**IN THE HIGH COURT AT CALCUTTA**
**ORIGINAL CIVIL JURISDICTION**
**COMMERCIAL DIVISION**
**ORIGINAL SIDE**

Present:-
***Hon'ble Justice Shampa Sarkar.***

**AP-COM/218/2025**

**ROSHAN AGARWAL**
**VS**
**NATIONAL PROJECTS CONSTRUCTION CORPORATION LIMITED (NPCCL) & ANR.**

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|---|---|---|
| For the petitioner | : | Mr. Probal Kumar Mukherjee, Sr.Adv.<br>Mr. Sanjay Mukherjee Adv. |
| For the respondents | : | Mr. Debajyoti Basu, Sr.Adv.<br>Mr. Diptomoy Talukder, Adv.<br>Mr. D. Ghosh, Adv. |
| Hearing concluded on | : | 22.07.2025 |
| Judgment on | : | 04.08.2025. |

**Shampa Sarkar, J.**

1. This is an application for appointment of an Arbitrator on the strength of Clause 76.0 of the General Conditions of Contract. The General Conditions of Contract (GCC) was made applicable to the agreement between the petitioner and the respondents. National Projects Construction Corporation Ltd (NPCCL), i.e., the respondent had awarded a contract to the petitioner for reconstruction/upgradation of the existing road NH-717-A to Two lane with paved shoulder, including geometric improvement from KM

6.00 to KM 16.167 in NH 717A in the state of Sikkim, on the terms and conditions contained in the Letter of Award.

2. The petitioner contends that disputes cropped up with regard to withholding payment of the running account bill (R.A bill), invocation of bank guarantee upon termination of the contract, non-refund of security deposit etc. Ultimately, the notice invoking arbitration was issued by the petitioner on February 19, 2022. The third and final RA bill allegedly became due and payable sometime in February/March 2021.

3. Mr. Mukherjee, learned senior advocate for the petitioner, submitted that in terms of the GCC, the parties were entitled to refer the dispute to arbitration. The demand notices raised by the petitioner would clearly indicate that disputes had been raised by the petitioner long time ago. The demand notices remained unanswered. Ultimately, finding no other alternative, the arbitration clause was invoked. The respondent did not take any step despite such invocation. Finding no other alternative, the petitioner approached this Court for appointment of an arbitrator.

4. In support of his contention that Clause 76 of the GCC was a valid clause, Mr. Mukherjee relied on the decision of ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited vs Jade Elevator Components*** reported in ***(2018) 9 SCC 774***.

**5.** Mr. Mukherjee further submitted that the petitioner was made to sign on a dotted line contract. The GCC was framed by the respondent. The petitioner did not have any say in the drafting of the clauses. The GCC provided that arbitration would be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The clause,

therefore, envisaged and contemplated that all disputes would be resolved by arbitration, upon reference by the parties. The jurisdiction clause 76.1, followed the arbitration clause. Reliance was further placed on the decision of ***Enercon (India) Limited and other Vs. Enercon GMBH and Another*** reported in ***(2014) 5 SCC 1.***

6. Mr. Basu, learned senior advocate for the respondents submitted that the claim was barred by limitation. The notice invoking arbitration was not proper and the clause relied upon by the petitioner, was not a valid arbitration clause.

7. This Court finds that clause 76 has been incorporated just after clause 75. Clause 75 is the Force Majeure clause. Clauses 75, 76.0 and 76.1 are quoted below for convenience.

> "75.0 FORCE MAJEURE
>
> Any delay in or failure of the performance of either party hereto shall not constitute default hereunder to give rise to any claims for damages, if any to the Extent such delay or failure of performance is caused by occurrences such as acts of god or the public enemy, expropriation, compliance with any order or request of Government authorities, acts of war, rebellions, sabotage fire, floods, strikes, or riots (other than contractor's employees). Only extension of time shall be considered for Force Majeure conditions as accepted by NPCC. No adjustment in contract price shall be allowed for reasons of force majeure.
>
> 76.0 ARBITRATION
>
> The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made there under and for the time being in force shall apply under this clause.
>
> 76.1 JURISDICTION
>
> The agreement shall be executed at Kolkata on non-judicial stamp paper and the Courts at Kolkata alone will have jurisdiction to deal with matters arising there from, to the exclusion of all other courts."

