IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

RESERVED ON: 09.09.2026
DELIVERED ON: 30.09.2026

PRESENT:

THE HON'BLE MR. JUSTICE GAURANG KANTH

AP-COM 203 OF 2025

M/S DESIRE AGRO RESORTS DEVELOPMENT LTD

VS

M/S ASHIANA VINIMAY PVT LTD AND ANR

Appearance: -

Ms. Tanuka Basu, Adv.
Ms. Tripti Ghosh, Adv.
..... for the petitioner

Mr. Varun Kothari, Adv.
Mr. A. Agarwalla, Adv.
Ms. Shatabdi Kundu, Adv. ***..... ...for the respondents***

JUDGMENT

Gaurang Kanth, J. :-

1. The Petitioner preferred the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeking the appointment of an arbitrator to adjudicate the disputes between the parties arising out of the Memorandum of Understanding dated 30.11.2009 executed between the Petitioner and Respondent No. 1.

2. The facts leading to the present petition are as follows:

3. The Petitioner is a private limited company engaged in real estate development, being the promoter of a realty project over the land purchased by it as aforesaid. Respondent No. 1 is a private limited company which owns land adjacent to that of the Petitioner and is a signatory to the said MOU.

Respondent No. 2 is a private limited company, stated by the Petitioner to be a sister/associate concern of Respondent No. 1, in whose favour the Petitioner sold certain plots of land vide the four registered sale deeds referred to above.

4. The Petitioner had purchased land measuring about 17.06 bighas, and had entered into an agreement for purchase of land measuring about 350 bighas, situated at Mouza-Vasa and Uttar Kajir Hat, J.L. Nos. 20 and 22 respectively, P.S. Bishnupur, District South 24 Parganas, from one M/s Joyotu Land Development Pvt. Ltd., and vide several registered sale deeds became the owner of the said land. Respondent No. 1, by virtue of several registered deeds of conveyance, purchased land adjacent to the land of the Petitioner in the same mouzas.

5. Disputes having arisen between the Petitioner and the said Joyotu Land Development Pvt. Ltd., and at the intervention of common friends, the Petitioner and Respondent No. 1 amicably settled the same and entered into the Memorandum of Understanding dated 30.11.2009, demarcating each party's land (Schedules A/A1 for Respondent No. 1 and B for the Petitioner), providing for exchange of certain plots (Schedules C and D), and for Respondent No. 1 to construct a 40–50 ft metalled road (Schedule E land) for use as a common passage for pathways, egress and ingress, electricity, waterline and telephone line, with a "reserve space" for garden/beautification on which the Petitioner would have no right of access.

6. At the request of Respondent No. 1, the Petitioner also sold certain plots of land to Respondent No. 2, vide four registered sale deeds, in which Respondent No. 1 was made a confirming party, and it was recorded that such sale was subject to the terms and conditions of the said MOU.

7. Disputes arose between the parties on account of Respondent No. 1's failure to construct the metalled road as agreed under the MOU despite repeated requests by the Petitioner, the last being on 6th August, 2024, and on account of Respondent No. 1 allegedly attempting to encumber, alienate and/or construct upon the Schedule "E" land and encroach upon the Petitioner's access.

8. Left with no alternative, the Petitioner filed an application under Section 9 of the Arbitration and Conciliation Act, 1996, being Misc. Case (Arb.) No. 65 of 2024, before the Learned District Judge, South 24-Parganas at Alipore, praying for injunctive reliefs. The said application was heard *ex parte*, and by order dated 16.08.2024, an ad-interim injunction was granted in favour of the Petitioner restraining the Respondents from entering into any agreement with any third party and/or encumbering, alienating and/or parting with the Schedule "E" land, till 12.09.2024, subject to the condition that the Petitioner would initiate arbitration proceedings by appointment of an arbitrator within 90 days from the date of the said order.

