[2025] 7 S.C.R. 1275 : 2025 INSC 874

# BGM and M-RPL-JMCT (JV)
# v.
# Eastern Coalfields Limited

(Civil Appeal No. 9795 of 2025)

18 July 2025

**[Pamidighantam Sri Narasimha and Manoj Misra,* JJ.]**

## Issue for Consideration

(i) Whether the question of existence of an arbitration agreement should be left for the arbitral tribunal to decide; (ii) whether clause 13 of the General Terms and Conditions of the contract and relied upon by the appellant would constitute an arbitration agreement between the parties as contemplated u/s.7 of the Arbitration and Conciliation Act, 1996; (iii) whether clause 32 of Instructions to Bidders negates the existence of an arbitration agreement.

## Headnotes†

**Arbitration and Conciliation Act, 1996 – Sub-section (6-A) of s.11 – Existence of arbitration agreement – The appellant and the respondent entered into a contract relating to transportation/handling of goods – Dispute arose between the parties – Appellant relied on clause 13 of the General Terms and Conditions of the contract as arbitration agreement – However, respondent contended that clause 13 is bereft of the essential ingredients to constitute an arbitration agreement – According to the appellant, the Referral Court should straight away refer the matter and leave it to the arbitral tribunal to decide whether the arbitration agreement exists or not – Whether the question of existence of an arbitration agreement should be left for the arbitral tribunal to decide:**

**Held:** 1. The argument of the appellant that Referral Court should straight away refer the matter and leave it to the arbitral tribunal to decide whether the arbitration agreement exists or not cannot be accepted. [Para 19]

2. In the instant case, the appellant is relying on just one clause in the contract which, according to the appellant, constitutes an arbitration agreement whereas according to the respondent, though the clause is not disputed, the same does not constitute an arbitration agreement

* Author

– In such circumstances, the Court while exercising power u/s.11 would not have to hold a mini-trial or an enquiry into its existence rather a plain reading of the clause would indicate whether it is, or it is not, an arbitration agreement, *prima facie*, satisfying the necessary ingredients of it, as required by s.7 of the 1996 Act – In view of this Court, such a limited exercise would not transgress the limit set out by sub-section (6-A) of s.11 of the 1996 Act as introduced by 2015 Amendment because the object of such an exercise (i.e., of examination) is to weed out frivolous claims for appointment of an arbitrator/ reference to an arbitral tribunal. [Paras 18, 19]

**Arbitration and Conciliation Act, 1996 – s.11 – The appellant and the respondent entered into a contract – Dispute arose between the parties – Appellant sought to invoke arbitration through clause 13 of the General Terms and Conditions of the contract – High Court held that clause 13 does not constitute an arbitration agreement – Whether clause 13 of the General Terms and Conditions of the contract and relied upon by the appellant would constitute an arbitration agreement between the parties as contemplated u/s.7 of the Arbitration and Conciliation Act, 1996:**

**Held:** 1. 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. [Para 26]

2. In the instant case, 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 view of this Court, 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 – Therefore, the High Court was justified in holding that clause 13 does not constitute an arbitration agreement. [Para 31]

**Arbitration and Conciliation Act, 1996 – Whether clause 32 of Instructions to Bidders negates the existence of an arbitration agreement:**

**Held:** In the instant case, clause 32 does not exclude resolution of disputes through arbitration agreement – It only fixes jurisdiction

and in the event of there being an arbitration agreement could determine the juridical seat – However, since this Court has held that there is no arbitration agreement between the parties, decision of this issue is of no consequence. [Para 33]

**Case Law Cited**

*Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re* **[2023] 15 SCR 1081 : (2024) 6 SCC 1**; *Cox and Kings Limited v. SAP India Private Limited and another* **(2024) 4 SCC 1** – **followed.**

*Bihar State Mineral Development Corporation v. Encon Builders* **[2003] Supp. 2 SCR 812 : (2003) 7 SCC 418;** *Jagdish Chander v. Ramesh Chander and Others* **[2007] 5 SCR 720 : (2007) 5 SCC 719 – relied on.**

*Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture* **[2022] 7 SCR 522 : (2022) 20 SCC 636 – referred to.**

**List of Acts**

Arbitration and Conciliation Act, 1996.