8. Clause 76 of the said agreement does not satisfy the definition of an agreement under Section 7 of the Arbitration and Conciliation Act, 1996.

9. Section 7 of the Arbitration and Conciliation Act, 1996 is quoted below:-

> " 7. **Arbitration agreement**:- (1) *In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."*
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
> *(3) An arbitration agreement shall be in writing.*
> *(4) An arbitration agreement is in writing if it is contained in-*
> *(a) a document signed by the parties;*
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication (including communication through electronic means) which provide a record of the agreement; or*
> *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."*

10. The first ingredient of a valid arbitration agreement is meeting of minds of the parties who are in a definite commercial relationship to refer all or certain disputes which may arise between them in discharge of their business obligations and performance thereof, to arbitration. The expression used by the statute is "submit to arbitration". It is not in doubt that the parties hereto had entered into a business relationship and a contract had been awarded to the petitioner. However, clause 76 of the GCC, which is quoted above and which is claimed by the petitioner to be an arbitration agreement, does not indicate that the parties had agreed to refer present

and future disputes arising during or after the execution of the subject contract, to arbitration. There is no dispute resolution clause.

11. An arbitration agreement does not have to be in any particular form. It is well-settled that, words like "arbitrator or arbitration" are not required to be mentioned for a clause to be an arbitration clause. Either the contract or any written document, telex, telecommunications or email, should reflect that the parties were ad idem on the issue of referring differences or disputes arising in discharge of their contractual obligations, to an arbitral tribunal.

12. In the present case, clause 76 is incorporated under the head Arbitrator, and provides that arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996, with all modifications, amendments and re-enactments. This court is of the view that, a mere heading in a clause will not make the said clause an arbitration agreement. From a comprehensive reading of the entire contract, it appears that there is no dispute resolution clause. No choice of forum by the parties, is reflected either in the GCC or in the Letter of Award. There is nothing on record to show that the parties had agreed to resolve any dispute or difference which may arise during the execution of the subject contract or thereafter, by an independent, impartial and private tribunal. Even if there is no mention that the arbitrator will be an independent tribunal and the parties will be bound by the award in the clause, at least, there should have been a clause which would indicate that the parties were in agreement to refer any dispute arising out of the said contract, to arbitration. The GCC does not specifically contain an arbitration agreement, but only refers to the statute. An

agreement to refer disputes to arbitration, should have been mentioned either in the Letter of Award or in any communication between the parties, i.e., letters, telex, telecommunications or email. This is not the case here.

13. The law as laid down in ***Enercon (India) (supra)*** is that, if a detailed semantic and syntactical analysis of words in a commercial contract led to a conclusion that flouted business common sense, the agreement must be made workable, so as to yield to business common sense. However, in the instant case, the GCC is devoid of any dispute resolution clause. There is no indication at all that the parties had concurred to resolve their dispute by reference to arbitration. It will not be a pedantic approach on the part of the Court in holding that there is no arbitration agreement. Such finding will not be contrary to the accepted norm of "business common sense". In fact, the GCC does not speak of any method and mechanism for dispute resolution at all. Relevant paragraphs of ***Enercon (India)(Supra)*** are quoted below :-

> "**52.** Dr Singhvi then submitted that leaving aside the question of unworkability of the arbitration clause for the moment, the intention of the parties in the instant case may be determined from the following clauses of IPLA:
>
> "17. *Governing law*
>
> 17.1 This agreement and any dispute of claims arising out of or in connection with its subject-matter are governed by and construed in accordance with the law of India.
>
> 18. *Disputes and arbitration*
>
> 18.1 All disputes, controversies or differences which may arise between the parties in respect of this agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this agreement, the parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the parties may agree in writing, any party may refer dispute(s),

controversy(ies) or difference(s) for resolution to an Arbitral Tribunal to consist of three (3) arbitrators, of whom one will be appointed by each of the licensor and the licensee and the arbitrator appointed by the licensor shall also act as the presiding arbitrator.