9. In compliance with the said direction, the Petitioner, through its advocate, issued a notice dated 12.11.2024 under Section 21 of the Arbitration and Conciliation Act, 1996, invoking the arbitration clause contained in Clause 9 of the MOU and calling upon the Respondents to consent to the appointment of a named sole arbitrator to adjudicate the disputes between the parties. The said notice was duly served upon Respondent No. 1 and its director, as also upon Respondent No. 2. However, the notice addressed to the then director of Respondent No. 2 was returned unserved with the postal remark "dead", and the Respondents did not respond to the notice or appoint an arbitrator in terms thereof.

10. Being aggrieved thereby, the Petitioner has preferred the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying for the appointment of a fit and proper person as arbitrator to adjudicate the disputes and differences arisen between the parties.

Submission on behalf of the Petitioner

11. Ms. Tanuka Basu, learned counsel for the Petitioner submits that Clause 9 of the Memorandum of Understanding dated 30.11.2009 constitutes a valid and binding arbitration clause, which provides that in the event of any difference or dispute between the parties in connection with, or arising out of, the said MOU, the same shall in the first instance be settled and resolved by the parties mutually, failing which such dispute or difference "may be referred to arbitration" within the meaning of the Arbitration and Conciliation Act, 1996. It is submitted that the mere use of the expression "may" does not detract from the binding character of the clause, and the same has to be read as a whole and not in isolation; when so read, it manifests a clear and unambiguous intention on the part of the parties to have their disputes resolved through arbitration. It is submitted that the true test in construing an arbitration clause is the intention of the parties, gathered from the clause read in its entirety, the nature of the transaction and the surrounding circumstances, and applying the said test, the parties herein were ad idem on the point of referring their disputes to arbitration. In support of this submission, learned counsel for the Petitioner places reliance on the judgment of the Hon'ble Supreme Court in ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components,*** reported as ***(2018) 9 SCC 774***, wherein, in the context of a clause providing an option to the parties to proceed either by arbitration or by litigation, it was held that

since the petitioner therein had invoked the arbitration clause, the intention of the parties to resolve the disputes through arbitration stood established, and reliance was placed on the earlier decision in ***Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd.,*** reported as ***(2008) 10 SCC 308***, for the proposition that emphasis has to be laid on the intention of the parties rather than on the precise phraseology employed in the clause.

12. Learned counsel for the Petitioner further submits that Respondent No. 2 is a sister/associate concern of Respondent No. 1, and it was at the specific instance and request of Respondent No. 1 that the Petitioner executed registered conveyance deeds in favour of Respondent No. 2. It is submitted that the MOU dated 30.11.2009 itself makes reference to Respondent No. 2 and its lands, thereby demonstrating that Respondent No. 2 was within the contemplation of the parties at the time of execution of the MOU. It is further submitted that the conveyance deeds executed in favour of Respondent No. 2 specifically and expressly recite that all the terms and conditions of the said MOU shall be applicable thereto, and that in terms of Section 7(5) of the Arbitration and Conciliation Act, 1996, such a reference to a document containing an arbitration clause constitutes an arbitration agreement, where the reference is such as to make the arbitration clause part of the contract. It is accordingly submitted that Respondent No. 2, having taken the benefit of the conveyance executed subject to the terms of the MOU, is equally bound by the arbitration clause contained therein.

13. Learned counsel further submits that the present proceedings are not barred by the law of limitation. It is submitted that although the MOU was executed on 30.11.2009, the disputes giving rise to the present proceedings did not arise on the date of execution of the MOU but only when the Petitioner

became aware, in or about the year 2024, of the acts of Respondent Nos. 1 and 2 affecting its rights under the MOU, including the failure to construct the metalled road and the attempt to deal with the Schedule "E" land contrary to the terms of the MOU. It is submitted that the cause of action, and consequently the period of limitation, arose only upon the Petitioner acquiring knowledge of the respondents' conduct inconsistent with the MOU and their refusal/failure to perform their obligations thereunder, and that the present petition, filed thereafter, is well within limitation.