**List of Keywords**

Arbitration agreement; Existence of an arbitration agreement; Referral Court; Arbitral Tribunal; Sub-section (6-A) of s.11 of Arbitration and Conciliation Act, 1996; Consensus before a reference to arbitration; Enabling clause; Juridical seat.

**Case Arising From**

CIVIL APPELLATE JURISDICTION: SLP (C) Diary No. 21451 of 2024

From the Judgment and Order dated 19.01.2024 of the High Court at Calcutta in AP No. 745 of 2023

**Appearances for Parties**

*Advs. for the Petitioner:*
Subhabrata Dutta, Sunando Raha, Subhojit Seal, Kunal Malik, Manish Awasthi.

*Advs. for the Respondent:*
Ritin Rai, Sr. Adv., R. Venkat Prabhat, Daksh Pandit.

**Judgment / Order of the Supreme Court**

**Judgment**

**Manoj Misra, J.**

1. Leave granted.

2. This appeal impugns an order of the High Court[1] dated 19.01.2024 whereby the application[2] of the appellant, under Section 11 of the Arbitration and Conciliation Act, 1996[3], was dismissed on the ground that there exists no arbitration agreement between the parties.

**FACTS**

3. The appellant and the respondent entered into a contract relating to transportation/handling of goods. Disputes arose between the parties during the subsistence of the contract. Clause 13 of the General Terms and Conditions, appended to the e-tender notice, which forms part of the contract and relied upon by the appellant as an arbitration agreement, is the subject matter of interpretation. The same is extracted below:

> "13. SETTLEMENT OF DISPUTES
>
> 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 cause of dispute/ claim failing which no disputes/ claims of the contractor shall be entertained by the company.
>
> Effort shall be made to resolve the dispute in two stages.
>
> In first stage dispute shall be referred to Area CGM, GM. If difference still persist the dispute shall be referred to a

1 The High Court at Calcutta

2 A.P. No. 745 of 2023

3 1996 Act

committee constituted by the owner. The Committee shall have one member of the rank of Director of the company who shall be chairman of the company.

If differences still persist, the settlement of the dispute shall be resolved in the following manner:

In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts *inter se* and also between CPSEs and Government Departments/ Organizations (excluding disputes concerning railways, Income Tax, Customs & 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.

In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through ARBITRATION AND CONCILIATION ACT, 1996 as amended by AMENDMENT ACT OF 2015"

(Emphasis supplied)

4. Treating the underscored portion of clause 13 as an arbitration agreement, the appellant filed an application under Section 11(6) of the 1996 Act for appointment of an Arbitrator for settlement of the disputes *inter se* the parties.

5. The respondent objected to the prayer for appointment of an Arbitrator, *inter-alia*, on the ground that clause 13 is bereft of the essential ingredients to constitute an arbitration agreement and therefore the application seeking appointment of an Arbitrator deserves rejection.

6. The High Court accepted the objection and dismissed the application. While rejecting the prayer, the High Court laid emphasis on use of the word "*may*" before "*be sought*" in the underscored portion of clause 13 and, *inter alia*, relied on two decisions of this Court, namely, ***Jagdish Chander vs. Ramesh Chander and Others***[4] and

4 (2007) 5 SCC 719

***Mahanadi Coalfields Ltd. vs. IVRCL AMR Joint Venture***[5] to hold that where the word "may" is used there is no clear intention of the parties to refer the dispute between them to arbitration and therefore, the prayer to appoint an Arbitrator is not sustainable.

7. We have heard learned counsel for the parties and have perused the materials on record.

**Submissions on behalf of the Appellant**

8. The learned counsel for the appellant contended that the use of the word "may" is only to indicate that parties to the agreement have an option to take recourse to settlement of dispute(s) through arbitration under the 1996 Act. However, once that option is exercised by any of the parties to the agreement, as in the present case, it becomes a binding contract to settle *inter se* dispute(s) through arbitration. It was contended that the decisions of this Court in ***Jagdish Chander*** **(supra)** and ***Mahanadi Coalfields*** **(supra)** dealt with entirely different clauses than the one in question and, therefore, the High Court erred in placing reliance on them to reject the application of the appellant.