18.2 ***

18.3 The proceedings in such arbitration shall be conducted in English. The *venue* of the arbitration proceedings shall be in London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.

The reference of any matter, dispute or claim or arbitration pursuant to this Section 18 or the continuance of any arbitration proceedings consequent thereto or both will in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this agreement."

14. Interpreting the arbitration clause in the said agreement, the Hon'ble Apex Court held that it was a well-recognized principle of arbitration jurisprudence in almost all jurisdictions, especially, those following the Uncitral Model Law, that Courts should play a supportive role in encouraging arbitration, by following the practice of least intervention by Courts. Upon considering the principles behind the enactment of the law, the Hon'ble Apex Court found that an arbitration clause could not be frustrated on the ground that it was un-workable and any obvious omission could be set right by Court. The clause which was being considered by the Hon'ble Apex Court is quoted below :-

"*18 Disputes and arbitration*

*18.1 All disputes, controversies or differences which may arise between the parties in respect of this agreement including without limitation to the validity, interpretation, construction performance and enforcement or alleged breach of this agreement, the parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, controversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the parties may agree in writing, any party may refer dispute(s) for resolution to an Arbitral Tribunal to consist of three 93)*

> *arbitrators, of whom one will be appointed by each of the licensor and the licensee and the arbitrator appointed by the licensor shall also act as the presiding arbitrator.*
> *18.2 * * **
> *18.3 The proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be in London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.*
> *The reference of any matter, dispute or claim or arbitration pursuant to this Section 18 or the continuance of any arbitration proceedings consequent thereto or both will in no way operate as a waiver of the obligations of the parties to perform their respective obligations under this agreement."*

15. The issue before the Hon'ble Apex Court was unworkability of the arbitration clause on the ground that there was a confusion with regard to venue and the governing law.

16. In ***Visa International Ltd. Vs. Continental Resources (USA) Ltd.*** reported in ***(2009) 2 SCC 55***, it was held that no party can be allowed to take advantage of an inartistic drafting of the arbitration clause in any agreement, as long as, there is a clear intention of the parties to go for arbitration in case of future disputes. Here, such intention is missing.

17. In the present situation, the surrounding circumstances do not persuade this court to hold that the parties had intended to refer their disputes to arbitration. Such agreement is absent. This is neither a case of inarticulate drafting of an arbitration clause nor a case of ambiguity in the said clause.

18. Under these circumstances, this Court does not find Clause 76 to be a binding arbitration clause.

19. Mr. Mukherjee's submission that the purpose behind incorporation of the said clause was solely for settlement of dispute by an arbitrator, or else,

the clause would not have been incorporated at all, is not accepted. This Court is of the view that, the parties had an option to enter into a further agreement to refer their disputes to arbitration when such disputes arose. The said Act would then apply.

20. Mr. Mukherjee referred to clause 73.3 of the GCC. The clause provides that any sum of money due and payable to the contractor under the subject contract can be withheld or retained by way of lien against any claim of the Engineer in charge or the respondent, and the sum shall not be released till the claim arising out of the subject contract or any other contract is either mutually settled or determined by arbitration or by a competent court, as the case may be. The contention was that, use of the word arbitration in the said clause indicated that the parties had agreed to refer their disputes to arbitration.

21. Clause 73.3 is quoted below:-

> "73.3 Lien In Respect of Claims in Other Contracts
>
> *Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or by NPCC against any claim of the Engineer-in-Charge or NPCC in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the Engineer-in-Charge or the NPCC. It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the NPCC will be kept withheld or retained as such by the Engineer-in-Charge or the NPCC or till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitration clause or by the competent court, as the case may be, and that the contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor."*

22. The above clause provided that a right of lien can be exercised by the respondent over the payments to be made in respect of a contract, until the dues of the respondent in respect of the subject project or other projects were settled either amicably or by arbitration or by a court of law. According to the said clause, till such time the disputes were settled either by arbitration or by a court of law, such lien would continue. Here too, an option is available to the parties to either settle their disputes through arbitration or by a court of law. The clause which has been quoted hereinabove, is not a binding arbitration agreement. It mentions various modes of resolution i.e. amicable, in arbitration or by courts of law.