14. Lastly, learned counsel submits that, in compliance with the mandatory requirement of Section 21 of the Arbitration and Conciliation Act, 1996, and pursuant to the direction contained in the order dated 16.08.2024 passed in the Section 9 proceedings, the Petitioner issued a notice dated 12.11.2024 invoking the arbitration clause and calling upon the respondents to concur in the invocation of the arbitration clause and in the appointment of a named sole arbitrator. It is submitted that the said notice was duly received on behalf of Respondent Nos. 1 and 2, and it was only the notice addressed to the erstwhile director of Respondent No. 2 which was returned with the postal endorsement that he was "no more", a circumstance which cannot enure to the benefit of the respondents or defeat the Petitioner's right to seek appointment of an arbitrator, more particularly when the notice stood duly served upon the respondent companies, who thereafter also filed their written objections in response thereto. In view of the aforesaid submissions, learned counsel for the Petitioner prays that the present petition be allowed and a fit and proper person be appointed as the sole arbitrator to adjudicate the disputes and differences that have arisen between the parties arising out of the Memorandum of Understanding dated 30.11.2009.

Submissions on behalf of the Respondents

15. Mr. Varun Kothari, learned counsel for the Respondents submits that the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 is misconceived and not maintainable, and deserves to be dismissed at the threshold, since Clause 9 of the Memorandum of Understanding dated 30.11.2009 does not constitute a binding arbitration clause. It is submitted that Clause 9 provides that in the event of any difference or dispute, the same shall in the first instance be settled and resolved by the parties mutually, *"failing which such dispute/differences may be referred to arbitration,"* and that the use of the word "may" is conscious and deliberate, denoting mere discretion and not a binding obligation to arbitrate. It is submitted that even upon failure of the compromise/mutual settlement talks, the clause does not automatically or mandatorily result in a reference to arbitration; the parties would still have to arrive at a fresh and further agreement or consensus to refer the matter to arbitration. Such requirement of further consent is fatal to the existence of a valid and binding arbitration agreement, inasmuch as the parties cannot be said to be *ad idem* on the vital question of referring their disputes to arbitration. In support of this submission, learned counsel places reliance on the judgment dated 07.04.2025 of this Court in ***Sunil Kumar Samanta v. Smt. Sikha Mondal, AP/15/2022***, where an identically worded *"may be decided by an Arbitrator"* clause was held to reflect only a future possibility and not a binding agreement, and on the judgment of this Court in ***BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Limited, AP 745 of 2023***, where, following the judgement of Hon'ble Supreme Court in ***Jagdish Chander v. Ramesh Chander,*** reported as ***(2007) 5 SCC 719***, it was held that words such as *"the parties may…"* are counter-productive to the

unequivocality of the intention to arbitrate and cannot constitute a binding arbitration agreement, resulting in dismissal of the Section 11 petition on the ground of maintainability.

16. Learned counsel further submits that, without prejudice to the above and in the alternative, even if this Court were to hold that Clause 9 constitutes a valid arbitration clause, no reference to arbitration can, in any event, be made as against Respondent No. 2, who is admittedly not a signatory or a party to the MOU dated 30.11.2009, executed solely between the Petitioner and Respondent No. 1. It is submitted that the mere circumstance that the conveyance deed(s) executed in favour of Respondent No. 2 make a passing reference to the said MOU does not, *ipso facto*, lead to the conclusion that the parties to the conveyance deed intended to incorporate or import the arbitration clause contained in the MOU into the conveyance deed as part of its terms. A bare reference to a document does not amount to "incorporation," and cannot substitute for the specific and unambiguous intention required in law to incorporate an arbitration clause from one document into another. In support of this submission, learned counsel places reliance on the judgment of the Hon'ble Supreme Court in ***Indowind Energy Limited v. Wescare (India) Limited and Another,*** reported as ***(2010) 5 SCC 306***, holding that a non-signatory company does not become a party to an arbitration agreement merely by reason of common directors or being described as a promoter/nominee, in the absence of a document signed by it, or a valid incorporation by reference under Section 7(5) of the Act, and on the recent judgment of the Hon'ble Supreme Court in ***Maharashtra State Electricity Distribution Company Limited (MSEDCL) & Ors. v. R Z Malpani***, arising out of ***SLP (C) No. 36889 of 2025*** (decided on 9th April, 2026), reiterating,