9. In addition to above, it was argued that at the stage of appointment of an arbitrator the court is required to examine whether arbitration agreement exists or not. Such examination is for the Court to satisfy itself that, *prima* facie, an arbitration agreement exists, though the final call on its existence is to be taken by the arbitral tribunal, which is competent to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Thus, it was argued, the appropriate course for the High Court was to appoint an arbitral tribunal and leave the issue open for the arbitral tribunal to decide.

**Submissions on behalf of the Respondent**

10. Per contra, the learned counsel for the respondent supported the impugned order and also referred to Clause 32 of the Instructions to Bidders to contend that there was no definite agreement between the parties to settle their disputes through arbitration. According to

5 (2022) 20 SCC 636

the learned counsel for the respondent, the use of the word "may" in the so-called arbitration clause clearly indicates that at the time of entering the agreement, parties were not *ad idem* on referring present or future disputes between them to arbitration. The clause only enabled the parties to agree on any future date to refer the disputes to arbitration. Therefore, in the absence of proof of any such agreement, reference to arbitral tribunal has been justifiably declined.

11. In addition to above, by referring to Clause 32 of the Instructions to Bidders, the learned counsel for the respondent contended that disputes between the parties were to be settled through regular court proceedings and not through arbitration. Clause 32 is extracted below:

> "Clause 32- Legal Jurisdiction: - Matters relating to any dispute or difference arising out of this tender and subsequent contract awarded based on this tender shall be subject to the jurisdiction of District Court where the subject work is to be executed."

12. Besides above, the learned counsel for the respondent submitted that if, on a plain reading of the relevant clause, relied by any one of the parties as an arbitration agreement, it does not appear that parties are *ad idem* on settlement of *inter se*, present or future, disputes through arbitration to the exclusion of domestic courts, the very existence of an arbitration agreement comes into question, which can be taken notice of by the Court so as to decline the prayer for appointment of an arbitral tribunal under Section 11 of the 1996 Act.

**Issues**

13. Having regard to the facts and the submissions made before us, we are of the view that following three issues arise for our consideration:

    (i) Whether the question of existence of an arbitration agreement should be left for the arbitral tribunal to decide?

    (ii) Whether clause 13 (supra) would constitute an arbitration agreement between the parties as contemplated under Section 7 of the 1996 Act?

    (iii) Whether clause 32 of Instructions to Bidders negates the existence of an arbitration agreement?

**Issue (i)**

14. Insofar as issue (i) is concerned, a seven-Judge Constitution Bench of this Court in **Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899**, **In re**[6]**,** after surveying several decisions as also the impact of the 2015 Amendment on the 1996 Act, has settled the law in the following terms:

> "**164.** The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the Referral Court to look into the *prima facie* existence of a *valid* arbitration agreement, Section 11 confines the Court's jurisdiction to the examination of the *existence* of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the Referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of *Patel Engg.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.
>
> **165.** The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a *prima facie* determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , this Court held that the Referral Courts only need to consider one aspect to determine the existence

6 (2024) 6 SCC 1

of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in the context of Section 8 and Section 11 of the Arbitration Act.

**166.** The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only *prima facie* proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.

**167.** Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. [ P. Ramanatha Aiyar, *The Law Lexicon* (2nd Edn., 1997) 666.] On the other

> hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234]
>
> **xxx xxx xxx**
>
> **169.** When the Referral Court renders a *prima facie* opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award will be bound by such a *prima facie* view. If a *prima facie* view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the Arbitral Tribunal to examine the issue in depth. Such a legal approach will help the Referral Court in weeding out *prima facie* non-existent arbitration agreements. It will also protect the jurisdictional competence of the Arbitral Tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement."

15. The legal principles deducible from the above decision *qua* the scope of Referral Court's power under Section 11 of 1996 Act are as follows:

    (a) Section 11 confines the Court's jurisdiction to the examination regarding the existence of an arbitration agreement.

    (b) The use of the term "examination" in itself connotes that the scope of the power is limited to a *prima facie* determination.

    (c) Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined

to the existence of an arbitration agreement on the basis of Section 7. Such a legal approach will help the Referral Court in weeding out *prima facie* non-existent arbitration agreements.

