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

COMM ARBITRATION APPLICATION NO.397 OF 2026

Jayant Infratech Limited ... Applicant

Vs.

RCCPL Private Limited ... Respondent

ATUL GANESH KULKARNI
Digitally signed by ATUL GANESH KULKARNI
Date: 2026.10.05 11:26:46 +0530

Mr. Yahya Ghoghari with Mr. Urusah M.I. i/by Dave & Co., for the Applicant.

Ms. Manjiri Parasnis with Mr. Tarun Shrivastava, and Ms. Samiksha Lokhande i/by Tarun Shrivastava for the Respondent.

CORAM : AMIT BORKAR, J.

RESERVED ON : SEPTEMBER 30, 2026

PRONOUNCED ON : OCTOBER 5, 2026

JUDGMENT:

1. The present Application has been filed under Section 11 of the Arbitration and Conciliation Act, 1996, by the Applicant seeking appointment of a Sole Arbitrator for adjudication of the disputes arising out of and in connection with the contract entered into between the Applicant and the Respondent for supply, installation, testing and commissioning of OHE (Overhead Equipment, meaning the electric wires and fittings used for supplying power to trains) and PSI (Power Supply Installation,

meaning the system through which electricity is supplied to the railway network) works at the Respondent's Mukutban siding in the Wani-Pimpalkhuti Section of Nagpur Division under Central Railway.

2. According to the Applicant, the arbitration clause is contained in Clause 18 of the General Conditions of Contract, which forms part of the tender and contractual documents exchanged between the parties through email communications. The said clause provides for settlement of disputes through arbitration at Mumbai. According to the Applicant, it duly completed the contractual work and Central Railway issued the Energisation Certificate dated 8 April 2024 confirming that the installation had been energised. After expiry of the Defects Liability Period on 10 April 2025, the retention amount of Rs.55,98,780/- became payable to the Applicant. However, despite repeated reminders and communications, the Respondent failed to release the said amount. Thereafter, in accordance with Clause 18 of the General Conditions of Contract, the Applicant issued a Notice of Dispute dated 21 November 2025, calling upon the Respondent to resolve the disputes amicably. As the disputes were not resolved, the Applicant invoked the arbitration agreement under Section 21 of the Arbitration and Conciliation Act, 1996, by Advocate's Notice dated 8 January 2026 and proposed appointment of a Sole Arbitrator. Despite receiving the said notice, the Respondent did not agree to the appointment of an Arbitrator within the prescribed period. Instead, the Respondent raised disputes relating to alleged delay, liquidated damages and other

matters, which according to the Applicant were contrary to the agreed mechanism for resolution of disputes.

3. According to the Applicant, the following facts led to the filing of the present Application. On 8 February 2023, the Respondent forwarded the tender documents to the Applicant for execution of OHE and PSI works at Mukutban siding. The said tender documents contained an arbitration clause in Clause 18 of the General Conditions of Contract. On 18 April 2023, the parties held a techno-commercial discussion and negotiation meeting. Thereafter, by email dated 26 April 2023, the parties confirmed the contractual terms which had been agreed between them, including the General Conditions of Contract and the arbitration clause. On 2 May 2023, the Respondent issued Consolidated Purchase Order No. G1-14-22-SP-2 in favour of the Applicant. On 6 September 2023, the said Consolidated Purchase Order was divided, for the purpose of execution, into Work Order No. 23782614 and Purchase Order No. 23124020. During the period from January to April 2024, the final checking of the work and the process of energisation were undertaken. On 8 April 2024, Central Railway issued an Energisation Certificate confirming that the system had been energised on 10 April 2024. According to the Applicant, upon expiry of the Defects Liability Period on 10 April 2025, the retention amount became due and payable. The Applicant issued the first reminder on 5 May 2025 requesting the Respondent to release the retention amount. A second reminder was issued on 26 June 2025 seeking payment of the outstanding amount. Since the amount was still not released, the Applicant issued a third

reminder on 24 July 2025.

4. On 21 November 2025, the Applicant issued a Notice of Dispute under Clause 18 of the General Conditions of Contract and called upon the Respondent to resolve the disputes amicably. As the disputes remained unresolved, the Applicant invoked the arbitration agreement under Section 21 of the Arbitration and Conciliation Act, 1996, by notice dated 8 January 2026 and proposed appointment of a Sole Arbitrator. On 16 February 2026, the Respondent sent its reply disputing the Applicant's claims. The Respondent alleged delay in execution of the work and raised claims towards liquidated damages. During February and March 2026, the Respondent did not agree to the appointment of the Arbitrator within the stipulated period. As the agreed procedure for appointment of the Arbitrator did not result in appointment of an Arbitrator, the Applicant filed the present Commercial Arbitration Application under Section 11 of the Arbitration and Conciliation Act, 1996, in April 2026.