following ***NBCC (India) Ltd. v. Zillion Infraprojects Pvt. Ltd.,*** reported as ***(2024) 7 SCC 174***, that a mere general reference in one document to another document containing an arbitration clause does not incorporate the arbitration clause, unless the reference is specific and clearly indicates an intention to incorporate that clause itself. It is submitted that the conveyance deed executed in favour of Respondent No. 2 nowhere makes any specific reference to Clause 9 of the MOU or to the arbitration mechanism contained therein, but merely records the factum of execution of the MOU generally, and consequently no arbitration agreement can be said to exist between the Petitioner and Respondent No. 2, who is liable to be deleted from the array of parties.

17. Learned counsel further submits that the present petition, and the disputes sought to be referred to arbitration, are barred by limitation. It is submitted that the MOU was executed as far back as on 30.11.2009, and there is no correspondence, demand, or communication of any nature on record between the parties for a period of about fifteen years thereafter. It is further submitted that Article 54 of the Limitation Act, 1963 prescribes a period of three years for a claim founded on the said agreement, and that such period has plainly elapsed long before the Petitioner chose to raise any grievance in the year 2024. It is submitted that the pleading of an "imaginary" cause of action allegedly arising on 11.08.2024, unsupported by any contemporaneous document or correspondence, is a device resorted to only for the purpose of bringing the present proceedings within time, and cannot extend a period of limitation which had already expired, and that the conduct of the parties over the intervening period demonstrates that the MOU was never acted upon and has, for all intents and purposes, been given a go-by.

Legal Analysis

18. This Court heard the arguments advanced by both the parties and examined the documents and Judgments cited at bar.

19. The core issue involved in the present matter is whether Clause 9 of the Memorandum of Understanding dated 30.11.2009 constitutes a valid and binding arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996, so as to entitle the Petitioner to seek appointment of an arbitrator under Section 11(6) of the said Act.

20. Before adverting to the facts of the present case, this Court deems it appropriate to examine the law in this regard.

21. An arbitration agreement is the very foundation of arbitration, as it records the consent of the parties to submit their disputes to arbitration to the exclusion of the jurisdiction of the domestic courts. Section 2(b) read with Section 7 of the Arbitration and Conciliation Act, 1996 defines an "arbitration agreement" as 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. In ***Bihar State Mineral Development Corporation v. Encon Builders*****,** reported as **(2003) 7 SCC 418**, the Hon'ble Supreme Court culled out the essential ingredients of a valid arbitration agreement, namely: (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*.

22. The Hon'ble Supreme Court, in ***Jagdish Chander*** *(supra)*, authoritatively laid down the principles governing what constitutes an arbitration agreement,

holding, *inter alia*, that the words used in the clause *"should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration,"* and that *"where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted with an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement."* It was further held that the 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, and that clauses requiring the parties to arrive at a further agreement to go to arbitration *"as and when disputes arise"* are not arbitration agreements, but merely agreements to enter into an arbitration agreement in future.

23. This principle has consistently guided courts in interpreting the word *"may"* in dispute resolution clauses, such word has generally been construed as indicative only of a future possibility or discretion, and not of an unequivocal, binding commitment to arbitrate, since it leaves the door open for the parties to require a further or fresh consensus before any reference to arbitration can be made.

