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

Judgement delivered on: 28.01.2026

\+ ARB.P. 1479/2025

WINFRA BUILD TECH PRIVATE LIMITED .....Petitioner

Through: Mr. Atul Verma, Advocate.

versus

NKG INFRASTRUCTURE LIMITED .....Respondent

Through: Mr. Manish Gupta, Mr. Mehul Jain, Ms. Payal Singh, Ms. Riya, Mr. Nikhil Malik, Ms. Shipra Bhardwaj, Mr. Vivek Chandrasekhar, Mr. Yash Tiwari, Ms. Manaswee Gupta, Mr. Ravi and Ms. Sowmya China, Advocates.

CORAM:
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

JUDGEMENT *(ORAL)*

1. The present petition has been filed under Section 11(6) of the **Arbitration and Conciliation Act, 1996**[1], seeking the appointment of a Sole Arbitrator for adjudication of the disputes alleged to have arisen between the parties out of the Work Order/Purchase Order dated 08.02.2024.

2. Learned counsel for the Petitioner places reliance upon Clause 29 of the **Purchase Order dated 08.02.2024**[2], which has been

[1] Act
[2] Purchase Order

annexed as *'Document No. D1'* to the present petition. The said clause reads as under: -

> "**29. Dispute Resolution**:
> 1. All dispute and claims will be mutually discussed and agreed upon at site level. in case of any difference of opinion, the decision of "Contracts Head" of NKG Infrastructure shall be final and binding.
> 2. Arbitrators, if needed shall be appointed by NKG Infrastructure Ltd in Delhi only.
> 3. Any further dispute shall be settled in courts of jurisdiction of Delhi."

3. It is the case of the Petitioner that disputes subsequently arose between the parties, pursuant to which arbitration was invoked by way of a legal notice dated 22.07.2025. It is contended that despite the invocation of arbitration, no Arbitrator was appointed by the Respondent, compelling the Petitioner to approach this Court by filing the present petition.

4. Learned counsel appearing for the Respondent, however, submits that there exists no valid or enforceable arbitration agreement between the parties. It is urged that Clause 29 of the Purchase Order, as relied upon by the Petitioner, is vague, ambiguous, and does not unequivocally provide for arbitration as the agreed and definitive mechanism for the resolution of disputes between the parties.

5. Learned counsel for the Respondent further submits that the clause merely reflects a tentative or optional possibility of arbitration, evident from the use of the expression "*Arbitrators, if needed*". It is argued that such language demonstrates the absence of a firm and binding consensus *ad idem* between the parties to mandatorily refer disputes to arbitration. Reliance is placed upon the judgments of the Hon'ble Supreme Court, stating that an arbitration agreement must

reflect a clear, unambiguous, and definitive intention of the parties to submit disputes to arbitration, without requiring any further consent at a later stage. In the absence of such clarity, the disputes cannot be referred to arbitration.

6. *Per contra*, learned counsel for the Petitioner submits that Clause 29 constitutes an arbitration clause and that the appointment of the Arbitrator ought to be made in terms thereof.

7. Learned counsel for the parties have been heard at length, and with their able assistance, this Court has carefully perused the paper book and other materials placed on record.

8. There is a consistent and settled line of precedent laid down by the Hon'ble Supreme Court to the effect that the intention of the parties to enter into an arbitration agreement must be gathered from the terms of the agreement as a whole. Where the terms clearly indicate an intention to refer disputes to a tribunal for adjudication and a willingness to be bound by its decision, such clause would constitute an arbitration agreement.

9. It is equally well settled that where there is a clear and specific expression of intent to resolve disputes through arbitration, it is not necessary for the clause to expressly incorporate all the attributes of an arbitration agreement. However, where the dispute resolution clause contains language that either excludes essential attributes of arbitration, or contemplates a future or fresh consent of the parties for reference to arbitration, or otherwise detracts from the binding nature of arbitration, such a clause cannot be construed as an arbitration agreement. Mere use of the words "arbitration" or "arbitrator" is not determinative, particularly where the clause is couched in tentative or

conditional terms. The Hon'ble Supreme Court, in ***BGM & M-RPL-JMCT (JV) v. Eastern Coalfields Ltd.***[3], made various pertinent observations, which read as under:

