Case Citation: (2026) ibclaw.in 5223 HC

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMM ARBITRATION APPLICATION (L) NO.23526 OF 2026

1. Lion Rubber Industries Private Limited
2. Sachin Navinchandra Goradia ... Applicants

Vs.

1. Santec Exim Private LImited
2. Richa Sangal
3. Umakant Sangal ... Respondents

ATUL GANESH KULKARNI
Digitally signed by ATUL GANESH KULKARNI
Date: 2026.09.07 12:00:02 +0530

Ms. Varshini Sunder with Ms. Payal Sethiya for the Applicants.

Mr. Satya Saharawat with Mr. Vivek Singh for the Respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 2, 2026.

PRONOUNCED ON : SEPTEMBER 7, 2026

JUDGMENT:

1. By the present Application, the Applicants seek appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996, relying upon Clause No.9 of the Purchase Order.

2. The facts and circumstances which have led to filing of the present Application, as stated by the Applicants, are as follows. In

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January 2024, the Applicants invited quotations for purchase of a Machine. In response to the same, the Respondents submitted their quotation dated 18 June 2024. Thereafter, the Applicants issued a domestic Purchase Order dated 19 June 2024 containing the technical details and the commercial terms for purchase of the Machine. Between 5 August 2025 and 23 September 2025, several correspondences took place between the parties concerning the work. According to the Applicants, the Respondents committed breaches, which are stated to be borne out from the record. On 15 November 2025, the Applicants received the records and proceedings of an unnumbered Commercial Suit of 2025 filed by the Respondents before the Gurugram Court Complex against the Applicants. According to the Applicants, an incorrect and false amount was claimed in the said Suit. On 11 February 2026, the Applicants invoked the arbitration clause contained in the Purchase Order and suggested names of Advocates to act as the Sole Arbitrator for resolving the disputes between the parties. The Respondents, through their Advocate's letter dated 23 February 2026, replied to the Applicants' notice and made certain assertions which, according to the Applicants, were false. The Applicants state that efforts were thereafter made to resolve the disputes and differences between the parties, but those efforts did not succeed. The Applicants were therefore required to approach this Court. Hence, the present Arbitration Application has been filed.

3. Ms. Sunder, learned Advocate for the Applicants, submits that there are valid and continuing Purchase Orders under which the Respondents supplied the Machine to the Applicants. She

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submits that under these Purchase Orders, the Applicants and Respondents had agreed to resolve their disputes through arbitration. According to her, the Respondents have breached the Arbitration Agreement contained in Clause No.9 of the Purchase Orders by filing a Suit. The Applicants reserve their liberty to take appropriate proceedings, including but not restricted to filing an Application under Section 8 of the Arbitration and Conciliation Act, 1996. At the same time, the Applicants apprehend that the Respondents may proceed ex parte against them in the said Suit. It is submitted that the Suit filed by the Respondents is clearly without jurisdiction and is contrary to the Arbitration Agreement contained in Clause No.9 of the Domestic Purchase Orders. According to the Applicants, it would therefore be unfair to refuse an order against the Respondents from proceeding before a Court which, on the face of the matter, would have no jurisdiction in view of Clause No.9 of the Domestic Purchase Order. She submits that Clause 9 of the Purchase Order states "Subject to Mumbai Jurisdiction." According to her, it is well settled that when parties agree to give exclusive jurisdiction to a particular Court, the jurisdiction of all other Courts is excluded. She submits that filing the Suit at Gurugram amounts to forum shopping and is contrary to the contractual arrangement between the parties. According to the Applicants, the Suit has been filed only to cause difficulty and harassment to them.

4. In support of her submissions, Ms. Sunder relies upon the judgments in the cases of *Enercon (India) Limited & Others vs. Enercon GMBH & Another,* (2014) 5 SCC 1, *Janki Vikas Sant &*

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Others vs. Konkan Vikas Development Company Ltd., 2015 SCC OnLine Bom 2273, *Visa International Limited vs. Continental Resources (USA) Limited,* (2009) 2 SCC 55, *Poonawalla Fincorp Limited vs. Aditya Lands Private Limited & Others,* MANU/WB/1836/2025, *Hitesh Coal Traders vs. Indapur Dairy & Milk Products Ltd.,* 2026 SCC OnLine Bom 2859, *the decision of Royal Courts of Justice* dated 13 December 1965 in the matter between *Tritonia Shipping Incorporated vs. South Nelson Foresh Products Corporation,* and the decision dated 18 July 1969 in the case of *J.C. Kirkland LTD vs. James Cameron Kirkland*.