23. In ***Panchdeep Constructions Ltd. vs National Project Construction Corporation Ltd*** decided in ***AP 156 of 2021,*** the issue was neither raised nor decided. The decision in ***Zhejiang Bonly Elevator (supra),*** does not apply in this case. There, the Hon'ble Apex Court found that the english translation of the heading of the dispute resolution clause, which was originally in Chinese, might not have been accurate but, at least the clause provided that the parties had agreed to a dispute resolution either by arbitration or by court. The relevant portion of the decision is quoted below:-

> "4. To appreciate the controversy, it is required to be seen whether there is an arbitration clause for resolution of the disputes. Clause 15 of the agreement as translated in English reads as follows:
>
> "15. *Dispute handling*.—Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court."
>
> 9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus : (*Indtel Technical Services case* [*Indtel Technical Services (P) Ltd.* v. *W.S. Atkins Rail Ltd.*, (2008) 10 SCC 308] , SCC p. 318, para 38)

> "*38.* Furthermore, from the wording of Clause 13.2 and Clause 13.3 I am convinced, for the purpose of this application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."
>
> The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration."

24. In the present case, there is not a single clause which talks about dispute resolution. By mere use of a heading "Arbitration" above clause 76, the said clause does not become a binding arbitration agreement. The intention of the parties to refer any or all disputes arising out of the concerned agreement to arbitration, is absent. It is just an enabling clause.

25. Reference is made to the following decisions on the proposition of law that, the arbitration agreement should demonstrate meeting of minds of the parties to refer some or all disputes arising out of the contract, to arbitration.

26. In the matter of ***BGM and M-RPL-JMCT (JV) vs Eastern Coalfields Limtied*** reported in ***2025 INSC 874*** , the Hon'ble Apex Court held as follows:-

> "**25.** Following the decision in Jagdish Chander (supra), this Court, in Mahanadi Coalfields (supra), held that Clause 15 of the Contract Agreement though is titled "Settlement of Disputes /Arbitration", the substantive part of it makes it abundantly clear that there is no arbitration agreement between the parties to refer either present or future dispute to arbitration.

**26.** What is clear from the judgment in Mahanadi Coalfields (supra) is that mere use of the word “arbitration” or “arbitrator” in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. In Jagdish Chander (supra), use of words such as "parties can, if they so desire, refer their disputes to arbitration", or "in the event of any dispute, the parties may also agree to refer the same to arbitration", or "if any disputes arise between the parties, they should consider settlement by arbitration", in a clause relating to settlement of disputes, were found not indicative of an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" would not constitute an arbitration agreement. Because such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. This is so, because such clauses require the parties to arrive at a further agreement to go to arbitration, as and when disputes arise. Therefore, 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.

**27.** Now, the question which arises for our consideration is whether Clause 13 constitutes an arbitration agreement or it is just an enabling provision for parties to agree to refer the dispute(s) for settlement through arbitration.

**28.** Clause 13 in its first paragraph sets out intent to avoid litigation and advises the contractor to make effort to settle the dispute at the company level. Second paragraph sets out the procedure for raising the dispute/ claim for settlement at the company level. It provides that the contractor should make request in writing to the Engineer-in-charge for settlement of disputes/ claims within 30 days of arising of the cause of dispute/ claim failing which it shall not be entertained by the company. Thereafter, clause 13 provides for a two-stage procedure for resolution of the dispute. In the first stage, dispute is to be referred to Area CGM, GM. If difference persists, the dispute is to be referred to a committee constituted by the owner. If difference continues to persist, the second stage procedure becomes applicable. According to which, if the dispute or difference relates to the interpretation and application of the provisions of commercial contracts between Central Public Sector Enterprises CPSEs /Port Trusts inter se, or is between CPSEs and Government Departments/ Organizations (excluding disputes concerning railways, income tax, Customs and Excise departments), such dispute or difference shall be taken up by either party for resolution through AMRCD as mentioned in DPE OM No.4(1)/2013-DPE (GM)/FTS -1835 dated 22-05-2018. However, in case of parties other than Govt. Agencies, the redressal of the dispute may be sought through arbitration as per 1996 Act.