5. Mr. Ghogari, learned Advocate appearing for the Applicant, submitted that the Reply filed by the Respondent accepts the existence of an arbitration agreement. According to him, once the existence of an arbitration agreement is admitted, the principal enquiry under Section 11 of the Arbitration and Conciliation Act, 1996 comes to an end. He submitted that the entire case of the Respondent proceeds on the basis that there is a binding arbitration agreement in writing between the parties. The Respondent has relied upon and reproduced Clause 20, titled “ARBITRATION”, forming part of the document described by the

Respondent as the “General Terms and Conditions”. The Respondent has pleaded that “the arbitration agreement contained in the tender document was superseded by subsequent agreements”. According to the learned Advocate, this plea assumes that there was an arbitration agreement in the subsequent documents. He submitted that, although the Respondent refers to a subsequent agreement, it has not stated when or in what manner the Applicant accepted such alleged subsequent agreement.

6. The learned Advocate submitted that the existence of an arbitration agreement between the parties is therefore not seriously disputed. According to him, the Respondent's case, at the highest, is that a different arbitration clause governs the disputes between the parties and that the seat of arbitration is elsewhere. Such a contention concerns the interpretation, applicability, and construction of the alleged arbitration clause. It does not amount to a denial of the existence of an arbitration agreement. He submitted that the reliance placed by the Respondent upon a different arbitration clause is misconceived because no such clause was ever agreed to, executed or incorporated into the contract between the parties. The learned Advocate submitted that, even according to the Respondent's own case, the disputes are required to be referred to “a sole arbitrator to be mutually appointed by the Parties under the provisions of the Arbitration and Conciliation Act, 1996”.

7. He submitted that it is an admitted position that the Respondent has not agreed to the appointment of any Arbitrator. In its letter dated 16 February 2026, the Respondent has stated

that it “does not consent to any unilateral appointment or proposal of an arbitrator”. No Arbitrator has been appointed till date. According to the learned Advocate, the agreed procedure for appointment of the Arbitrator has therefore failed. Consequently, the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 is attracted even on the Respondent's own case. This would be so irrespective of which of the two documents or clauses is ultimately found to govern the relationship between the parties. The learned Advocate submitted that the enquiry of this Court under Section 11 of the Act is limited to examining the existence of an arbitration agreement, subject to the principles laid down by the Supreme Court.

8. He submitted that all other questions raised by the Respondent are matters for consideration by the Arbitral Tribunal. These include the question whether the tender conditions were superseded, which document governs the relationship between the parties, the alleged misjoinder of causes of action, the alleged delay, the entitlement to liquidated damages, withholding, or adjustment of retention money, and the counter-claims proposed by the Respondent. According to him, the Arbitral Tribunal is fully competent to consider these questions, including the question of its own jurisdiction under Section 16 of the Act. He submitted that, even assuming that this Court were to examine any of these objections at this stage, the Respondent's own pleadings and contractual documents are mutually inconsistent. On the Respondent's own showing, they establish the existence of an arbitration agreement and establish that the agreed procedure for

appointment of the Arbitrator has failed.

9. He pointed out that the Applicant has placed on record the tender document forwarded by the Respondent under cover of its email dated 8th February 2023. The Applicant has placed on record the email dated 26 April 2023 recording the terms agreed between the partie. The Applicant has produced the operative contractual documents, namely Purchase Order No. G1-14-22-SP-2 dated 2 May 2023, marked as Exhibit "D1", Work Order No. 23782614 dated 6 September 2023, marked as Exhibit "D2", and Purchase Order No. 23124020 dated 6 September 2023, marked as Exhibit "D3". He therefore submitted that there has been no suppression of any material document by the Applicant. The learned Advocate submitted that, on the contrary, the Respondent has selectively produced only those documents which support its case and has not placed the complete contractual record before the Court. He submitted that the Applicant has produced the operative Purchase Order bearing Ref. No. G1-14-22-SP-2 dated 2 May 2023, Purchase Order No. 23124020 dated 6 September 2023 and Work Order No. 23782614 dated 6 September 2023.