5. Mr. Saharawat, learned Advocate for the Respondents, submits that before filing the present Application, Applicant No.1 through Applicant No.2 had already entered appearance in Commercial Suit No.11 of 2026 pending before the Court of the Civil Judge (Junior Division), Gurugram, hereinafter referred to as "the Commercial Suit". He submits that the Applicants have filed a detailed Written Statement in that Suit, along with an Application under Section 151 of the Code of Civil Procedure, 1908 seeking to have the Written Statement taken on record. More importantly, according to the Respondents, the Applicants have stated in their Written Statement that the applicant, being the defendant therein, has "already preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996, seeking reference of the disputes to arbitration". It is submitted that till date the Respondents have not been served with a copy of any such Application under Section 8 of the Act. They state that they have no knowledge of any such Application having been filed. It is

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submitted that Clause 9 of the Commercial Terms of the Purchase Orders at Exhibits A and B, which reads in its entirety, "9. Arbitration Subject to Mumbai Jurisdiction." does not amount to a valid and binding arbitration agreement between the parties within the meaning of Section 7 of the Act. According to the Respondents, this objection was raised in their Reply dated 23 February 2026 to the Applicants' Invocation Notice dated 11 February 2026. The same objection is reiterated and explained in the present proceedings.

6. He submits that although there is no particular form in which an arbitration agreement must be made, the words used by the parties must show a clear decision and obligation to refer their disputes to arbitration. There must be something more than a mere possibility that the parties may choose arbitration later. According to him, where a clause requires or suggests that some consent, agreement or decision between the parties is necessary before the dispute can be referred to arbitration, such clause does not constitute a binding arbitration agreement. In support of this submission, he relies upon *Jagdish Chander v. Ramesh Chander,* (2007) 5 SCC 719. He submits that the essential requirements of a valid arbitration agreement, as recognised by the Supreme Court, include: (a) a clear and unambiguous intention to refer present or future disputes to arbitration; (b) an obligation to arbitrate and not merely an option or possibility; (c) the arbitral award being final and binding upon the parties; and (d) sufficient clarity regarding the manner in which the arbitral tribunal is to be constituted. He relies upon *K.K. Modi v. K.N. Modi,* (1998) 3 SCC

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573. He submits that Clause 9 of the Purchase Orders at Exhibits A and B does not satisfy these requirements when it is read plainly. According to him, the clause contains only the three words “Subject to Mumbai Jurisdiction” under the heading “Arbitration”. It does not say that disputes “shall” or “will” be referred to arbitration. It does not provide any procedure for constitution of an arbitral tribunal. It does not state that an arbitral award would be final and binding. It does not otherwise show any clear intention of the parties to submit their disputes to private arbitration instead of having them decided by a Court. According to the Respondents, merely using the heading or word "Arbitration" cannot by create a binding arbitration agreement when the actual operative words do not create an unconditional obligation to arbitrate. He relies upon *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*, (2022) 20 SCC 636, where a clause headed “Settlement of Disputes / Arbitration” was held not to amount to an arbitration agreement because the substantive part of the clause required the non-government parties to seek redressal “in a court of law”, despite the heading. He relies upon *BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd.,* 2025 INSC 874, wherein the Supreme Court, in its judgment dated 18 July 2025, reiterated that permissive or unclear language is not enough to create a binding arbitration agreement under Section 7 and that the language must be clear and mandatory. It is submitted that, on a natural reading, Clause 9 is at the highest an unclear and abbreviated clause which brings together the words “arbitration” and “jurisdiction” without making it clear which method of

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resolving disputes was intended by the parties. It does not make clear whether the parties intended their disputes to be decided by private arbitration or by the civil Courts at Mumbai. According to the Respondents, such an unclear clause does not satisfy the requirement of a clear and definite arbitration agreement. It is submitted that the Applicants, being the parties relying upon Section 11, are required to establish the existence of an arbitration agreement, and that burden has not been discharged.