**29.** The High Court opined that use of the words "may be sought through Arbitration..." indicate that at the stage of entering the contract, parties were not ad idem that inter se dispute shall be resolved through arbitration, therefore the said clause would not constitute an arbitration agreement.

**30.** The argument of the learned counsel for the appellant is that clause 13 provides option to the parties, which include any of one of the parties, to seek dispute resolution through arbitration and, therefore, it is nothing but an arbitration clause. According to him, use of the word "may" in clause 13 does not provide choice to the parties to agree, or not to agree, for arbitration, rather it is a choice given to either of the parties to seek a settlement through arbitration and, therefore, when one party exercises the option, the other party cannot resile from the agreement. In that sense, according to him, clause 13 is an arbitration agreement.

**31.** We do not agree with the aforesaid submission because clause 13 does not bind parties to use arbitration for settlement of the disputes. Use of the words "may be sought", imply that there is no subsisting agreement between parties that they, or any one of them, would have to seek settlement of dispute(s) through arbitration. It is just an enabling clause whereunder, if parties agree, they could resolve their dispute(s) through arbitration. In our view, the phraseology of clause 13 is not indicative of a binding agreement that any of the parties on its own could seek redressal of inter se dispute(s) through arbitration. We are, therefore, of the considered view that the High Court was justified in holding that clause 13 does not constitute an arbitration agreement."

27. In ***Wellington Associates Ltd. vs. Kirit Mehta*** reported in ***(2000) 4 SCC 272,*** the Hon'ble Apex Court held as follows:-

"9. Before referring to the said sections, I shall refer to the relevant clauses 4 and 5 in the two agreements dated 15-8-1995. They read as follows:

"*4*. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

*5*. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents '*may be*

*referred'* to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

* * *

21. Does clause 5 amount to an arbitration clause as defined in Section 2(*b*) read with Section 7? I may here state that in most arbitration clauses, the words normally used are that "disputes *shall* be referred to arbitration". But in the case before me, the words used are "may be referred".

22. It is contended for the petitioner that the word "may" in clause 5 has to be construed as "shall". According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties. The parties, in my view, used the words "may" not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the civil courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words "it is *also* agreed" that the dispute "*may*" be referred to arbitration implying that parties need not necessarily go to the civil court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a civil court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can "*also*" go to arbitration in case the aggrieved party does not wish to go to a civil court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the venue of arbitration is concerned, uses the word "shall". The

parties, in my view, must be deemed to have used the words "may" and "shall" at different places, after due deliberation.

23. A somewhat similar situation arose in *B. Gopal Das* v. *Kota Straw Board* [AIR 1971 Raj 258 : 1971 Raj LW 151] . In that case the clause read as follows:

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

It was held that fresh consent for arbitration was necessary. No doubt, the above clause was a little clearer there than in the case before me. In the above case too, the clause used the word "may" as in the present case. The above decision is therefore directly in point.

24. Before leaving the above case decided by the Rajasthan High Court, one other aspect has to be referred to. In the above case, the decision of the Calcutta High Court in *Jyoti Bros.* v. *Shree Durga Mining Co.* [AIR 1956 Cal 280 : 60 CWN 420] has also been referred to. In the *Calcutta case* [AIR 1956 Cal 280 : 60 CWN 420] the clause used the words "can" be settled by arbitration and it was held that fresh consent of parties was necessary. Here one other class of cases was differentiated by the Calcutta High Court. It was pointed out that in some cases, the word 'may' was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the *Calcutta case* [AIR 1956 Cal 280 : 60 CWN 420] on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration was mandatory, once option was exercised. In England too such a view was expressed in *Pittalis* v. *Sherefettin* [(1986) 1 QB 868 : (1986) 2 All ER 227 (CA)] . In the present case, we are not concerned with a clause which used the word "may" while giving option to one party

> to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.
>
> 25. Suffice it to say, that the words "may be referred" used in clause 5, read with clause 4, lead me to the conclusion that clause 5 is not a firm or mandatory arbitration clause and in my view, it postulates a fresh agreement between the parties that they will to go to arbitration. Point 2 is decided accordingly against the petitioner."

