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Supreme Court of India holds that the use of the word 'can' in an arbitration clause does not create a binding arbitration agreement

The Supreme Court of India ("**Supreme Court**") has in ***Nagreeka Indcon Products Private Limited vs. Cargocare Logistics (India) Private Limited***[1] *inter alia* held that the use of the word 'can' in an arbitration clause only indicates the future possibility of referring disputes to arbitration and does not constitute a binding arbitration agreement.

Brief facts

The appellant contracted with the respondent for transportation of a 6 (six) container consignment to the consignee. Disputes arose during delivery of the fifth container as the respondent delivered the same despite the consignee's failure to: (a) produce the original bill of lading, as per the agreed past practice; or (b) make the requisite payment, resulting in losses to the appellant. The respondent disputed the existence of such practice and denied any liability.

The appellant invoked arbitration under the bill of lading which *inter alia* stipulated that "*[a]ny difference of opinion or dispute thereunder can be settled by arbitration in India or a place mutually agreed with each party appointing an arbitrator.*" The respondent disputed the reference to arbitration contending that the clause was not a mandate but left open an option for the parties to refer disputes to arbitration.

The Appellant filed an application under Section 11[2] of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") before the Bombay High Court for appointment of a sole arbitrator ("**Application**"). The court dismissed the Application and *inter alia* observed that: (a) use of the word 'can' in the arbitration clause does not make it imperative for the parties to be referred to arbitration as there is a choice available to the parties under the clause; and (b) arbitration cannot be considered as the 'mode of' resolving disputes in the absence of affirmation by the opposing party ("**Impugned Order**"). The Appellant preferred a special leave petition before the Supreme Court against the Impugned Order.

Issue

Whether the use of the word '*can*' in an arbitration clause in a contract necessitates the reference of all disputes to arbitration or is recourse to other dispute resolution mechanisms including that of a civil court open to the parties?

[1] 2026 SCC OnLine SC 630 (decided on April 17, 2026)
[2] Section 11 contains provisions in relation to the appointment of an arbitrator.

Findings and analysis

The Supreme Court dismissed the challenge to the Impugned Order and *inter alia* observed as follows:

1. the word '*can*' ordinarily means capacity, capability or factual possibility. In the judicial context, most often the words '*may*' or '*shall*' are used. While 'may' normally denotes a discretion, if a requirement is to be denoted, '*shall*' will be the most appropriate word to be used to signal a mandate or obligation.
2. The words chosen by the parties in a contract are the most reliable manifestation of their intent. The written word is the foundation of a legal obligation. To disregard or impute an obligation or meaning which was not intended would compromise party autonomy.
3. In *Jagdish Chander vs. Ramesh Chander*[3], the Supreme Court held that any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future. Such agreements or clauses require the parties to arrive at a further agreement to go to arbitration.
4. The word '*can*' used in the arbitration clause merely indicates the future possibility of referring disputes to arbitration and as such, cannot be said to constitute a binding arbitration agreement. For the disputes to be settled by arbitration, a further agreement between the parties would be required which comes into existence when both parties agree to the same.

Conclusion

This ruling reinforces the requirement of a clear and unequivocal intent to arbitrate which is gauged from the words used by the parties. The use of the word 'can' in an arbitration agreement would not satisfy the test of a valid arbitration agreement.

Consequently, loosely drafted or ambiguous clauses risk rendering the arbitral mechanism unworkable at the very threshold. The only remedy left would be to approach a civil court, which could lead to a time-consuming process for resolution of a dispute.

[3] 2007 (5) SCC 719

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