7. It is submitted that the Applicants are, in substance, treating Clause 9 as an exclusive jurisdiction or forum-selection clause giving jurisdiction to the civil Courts at Mumbai and excluding other Courts. According to the Respondents, this position is fundamentally inconsistent with the Applicants' other case stated in paragraph 3 and elsewhere in the present Application, where the Applicants contend that the very same Clause 9 is a binding arbitration agreement requiring the parties to refer their disputes to a private arbitral tribunal instead of a Court. It is submitted that the same clause cannot, in law, at the same time be construed to exclude the jurisdiction of civil Courts in favour of private arbitration and confer exclusive jurisdiction upon a particular civil Court to decide the dispute on its merits. According to the Respondents, these two constructions cannot stand together.

REASONS AND FINDINGS:

8. I have considered the submissions of Ms. Sunder, learned Advocate for the Applicants, and Mr. Saharawat, learned Advocate for the Respondents. The question is whether there is an

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arbitration agreement in writing between the parties, so that this Court can exercise jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996.

9. There is no serious dispute that the Purchase Order is a written document. It is for supply of a Hydraulic Press and contains various technical and commercial terms. In the commercial terms, Clause 9 is written as follows:

> "9. Arbitration ~ Subject to Mumbai Jurisdiction."

10. Therefore, these are not are written in the Purchase Order and are part of the terms. The Purchase Order has terms regarding delivery, payment, installation, commissioning, and warranty. From this it can be seen that the parties had entered into a commercial arrangement. The word "Arbitration" is separately appearing in the terms of the same Purchase Order.

11. The Respondents submit that Clause 9 cannot be treated as an arbitration agreement. Their submission is that the clause only contains the words "Arbitration" and "Subject to Mumbai Jurisdiction". There is no statement that the disputes "shall" or "will" be referred to arbitration. It is submitted that there is no procedure for appointment of arbitrator, no words that the award will be final and binding and no detailed procedure for conducting arbitration. According to the Respondents, because of these omissions, the clause is incomplete and does not show that there was a final agreement to arbitrate.

12. I am not able to accept the submission. It is true that Clause 9 is very short. It is true that many things which are seen in a

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detailed arbitration clause are not mentioned. But only for this reason it cannot be said that there is no arbitration agreement. Section 7 of the Act does not require that any particular fixed words must be used for making an arbitration agreement. What is required is to see what the parties have agreed. It is not necessary that the clause should be drafted in the legal language which a lawyer may use for drafting an arbitration clause.

13. The Supreme Court in *K.K. Modi*, as reproduced in *Babanrao Rajaram Pund v. Samarth Builders & Developers*, (2022) 9 SCC 691, has stated the attributes which generally show an arbitration agreement. The relevant passage is:

> "17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:
>
> (1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement,
>
> (2) that the jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,
>
> (3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,
>
> (4) that the tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,
>
> (5) that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law and lastly,
>
> (6) the agreement must contemplate that the tribunal will

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make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

14. The Supreme Court has observed:

> "18. The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law."

15. These observations do not mean that every one of these things must be separately written in the agreement. What is to be seen is whether the words used by the parties, if read with the whole contract, show that the parties intended their disputes to be decided by arbitration and not by an ordinary civil suit. This is why the Supreme Court in *Babanrao Rajaram Pund* has given importance to the substance of the clause and the intention which comes from the agreement. In the same judgment, while considering an arbitration clause which had more words and detailed machinery, the Supreme Court observed in paragraph 23:

> "23. Adverting to the case in hand, it may be seen that the contents and the nature of Clause 18 are substantially different from the dispute resolution pacts in K.K. Modi [K.K. Modi v. K.N. Modi, (1998) 3 SCC 573] , Jagdish Chander [Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719] , or Encon Builders [Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418] . We say so for three reasons. Firstly, apart from the fact that Clause 18 of the development agreement uses the terms "arbitration"

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> and "arbitrator(s)", it has clearly enunciated the mandatory nature of reference to arbitration by using the term "shall be referred to arbitration of a sole arbitrator mutually appointed, failing which, two arbitrators, one to be appointed by each party to dispute or difference". Secondly, the method of appointing the third arbitrator has been clearly mentioned wherein the two selected arbitrators are to appoint a third arbitrator. Finally, even the governing law was chosen by the parties to be "the Arbitration and Conciliation Act, 1996 or any re-enactment thereof." These three recitals, point towards an unambiguous intention of the parties at the time of formation of the contract to refer their dispute(s) to arbitration."