28. An arbitration agreement has to be couched not in precatory, but obligatory words. Although, there is no particular form or universally practiced format in framing an arbitration agreement, but the words used must be certain, definite and indicative of the determination of the parties to go for arbitration and not a choice or a mere possibility to refer such dispute to arbitration. In ***Jagdish Chander vs. Ramesh Chander*** reported in ***(2007) 5 SCC 719***, the question before the Apex Court was whether Clause 16 of the deed of partnership was an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act 1996 or not. The clause read as follows:-

> "16. If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine."

The Hon'ble Apex Court held as follows:-

> "5. The appellant has challenged the said order appointing the arbitrator. It is submitted that the power under Section 11 of the Act, to appoint an arbitrator, can be exercised only if there is a valid arbitration agreement between the parties, and that as there is no arbitration agreement between the parties, the arbitrator could not have been appointed. Strong reliance was placed by the appellant on

the decision in *Wellington Associates Ltd.* v. *Kirit Mehta* [(2000) 4 SCC 272] where a designate of the Chief Justice of India held that the following clause was not an "arbitration agreement":

"*5.* It is also agreed by and between the parties that any dispute or differences arising in connection with these presents *may be referred* to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay."

He also held that the use of the word "may" could not be construed as "shall" and that the clause was only an enabling provision and a fresh consent was necessary to go to arbitration. The decision of the Calcutta High Court in *Jyoti Bros.* v. *Shree Durg Mining Co.* [AIR 1956 Cal 280] was also cited with approval.

* * *

8. (*iv*) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they *so desire*, refer their disputes to arbitration" or "in the event of any dispute, the parties *may* also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. 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."

29. In the course of the discussion, the Hon'ble Court laid down the following principles to determine as to what would constitute an arbitration agreement:-

"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in *K.K. Modi* v. *K.N. Modi* [(1998) 3 SCC 573] , *Bharat Bhushan Bansal* v. *U.P. Small Industries Corpn. Ltd.* [(1999) 2 SCC 166] and *Bihar State Mineral Development Corpn.* v. *Encon Builders (I) (P) Ltd.* [(2003) 7 SCC 418] In *State of Orissa* v. *Damodar Das* [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an "arbitration agreement"

only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(*i*) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(*ii*) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (*a*) The agreement should be in writing. (*b*) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (*c*) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (*d*) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(*iii*) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(*iv*) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they *so*

> *desire*, refer their disputes to arbitration" or "in the event of any dispute, the parties *may* also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. 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."

30. Thus, by applying the ratio of ***Jagdish Chander (supra)***, this Court is constrained to hold that mere use of the expression "Arbitration" in Clause 76.0, will not automatically make the clause a binding arbitration agreement as comtemplated under Section 7 of the Arbitration Conciliation Act, 1996.

31. In the decision of ***Powertech World Wide Limited vs Delvin International General Trading LLC*** reported in ***(2012) 1 SCC 361***, the Hon'ble Apex Court held as follows:-

> "24. In a recent judgment of this Court in Visa International Ltd. v. Continental Resources (USA) Ltd. [(2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379] this Court was concerned with an arbitration clause contained in the memorandum of understanding that read as under: (SCC p. 61, para 12)
>
> > "12. … 'Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996.' "
>
> 25. The disputes having arisen between the parties, the respondent, instead of challenging the existence of a valid arbitration clause, took the stand that the arbitration would not be cost-effective and will be premature. In view of the facts, this Court held that there was an arbitration agreement between the parties and the petitioner was entitled to a reference under Section 11 of the Act and observed: (Visa International Ltd. Case.