(d) The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. However, the expression "examination" does not connote or imply a laborious or contested inquiry.

(e) The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. Only *prima facie* proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.

(f) Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, when the Referral Court renders a *prima facie* opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award is bound by such a *prima facie* view. If a *prima facie* view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the Arbitral Tribunal to examine the issue in depth.

16. What can be deduced from the above decision is that the Referral Court before appointing an arbitral tribunal will have to be *prima facie* satisfied that an arbitration agreement as contemplated in Section 7 of the 1996 Act exists. For this limited purpose it can scrutinize the documents relied upon by the parties in proof of its existence. Though the burden of proving the existence of arbitration agreement lies on the party seeking to rely on such agreement, only *prima facie* proof of its existence must be adduced before the Referral Court because the Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to its existence.

17. However, where professed arbitration agreement is found in an undisputed document, no trial or inquiry is required as to its existence. In such a situation, the Court would have to simply peruse the same to satisfy itself whether it, *prima facie*, fulfills the essential ingredients of an arbitration agreement as contemplated under Section 7 of the 1996 Act. But where the professed arbitration agreement is not contained in any one document and is to be inferred from two or more documents, such as exchange of letters or communications, parties may raise various pleas and place various documents to prove or disprove its existence. In such a scenario, if from the documents placed, existence of an arbitration agreement, as defined in Section 7, is *prima facie* made out, Referral Court, instead of undertaking a deeper probe or inquiry, should refer the matter to the arbitral tribunal. More so, because opinion of the Referral Court as to existence of an arbitration agreement is neither binding on the arbitral tribunal nor the Court dealing with the arbitral award.

18. In the instant case, the appellant is relying on just one clause in the contract which, according to the appellant, constitutes an arbitration agreement whereas according to the respondent, though the clause is not disputed, the same does not constitute an arbitration agreement. In such circumstances, the Court while exercising power under Section 11 would not have to hold a mini-trial or an enquiry into its existence rather a plain reading of the clause would indicate whether it is, or it is not, an arbitration agreement, *prima facie*, satisfying the necessary ingredients of it, as required by Section 7 of the 1996 Act. In our view, such a limited exercise would not transgress the limit set out by sub-section (6-A)[7] of Section 11 of the 1996 Act as introduced by 2015 Amendment because the object of such an exercise (i.e., of examination) is to weed out frivolous claims for appointment of an arbitrator/ reference to an arbitral tribunal.

19. In view of the above discussion, the argument of the appellant that Referral Court should straight away refer the matter and leave it to the arbitral tribunal to decide whether the arbitration agreement exists or not cannot be accepted. Issue (i) is decided accordingly.

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7 **Section 11.**
**(6-A).** The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

**Issue (ii)**

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 vs. 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*.

21. In ***Cox and Kings Limited vs. SAP India Private Limited and another***[10], a Constitution Bench of this Court held:

> "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

8 **Section 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 defense 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 agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

9 (2003) 7 SCC 418

10 (2024) 4 SCC 1

of parties to codify their intention to consensually submit their disputes to an alternative dispute resolution process."

22. The principles regarding what constitutes an arbitration agreement were summarized by this Court in ***Jagdish Chander*** **(supra)** in the following terms: -

> "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 :
>
> (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 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."
>
> (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**:
>
> 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.
>
> 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.

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.

32. As it is not the case of the appellant that parties at any later stage have agreed to refer the disputes to arbitration, in our view, the High Court was justified in rejecting the application seeking appointment of an arbitrator. Issue (ii) is decided in the aforesaid terms.

**Issue (iii)**

33. Having decided issue (ii) in the negative, deciding issue (iii) is of no consequence. However, we may observe that clause 32 does not exclude resolution of disputes through arbitration agreement. It only fixes jurisdiction and in the event of there being an arbitration agreement could determine the juridical seat. However, since we have held that there is no arbitration agreement between the parties, decision of issue (iii) is of no consequence.

34. In the light of our conclusion on the issues discussed above, the appeal fails and is, accordingly, dismissed.

35. There is no order as to costs.

36. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeal Dismissed.

†*Headnotes prepared by:* Ankit Gyan