16. The Respondents have relied upon this paragraph and say that Clause 9 in the present case does not contain similar words and therefore it cannot be enough. I am not able to accept this submission. The Supreme Court in *Babanrao* has not said that every arbitration agreement must contain exactly the same words as were contained in Clause 18 of that case. The Court considered the agreement before it and looked at its substance. In paragraph 24, the Supreme Court held:

> "24. We are, therefore, of the firm opinion that the High Court fell in error in holding that the appellant's application under Section 11 was not maintainable for want of a valid arbitration clause. We find that Clause 18 luminously discloses the intention and obligation of the parties to be bound by the decision of the tribunal, even though the words "final and binding" are not expressly incorporated therein. It can be gleaned from other parts of the arbitration agreement that the intention of the parties was surely to refer the disputes to arbitration. In the absence of specific exclusion of any of the attributes of an arbitration agreement, the

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> respondents' plea of non-existence of a valid arbitration clause, is seemingly an afterthought."

17. The same approach is required in the present case. The clause which the Respondents say is uncertain does not say that the parties will decide about arbitration at some later point of time. There are no words like "if the parties agree", "if mutually decided" or "may seek arbitration". The word which is before the Court is "Arbitration". After this the words are "Subject to Mumbai Jurisdiction". Therefore, it is required to see what an ordinary commercial person would understand from these words when they are written as Clause 9 in a concluded Purchase Order.

18. The Respondents have relied upon *Jagdish Chander* and *BGM and M-RPL-JMCT (JV)*. The principle in *Jagdish Chander* is not in dispute. The Court has to see whether the parties had agreed to arbitrate when the contract was made, and not merely whether they had an understanding that they may make such an agreement later. The Supreme Court, in paragraph 8 of *Jagdish Chander*, stated:

> "8. … (i) … 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.
>
> (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."

19. This principle, in my view, does not help the Respondents in the way they suggest. In the present Clause 9, there are no words showing that some fresh consent of both parties is required before

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arbitration can happen. The clause does not say that arbitration will happen only if the parties later agree. This difference is important.

20. The decision in *BGM and M-RPL-JMCT (JV)* has to be seen from the actual words used in that case. Clause 13 there used the following expression:

> "may be sought through ARBITRATION AND CONCILIATION ACT, 1996 as amended by AMENDMENT ACT OF 2015"

21. The Supreme Court, in paragraph 31, held:

> "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."

22. The difference between that clause and the present Clause 9 is important. In *BGM*, the words "may be sought" showed that arbitration depended on some agreement between the parties. In the present case, there are no such words. The clause directly uses the word "Arbitration". Therefore, the particular reason because of which the Supreme Court did not treat Clause 13 in *BGM* as an

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arbitration agreement is not present in Clause 9 before this Court.

23. The Respondents have pointed out that the words "shall be referred" or "will be referred" are not present in Clause 9. This objection appears to give more importance to how the sentence is written than to what the words can mean. An arbitration clause can be written in short form. Merely because short commercial words are used, it cannot be presumed that the word "Arbitration" was put there without any legal meaning.

24. I am conscious of position of law that an English judgment has no binding force merely because it was delivered by the English Court of Appeal. It may be used as persuasive material. In this connection, the decision in *Tritonia Shipping Incorporated v. South Nelson Forest Products Corporation*, [1966] 1 Lloyd's Rep. 114 (Court of Appeal)(CA) is of some help because the arbitration clause there was very short. The clause in that case was:

> "29. Arbitration to be settled in London".

25. The Court considered whether there was a binding submission to arbitration and observed that the clause, though brief, "could only have the one meaning". It was expanded to mean:

> "Any dispute under this charter party to be settled by arbitration in London".

26. The Court then said:

> "I think that was the agreement of the parties, It was an agreement and is binding."