> "25. … No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances."
>
> 26. It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in Jagdish Chander [(2007) 5 SCC 719] . But once the correspondence between the parties and the attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act."

32. In the case before this Court, there is neither any communication nor are there attending circumstances, which display intention of the parties to refer their disputes to arbitration. In the decision of ***Mahanagar Telephone Nigam Limited vs. Canara Bank and ors.*** reported in ***(2020) 12 SCC 767***, the Hon'ble Apex Court held as follows:-

> "9.3. Section 7(4)(*b*) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(*b*). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.
>
> 9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a

> binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.
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> * * *
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> * * *
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> 9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in *Enercon (India) Ltd.* v. *Enercon GmbH* [*Enercon (India) Ltd.* v. *Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.
>
> 9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings:"

33. In ***Jyoti Bros. vs. Shree Durga Mining Co.*** reported in ***AIR 1956 Cal 280***, the arbitration clause read 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."

The Calcutta High Court held that the same was not a valid arbitration clause. The conclusion is quoted below:-

> "4. I know of no reported decision where any Arbitration clause used the word "can" as in this case. The Arbitration Clause in this case can at best mean that the dispute "can" be settled by Arbitration. But that does not mean that the dispute shall be settled by Arbitration. It only

means this that after the dispute has occurred, the parties may go to Arbitration as an alternative method of settling the dispute instead of going to the Courts. But that means that after the dispute has arisen, the parties will have to come to a further agreement that they shall go to Arbitration.
In other words, the clause at best means that it is a contract to enter into a contract. It denotes the possibility of Arbitration in the event of a future dispute. I do not consider a contract to enter into a contract to be a valid contract in law at all. I am, therefore, of the opinion that this is not a valid submission to Arbitration. The word "can" by the most liberal interpretation only indicates a possibility. A legal contract is more than a mere possibility. It is possibility added to obligation. If a seller says "I can sell goods" that does not mean an immediate or present contract to sell.
Similarly, if a person says "I can go to arbitration"

34. In the decision of ***Karma Norbu Bhutia vs National Projects Construction Corporation Ltd. (NPCCL) & Anr.*** decided in ***AP-COM/1081/2024***, this court had the same view. The same clause in respect of a similar contract/work was under consideration. The court held as follows:-

> "12. The law is well-settled. The arbitration agreement does not have to be in any particular form. It is also well-settled that, words like "arbitrator or arbitration" were not required to be mentioned for a clause to be an arbitration clause. What is most important is that, either from the contract or from any other written document, telex or telecommunications or email, it should be evident that the parties were ad idem that, in case there was any difference or dispute amongst them in the discharge of their contractual obligation, they shall refer such dispute for settlement by an arbitrator or by a private tribunal. In the present case, although the clause provides that the arbitration shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 with all modifications, amendments and re-enactments, I hold that, a mere heading in a clause, will not make the said clause an arbitration. I do not find from a comprehensive reading of the entire contract that, there is any clause which deals with dispute resolution. What the parties had agreed to do, in case disputes and difference arose, has not been stated either the GCC or in the letter of intent. There is nothing on record to show that the parties had either agreed or decided that any dispute or difference which may arise during the execution of the said contract or thereafter, shall be referred to arbitration. Even if the other requirements, i.e., the Tribunal to be an independent Tribunal and that the parties had undertaken to be bound by the award etc. were

> missing, at least, there should have been a clause which indicated that the parties were in agreement to refer any dispute arising out of the said contract, to arbitration. Even if the GCC does not specifically contain an arbitration agreement, but an agreement could have been entered into later by a signed document or by exchange of letters, via telex or telecommunications or email. This is not the case here."

35. Under such circumstances, this application fails.

36. No order is passed as to costs.

37. The petitioner is at liberty to approach the appropriate forum in accordance with law.

38. AP-COM/218/2025 is, accordingly, disposed of.

(**Shampa Sarkar, J.**)