and verify the calculations and assumptions made/taken by the Actuary in its report. The intention of the parties was not that Mr. Malegam should decide the question referred to him in a quasi-judicial manner. It was rather the intention of the parties that Mr. Malegam should decide the matter according to his own skill, knowledge and experience. Parties had ample confidence in Mr. Malegam and they left it to his vast experience to come to a fair decision. Furthermore, the enquiry made by Mr. Malegam was not worked out in a judicial manner after recording of evidence. Consequently, the decision of Mr. Malegam did not constitute an arbitral award.

20. It is also apparent from the Letter Agreement that the Actuary was to prepare its report on the basis of calculations/assumptions and Mr. Malegam was not to interpret or apply any other document or formula which had not been taken into account by the Actuary. Consequently, if the determination by the Actuary was an expert determination as agreed by both the parties, then in the absence of intent to arbitrate, neither the status of Mr. Malegam can be changed to that of an arbitrator nor can his decision be termed as an arbitral award.

21. There was also no intent between the parties that Mr. Malegam was supposed to adjudicate or judicially determine the said equitable interest after calling for statement of claims/defences, evidence etc. It is pertinent to mention that no pleadings like statement of claim, statement of defence and/or evidence were filed and there were no joint hearings. Accordingly, in my view, Mr. Malegam was not required to judicially adjudicate any issue as he was to apply his own expertise and only check/verify the calculations and assumptions made by the Actuary.

22. Mr. Wadhwa's submission that Letter Agreement dated 1<sup>st</sup> July, 2003 constitutes an arbitration agreement between the parties on the ground that there existed a formulated dispute is untenable in law. *Russell* as well as *Mustill and Boyd* in their respective treatises in "*Russell on Arbitration*" as well as "*Commercial Arbitration*" and the Supreme Court in *K.K. Modi's* case (supra) have held that the

formulation of dispute or defence is a neat but an imprecise and unhelpful test. In fact, the test which is being applied today for determining whether an agreement executed between the parties is for reference to arbitration or for an expert determination, is whether the intent of the parties was to get the matter judicially adjudicated upon as opposed to determination on the basis of expertise of an expert. Since as pointed out hereinabove, in the present case the intent of the parties was not to get the issue judicially determined by Mr. Malegam, the Letter Agreement dated 1<sup>st</sup> July, 2003 is not an arbitration agreement.

23. Mr. Wadhwa reliance upon GIL's letter dated 3<sup>rd</sup> December, 2003 is also misplaced as the said letter has to be read in its entirety. In fact, at the end of the said Letter Agreement, GIL clearly asked Mr. Malegam to give his opinion, which clearly indicates that there was no *consensus ad idem* between the parties that Mr. Malegam was to act as an arbitrator. In any event, as pointed by the Supreme Court in **K.K. Modi's** case (supra) case, the intention of the parties has to be determined by reading the terms of the agreement broadly and not by the nomenclature used by the parties either in the agreement or in the correspondence.

24. In view of aforesaid, I am of the opinion that the decision given by Mr. Malegam is not an arbitral award and consequently, present petition under Section 34 is not maintainable.

25. However, in my view, as petitioner had continued to prosecute the present petition despite the order of this Court dated 14<sup>th</sup> July, 2004 asking the petitioner to elect as to whether petitioner wanted to file a suit or proceed with the present petition, I am of the opinion that the rights of respondent need to be protected and preserved, as for the period during which the present petition was pending, respondent could not take any step for recovery of the amount under Mr. Malegam's decision. Consequently, the time spent in the present proceedings would be excluded for the purposes of calculation of limitation in the event respondent files any proceeding for either enforcement/execution or for recovery of amount under Mr. Malegam's decision dated 11<sup>th</sup> December, 2003.

26. With the aforesaid observation, present petition and pending applications are dismissed but with no order as to costs.

**MANMOHAN,J**

**MAY 26, 2010**

rn