> "**20.** Before we proceed to consider whether Clause 13 would constitute an arbitration agreement, it would be useful to examine the law as to when an arbitration agreement comes into existence. An arbitration agreement is the foundation of arbitration as it records the consent of the parties to submit their disputes to arbitration. Section 2(b) of the 1996 Act defines an arbitration agreement to mean an agreement referred to in Section 7[8]. In *Bihar State Mineral Development Corporation* v. *Encon Builders*[9], this Court culled out the essential ingredients of an arbitration agreement as follows : (a) there must be a present or future difference in connection with some contemplated affair; (b) the parties must intend to settle such difference by a private tribunal; (c) the parties must agree in writing to be bound by the decision of such tribunal; and (d) the parties must be *ad idem*.
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> **21.** In *Cox and Kings Limited* v. *SAP India Private Limited*[10], a Constitution Bench of this Court held:
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> > "61. An arbitration agreement is a contractual undertaking by two or more parties to resolve their disputes by the process of arbitration, even if the disputes themselves are not based on contractual obligations. An arbitration agreement is a conclusive proof that the parties have consented to submit their dispute to an arbitral tribunal to the exclusion of domestic courts. The basis for an arbitration agreement is generally traced to the contractual freedom of parties to codify their intention to consensually submit their disputes to an alternative dispute resolution process."
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> **22.** The principles regarding what constitutes an arbitration agreement were summarized by this Court in *Jagdish Chander* (supra) in the following terms:—
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> > "8. …..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:
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> > (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

[3] 2025 SCC OnLine SC 1471 made

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 excludes 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."

(Emphasis supplied)

23. In *Jagdish Chander* (supra), the issue that arose for consideration was whether paragraph 16 in the partnership agreement constituted an arbitration agreement. Clause 16 under consideration there, is extracted below:

"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*."

While holding that clause 16 did not constitute an arbitration agreement, this Court observed:

"9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression

> "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore, it is not an arbitration agreement, as defined under section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under section 11 of the Act to appoint an Arbitrator does not arise."
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> (Emphasis supplied)

24. In *Mahanadi Coalfields* (supra), this court was required to consider whether clause 15 constituted an arbitration agreement. Clause 15 under consideration there, is extracted below:

> "**15. Settlement of Disputes/Arbitration**:
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> 15.1 It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the disputes at the company level. The contractor should make request in writing to the Engineer-in-Charge for settlement of such disputes/claims within 30 (thirty) days of arising of the case of dispute/claim failing which no disputes/claims of the contractor shall be entertained by the company.
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> 15.2 If differences still persist, the settlement of the dispute with Govt. Agencies shall be dealt with as per the Guidelines issued by the Ministry of Finance, Govt. of India in this regard. In case of parties other than Govt. Agencies, the redressal of the disputes may be sought in the Court of Law."

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."

10. In view of the aforesaid settled legal position, and upon a careful consideration of Clause 29 of the Purchase Order, this Court finds that the clause fails to fulfill the attributes of a valid arbitration agreement. The clause first provides for the resolution of disputes through mutual discussion at the site level, followed by a mechanism wherein the decision of the "*Contracts Head*" of the Respondent is stated to be final and binding.

11. The subsequent use of the expression "*Arbitrators, if needed*" renders the purported arbitration mechanism uncertain, conditional, and non-mandatory. The clause does not unequivocally demonstrate a binding obligation upon the parties to refer disputes to arbitration. Rather, it contemplates arbitration only as a contingent possibility, dependent upon a further determination of necessity. Such language introduces ambiguity and makes it impossible to discern, without doubt, that the parties had agreed to arbitration as the exclusive or mandatory mode of dispute resolution.

12. Consequently, this Court is of the considered opinion that the objection raised by the Respondent is well-founded. Clause 29 of the Purchase Order, as it stands, is clearly ambiguous and does not constitute a valid and enforceable arbitration agreement under the Act. There is no positive or unequivocal mandate for resorting to arbitration as a means of adjudication of disputes between the parties.

13. In view of the above, the reliefs sought in the present petition cannot be granted. The petition is accordingly dismissed.

HARISH VAIDYANATHAN SHANKAR, J

JANUARY 28, 2026/nd/sm