24. It is significant to note that the judgment of the Calcutta High Court in ***BGM and M-RPL-JMCT (JV)*** *(supra)*, which had held an identically structured clause, providing that *"the redressal of the dispute may be sought through ARBITRATION AND CONCILIATION ACT, 1996",* not to constitute a binding arbitration agreement, was carried in appeal before the Hon'ble Supreme Court, and has been upheld by the Hon'ble Supreme Court in ***BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Limited,*** reported as **2025 SCC OnLine SC 1471 (decided on 18.07.2025)**. The Hon'ble Supreme Court,

after extensively reiterating the principles laid down in ***Jagdish Chander* (supra)** and ***Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*,** reported as **(2022) 20 SCC 636**, held as follows:

> *"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."*

25. The Hon'ble Supreme Court further clarified, relying upon ***Jagdish Chander*** (supra), that *"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 conversely, *"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."* The Hon'ble Supreme Court also reiterated the settled scope of enquiry under Section 11(6-A) of the 1996 Act, namely, that the referral court, while examining the existence of an arbitration agreement, is required only to undertake a *prima facie* scrutiny and not a mini-trial, but where the professed arbitration agreement is found in an undisputed document, the Court must simply peruse the same to satisfy itself whether it, *prima facie*, fulfils the essential ingredients of Section 7. This Court, therefore, proceeds to examine Clause 9 of the MOU on this settled touchstone.

26. Turning to the facts of the present case, the Petitioner relies upon Clause 9 of the Memorandum of Understanding dated 30.11.2009, executed between the Petitioner and Respondent No. 1, as constituting the arbitration agreement. Clause 9 of the MOU reads as follows:

> *"9. That in the event of any difference or dispute between the parties herein in connection with, for purpose of and in relation to the said land or arising out of the construction of the present Memo of Understanding, the same shall be settled and resolved by themselves mutually failing which such dispute and differences may be referred to the arbitration within the meaning of Arbitration and Conciliation Act, 1996."*

27. A plain reading of Clause 9 shows that it is structured in the same manner as the clause considered and rejected in ***BGM and M-RPL-JMCT (JV)*** (supra). The parties are first required to settle the dispute mutually, and only upon failure of such mutual settlement does the clause provide that the dispute *"may"* be referred to arbitration. The clause does not, in unequivocal and mandatory terms, provide that the dispute "shall be referred to arbitration." It does not name arbitration as one of two definite, binding alternatives as was the case in ***Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd.*** *(supra)*, where the clause provided for reference "to the arbitration body for arbitration or the court". Instead, Clause 9 leaves the question of reference to arbitration entirely open ended and contingent upon a further and fresh consensus between the parties after failure of mutual settlement. The use of the word *"may"* in Clause 9, when tested against the principles laid down in ***Jagdish Chander*** *(supra)* and applied by the Hon'ble Supreme Court in ***BGM and M-RPL-JMCT (JV)*** *(supra)*, demonstrates that the parties were not *ad idem,* at the time of executing the MOU on the vital question of subjecting their disputes to arbitration. The clause, at best, is an enabling provision reflecting a desire or hope to explore arbitration as a mode of settlement if and

when the parties later so agree, and does not evidence the requisite unequivocal, binding intent to arbitrate.

28. In view of the foregoing discussion, this Court is of the considered opinion that Clause 9 of the Memorandum of Understanding dated 30.11.2009 does not constitute a valid and binding arbitration agreement as contemplated under Section 7 of the Arbitration and Conciliation Act, 1996.

29. In the absence of a valid arbitration agreement, the question of exercise of power under Section 11(6) of the said Act for appointment of an arbitrator does not arise, and the present petition is not maintainable. Since this Court has found, at the very threshold, that no arbitration agreement exists between the parties, it is not necessary to examine the other objections raised by the Respondents, namely, that Respondent No. 2 is not bound by the arbitration clause for want of being a signatory to the MOU, and that the claim is barred by limitation, and this Court refrains from expressing any opinion thereon.

30. This dismissal is confined to the maintainability of the present petition under Section 11(6) of the Act for want of a valid arbitration agreement, and shall not preclude the Petitioner from pursuing such remedies, including in respect of the interim order dated 16.08.2024 passed in Misc. Case (Arb.) No. 65 of 2024, as may be available to it in accordance with law.

31. Accordingly, the present petition is dismissed.

(GAURANG KANTH, J.)

SAKIL AMED (P.A)