10. As specifically stated in paragraph 8 of the Application, Purchase Order No. 23124020 and Work Order No. 23782614 were issued in substitution of the earlier Purchase Order dated 29 May 2023 and Work Order dated 8 May 2023 respectively. There was, however, no change in the scope of work. According to the learned Advocate, a plain reading of these operative contractual documents shows that they refer to and incorporate the General Conditions of Contract contained in the Tender, as mutually agreed

between the parties. These documents, therefore, do not support the Respondent's contention that the tender conditions had been superseded or had ceased to govern the contractual relationship between the parties.

11. The Respondent has stated that Clause 18 "has been superseded by a duly executed definitive agreement as mutually agreed between the parties, which is the governing document between the parties". He submitted that no such "duly executed definitive agreement" has been annexed to the Reply. It has not even been identified or described in the Reply. According to him, the reason is simple. No such agreement exists. He submitted that there is no separately executed comprehensive agreement between the parties which supersedes the tender documents. According to him, the contractual relationship between the parties arose from the tender process, the exchange of emails recording the agreed terms, and the Purchase Orders and Work Order issued thereafter. He pointed out that the Purchase Orders relied upon by the Respondent themselves contain the endorsement "SINCE IT IS A COMPUTER GENERATED COPY, NO SIGNATURE IS REQUIRED". They state that "You are requested to confirm your acceptance or issue about the Purchase Order within 5 days, failing which we will consider it as accepted."

12. The learned Advocate therefore submitted that the Respondent's stand is internally inconsistent. On the one hand, the Respondent contends that the Tender General Conditions of Contract were "neither accepted nor executed". On the other hand, it relies upon unsigned, computer-generated Purchase Orders,

which according to their own terms could be treated as accepted by conduct, as constituting the governing contract between the parties. He submitted that the entire case of the Respondent regarding supersession is based upon certain loose documents described as “General Terms and Conditions for Purchase Order”. According to him, these documents have not been shown to have been specifically incorporated into the contract between the parties. He pointed out that these documents do not bear any signature or date. They do not bear any letterhead, header, or footer. They do not contain any reference to a particular Purchase Order or contract. They do not disclose their authorship or source. He submitted that the Respondent has neither pleaded nor established when, how or by whom these alleged terms were communicated to the Applicant, accepted by the Applicant, or incorporated into the contractual arrangement between the parties.

13. According to the learned Advocate, such unattested loose sheets cannot constitute a concluded contractual arrangement and, in any event, cannot supersede an existing contractual arrangement. He submitted that the operative Purchase Orders themselves refer to the General Terms and Conditions “as mutually agreed between Jayant Infratech Limited & RCCPL Private Limited”. The Purchase Orders do not record any agreement by which the arbitration agreement contained in Clause 18 of the Tender General Conditions of Contract was excluded, superseded or substituted. The learned Advocate lastly submitted that it is settled law that an arbitration agreement need not necessarily be

contained in a separately signed contract.

14. He referred to Section 7(4)(b) and Section 7(4)(c) of the Arbitration and Conciliation Act, 1996, which recognise an arbitration agreement arising from an exchange of letters, telex, telegrams or other means of telecommunication, including electronic means, and from an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. He therefore submitted that the Respondent's contention that no contract could have been concluded through an exchange of emails is contrary to the express provisions of Section 7 of the Act.

15. Ms. Parasnis, learned Advocate appearing for the Respondent, submitted that the Applicant has invoked Clause 18 of the Tender Document in the present Application. She submitted that it is admitted that the tender document was issued by the Respondent for installation, testing and commissioning of OHE and PSI works for the private railway siding of RCCPL at Mukutban. According to her, the tender document was issued only for setting out the terms and conditions of the tender process. The document titled “General Conditions of Contract”, which was annexed to the tender, was only indicative in nature. She submitted that the document annexed to the present Application was neither accepted nor executed by the parties. She pointed out that the Applicant is relying upon the email communication dated 8 February 2023. According to her, the said email merely invited the Applicant to submit its offer for the project in accordance with the terms and conditions contained in the tender.