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27. Thus, the decision shows that only because detailed words are not written, an arbitration agreement does not become invalid, where the commercial meaning of the words can reasonably be understood. The Respondents may say that *Tritonia* is different because in that case the words "to be settled in London" were used, whereas in the present case there are only the words "Subject to Mumbai Jurisdiction". There is some difference in wording, but this by does not remove the principle. In *Tritonia*, the word "London" gave the territorial connection to the arbitration. Here, "Mumbai Jurisdiction" gives a territorial connection. The words "Subject to" do not say that arbitration is optional. They qualify the arbitration arrangement with reference to Mumbai jurisdiction.

28. The next decision relied upon, namely *Hobbs Padgett & Company (Reinsurance) Ltd. v. J.C. Kirkland Ltd.*, [1969] 2 Lloyd's Rep. 547 (Court of Appeal) (CA), is useful for the limited issue of a short arbitration clause. In that case Clause 16 was only:

> "Suitable Arbitration Clause."

29. Even then the Court held that the clause had meaning. Lord Justice Salmon observed:

> "The fact that the clause is very short does not seem to me to make it any less meaningful."

30. The Court then considered *Tritonia* and observed that an arbitration clause almost as short had been enforced. It finally held:

> "It seems to me that "Suitable Arbitration Clause"

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> Means that these parties have agreed that, if any dispute arises between them under the contract, including any dispute as to the meaning of the contract, that dispute should be referred to arbitration rather than to the courts".

31. The judgment says that the parties had made their intention clear that their differences should be arbitrated and that the Court should not become too technical only because of the words used. The facts of *Kirkland* were different and the words used there were "Suitable Arbitration Clause". Therefore, that judgment cannot be applied directly as if both clauses are the same. But the principle that a commercial contract should not fail only because the arbitration words are short is relevant. The Court there looked at what a businessman could reasonably understand from the words. Here the Purchase Order is a commercial document. It contains terms for supply of a costly Machine, payment stages, installation, commissioning and warranty. The word "Arbitration" is written as Clause 9 amongst the commercial terms of the Purchase Order.

32. I, therefore, find substance in the submission of the Applicants that the heading and the words following it have to be read together. The Court cannot read only "Subject to Mumbai Jurisdiction" and leave out the word "Arbitration". Similarly, the Court cannot read only "Arbitration" and leave out "Subject to Mumbai Jurisdiction". Both expressions are required to be read as one clause.

33. The submission of the Respondents that "Arbitration" is only a heading cannot be accepted. It is not a separate heading followed by an unrelated provision. The actual printed term is:

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"9 Arbitration ~ Subject to Mumbai Jurisdiction."

34. It is a numbered commercial term. There is no sentence saying that the parties will decide later whether arbitration is to be used. Therefore, on plain reading, arbitration was agreed and the arbitration arrangement was made subject to Mumbai jurisdiction.

35. I have considered the submission of the Respondents that "Mumbai Jurisdiction" means jurisdiction of civil courts and therefore the clause cannot at the same time be an arbitration agreement. It may be that the word "jurisdiction", in some other agreement or in some other setting, may refer to civil court jurisdiction. But here the complete Clause 9 is required to be read. If the parties intended only to give jurisdiction to Mumbai civil courts, there is no clear reason why the word "Arbitration" was put immediately before "Subject to Mumbai Jurisdiction". The interpretation suggested by the Respondents would, in effect, require the Court to give no real meaning to the word "Arbitration". Such a reading should not be preferred when another reasonable meaning can give effect to both parts of the clause. It is not impossible to say that arbitration is subject to Mumbai jurisdiction. Arbitration is not outside the supervision of courts. The parties can connect the arbitration with a particular place or jurisdiction. Therefore, merely because the words "Arbitration" and "Mumbai Jurisdiction" are together, it cannot be said that the clause has no meaning.

36. The Applicants have submitted that "Mumbai Jurisdiction" gives exclusive jurisdiction to Mumbai and therefore the filing of

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the suit at Gurugram is contrary to the contract. I do not think it is necessary for this Court, in the present application, to give a final finding regarding the territorial jurisdiction of the Gurugram civil court. That question can be considered by the court which is dealing with that proceeding and as per the remedies available in law. For the present Section 11 application, it is enough to find that the words relating to Mumbai jurisdiction do not destroy the arbitration agreement contained in Clause 9.

37. The Respondents have relied upon the fact that the Applicants appeared in the Gurugram proceedings and stated in their Written Statement that they "already preferred an application under Section 8 of the Arbitration and Conciliation Act, 1996, seeking reference of the disputes to arbitration". The Applicants have stated that they reserve their rights regarding the Section 8 proceedings and have separately invoked arbitration. In my view, this later conduct is not necessary for creating the arbitration agreement. The agreement, if there is one, comes from the contract. At the same time, the act of the Applicants invoking Clause 9 by notice dated 11 February 2026 cannot create a contractual term which was not present in the Purchase Order. It is only the Applicants asserting the right which, according to them, was already agreed. Similarly, the Reply dated 23 February 2026 of the Respondents denying the arbitration agreement cannot remove a agreement if such agreement is otherwise found to exist.

38. The Respondents submit that the Applicants have relied upon Section 8 proceedings and at the same time approached this Court under Section 11 and therefore their stand is inconsistent. I

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do not find this submission enough to decide the present issue. Section 8 and Section 11 arise in different situations. The arbitration agreement existed when the Purchase Order was entered into. The proceedings which came later cannot decide whether that agreement existed.

39. I have considered the submission that Clause 9 does not give any procedure for appointment of an arbitrator. This cannot mean that there is no arbitration agreement. Where parties agree for arbitration but do not give complete machinery for appointment, the law can provide the necessary machinery. The *Tritonia* decision proceeded on this understanding. The absence of a separate appointment method was not treated there as destroying the arbitration agreement. In the present matter, the Applicants invoked arbitration and suggested names of Advocates for appointment as Sole Arbitrator. The Respondents did not agree to the appointment. Therefore, not agreeing on the name of an arbitrator is a different matter from not agreeing to arbitration. One issue is about procedure or machinery and the other is about consent to arbitrate. At this stage, it is the latter which has to be considered.

40. The Supreme Court in *Babanrao* has made clear that absence of some words does not make an arbitration clause invalid. Paragraph 25 states:

> "25. Even if we were to assume that the subject clause lacks certain essential characteristics of arbitration like "final and binding" nature of the award, the parties have evinced clear intention to refer the dispute to arbitration and abide by the

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> decision of the tribunal. The party autonomy to this effect, therefore, deserves to be protected."

41. Again, in paragraph 26, while considering *Enercon*, the Supreme Court quoted the following principle:

> "88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach should be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute."

42. The Purchase Order is not a detailed institutional arbitration agreement. It is a commercial Purchase Order for a Machine and contains many technical and commercial conditions. In such a document, an arbitration term may be written in short form. The Court should not make a new contract for the parties. But equally, the Court should not remove a contractual term only because it is not written in detailed language.

43. The submission of the Respondents that there is no provision about finality of the award does not take the matter. It is not necessary that the parties should write every effect of arbitration in the contract. Once a valid arbitration agreement is found, the

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consequences under the Arbitration and Conciliation Act will follow. The parties are not required to write the whole Act into the Purchase Order.

44. Another thing is required to be kept in mind. The two English judgments relied upon by the Applicants are not being used to make some different rule against the Arbitration and Conciliation Act. They are being considered only for the limited point that a commercial arbitration clause does not become meaningless merely because it is short or not happily drafted. In *Tritonia*, the words "Arbitration to be settled in London" were given the reasonable meaning coming from the words. The Court said, "I think that was the agreement of the parties, It was an agreement and is binding."

45. Similar reasoning is found in *Kirkland*. There the Court found that the parties had made their intention clear that their differences should be arbitrated. The Court did not take a technical view merely because the clause was short. The judgment records that if the clause had simply read "arbitration Clause", there would have been no doubt that it was sufficiently precise. The Court therefore did not consider the addition of the word "Suitable" enough to make the clause uncertain.

46. I am conscious that the Supreme Court decisions relied upon by the Respondents require the Court to distinguish between an actual arbitration agreement and an agreement to make an arbitration agreement in future. There is no departure from that principle here. If Clause 9 had said, for example, "disputes may be

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referred to arbitration if mutually agreed" or "arbitration, if parties so decide", then the position may have been different. Such words would show that consent was required. There are no such words in Clause 9. The word "subject" does not show that consent was required. It can reasonably be read as qualifying the arbitration arrangement with reference to Mumbai jurisdiction. The words may not have been drafted perfectly, but imperfect drafting is not same as no agreement. The commercial meaning can still be understood when Clause 9 is read as a whole and along with the Purchase Order.

47. I have considered the submission that the Applicants cannot rely upon "Mumbai Jurisdiction" as a contractual restriction against the Gurugram suit and at the same time say that the same clause is an arbitration agreement. I do not find that these two positions destroy each other. The clause can be understood as providing arbitration for disputes while making the arbitration subject to Mumbai jurisdiction for purposes where the law gives supervisory jurisdiction to courts. Therefore, it is not necessary to accept the Applicants' alternative submission that "Mumbai Jurisdiction" is only an exclusive jurisdiction clause for civil proceedings in Mumbai. In my view, both parts of Clause 9 should be given some meaning as far as possible. The interpretation suggested by the Respondents gives effect to "Mumbai Jurisdiction" but makes the word "Arbitration" without meaning. This does not appear to be the proper way of reading a contractual term. The interpretation suggested by the Applicants gives some meaning to both parts by treating "Arbitration" as the agreed

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method for resolving disputes and "Subject to Mumbai Jurisdiction" as the qualification regarding the place or jurisdiction connected with such arbitration.

48. The submission that Clause 9 does not say that disputes are to be arbitrated "rather than before courts" cannot be accepted. Such words may make the intention clearer, but they are not compulsory if the agreement otherwise shows an intention to arbitrate. In *Kirkland*, even the words "Suitable Arbitration Clause" were treated as showing an agreement that disputes should go to arbitration rather than the courts. The important point was that the intention of the parties could be understood from the clause. The material before me does not show that the word "Arbitration" was inserted only for some future discussion. It appears as Clause 9 amongst the final commercial terms of the Purchase Order. The other provisions of the same document are written in short commercial language. There are terms regarding delivery, payments and other obligations, without writing every consequence which may come from them. Clause 9 has to be understood in this same commercial meaning. Therefore, the apprehension of the Respondents that by accepting this clause the Court would be supplying an agreement which the parties never made, is not accepted. The Court is not adding the word "shall" to the contract as a new term. The Court is trying to understand the words already written in the Purchase Order in their ordinary commercial setting. The word "Arbitration", along with the fact that there is no condition requiring fresh consent, is sufficient to show the intention to use arbitration for disputes arising from the

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Purchase Order.

49. Whether a particular dispute is covered by Clause 9, whether any claim is barred by limitation, whether any amount is payable, whether the Respondents committed the alleged breaches, whether the Gurugram proceedings are maintainable, or what final relief the Applicants may get, are matters which do not have to be finally decided for deciding whether an arbitration agreement exists. Such questions can be considered in the proper proceedings and as per law. Similarly, it is not necessary for this Court at this stage to decide whether statement made in the Gurugram proceedings is correct or incorrect.

50. On considering the whole matter, I find that the Applicants have been able to show existence of a written arbitration agreement between the parties. I am therefore satisfied that the basic requirement regarding existence of an arbitration agreement is fulfilled. The disputes arising from or connected with the Purchase Order are accordingly referable to arbitration, subject to such questions as may arise before the Arbitral Tribunal in accordance with law.

51. The request of the Applicants for appointment of an arbitrator is therefore required to be considered on the basis that Clause 9 constitutes a valid arbitration agreement. The other questions regarding constitution of the Arbitral Tribunal and the appropriate order under Section 11 will follow accordingly.

52. In view of the aforesaid, the present Application filed under Section 11 of the Act, is disposed of by passing the following

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order:

A) Mr. Shadab Jan, an advocate of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Office Address:- 1701, One Infinity, Cawasji Patel Street, Fort, Mumbai – 400001.

Email ID:shadabsjan@outlook.com

B) A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from today. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C) The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Applicant and a copy of the same shall be furnished by the Advocates for the Applicant to the Advocates for the Respondent;

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D) The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

E) The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

53. All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

54. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

55. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

(AMIT BORKAR, J.)

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