16. Ms. Parasnis submitted that the Applicant thereafter became the successful tenderer and the project was awarded to it. According to her, the tender process came to an end once the Applicant was selected as the successful tenderer. Therefore, the tender document, including the arbitration clause contained therein, ceased to operate upon completion of the tender process. She submitted that thereafter the Respondent issued a Letter of Intent bearing Ref. No. G1-14-22-SP-2 dated 2 May 2023. The said Letter of Intent stated that a detailed contract or order, together with the scope of services and the applicable terms and conditions mutually agreed between the parties, would be issued. She submitted that pursuant to the said Letter of Intent, two Purchase Orders, namely PO No. 23746311 dated 5 May 2023 and PO No. 23122464 dated 29 May 2023, were issued to the Applicant. The General Conditions of Contract and Special Conditions of Contract were annexed to these documents and, according to the Respondent, together constituted the governing contractual documents between the parties. She submitted that a reading of the said Purchase Orders and Work Order would show that they referred to "General Terms and Conditions", which were annexed to those orders. According to her, the Applicant accepted the said Purchase Orders and Work Order along with the General Terms and Conditions forming part thereof.

17. Ms. Parasnis, learned Advocate appearing for the Respondent, submitted that the Applicant has not placed the complete contractual documents before the Court and has deliberately relied upon only those documents which support its

case. According to her, the Applicant has suppressed the "General Terms and Conditions" which formed part of the Purchase Orders and Work Order issued. She submitted that the Respondent is relying upon Clauses 20 and 21 of the said General Terms and Conditions. Learned Advocate invited the attention of the Court to Clause 20, titled "ARBITRATION", contained in the General Terms and Conditions. She submitted that Clause 20 provides that, if any question, dispute, difference, or claim arises between the parties out of or in connection with the contract, the parties would first attempt to resolve the dispute through amicable consultations within thirty days. She submitted that Clause 20(b) provides that, if the dispute is not resolved through such consultations, the dispute would be referred to arbitration by a Sole Arbitrator to be mutually appointed by the parties under the provisions of the Arbitration and Conciliation Act, 1996, including any statutory modification thereof. She pointed out that Clause 20(c) provides that the arbitration would be held at Kolkata and that the language of the arbitration would be English. The clause provides that the award of the Arbitrator would be final and binding upon the parties and that each party would bear its respective costs of the arbitration.

18. Learned Advocate relied upon Clause 21, titled "JURISDICTION". She submitted that the said clause provides that the agreement would be governed by the laws of the Republic of India and that, subject to the provisions of Clause 27 and to the extent permitted under the Arbitration and Conciliation Act, 1996, the Courts at Kolkata, West Bengal, India would have exclusive

jurisdiction in all matters relating to or arising out of the agreement. On the basis of the aforesaid clauses, learned Advocate submitted that the arbitration agreement contained in the original tender document, upon which the Applicant relies, was superseded by the contractual documents issued after the tender process. According to her, the arbitration clause relied upon by the Applicant provided for arbitration at Mumbai, whereas the subsequent General Terms and Conditions specifically provide that the arbitration shall be held at Kolkata and that the Courts at Kolkata shall have exclusive jurisdiction. She, therefore, submitted that the present Application filed before this Court is not maintainable. According to her, once the subsequent contractual documents are taken into consideration, the parties had agreed to Kolkata as the place of arbitration and had agreed to confer exclusive jurisdiction upon the Courts at Kolkata. The Applicant cannot therefore invoke the arbitration clause contained in the earlier tender document and seek appointment of an Arbitrator from this Court.

19. Learned Advocate submitted that the Applicant's reliance upon the email dated 26 April 2023 is misplaced. She submitted that the Applicant has selectively relied upon the said email to contend that the contract was concluded between the parties through email communications. According to the Respondent, a plain reading of the email dated 26 April 2023 would show that it merely records discussions and modifications relating to the Special Conditions of Contract. It does not, according to the Respondent, constitute the final contractual document between the

parties. The subsequent Letter of Intent, Purchase Orders, Work Order and the General Conditions and Special Conditions annexed thereto constitute the contractual documents governing the relationship between the parties.

20. Learned Advocate submitted that the Applicant's case that the arbitration agreement contained in the tender document continued to govern the parties cannot be accepted without examining the subsequent contractual documents. According to her, the tender document was only part of the tendering process. After the Applicant was declared successful, the Respondent issued the Letter of Intent and thereafter the Purchase Orders and Work Order containing the terms which were to govern the actual execution of the work. She submitted that the subsequent contractual documents therefore have to be considered as a whole. The Applicant cannot rely upon one part of the tender document while ignoring the subsequent documents which were accepted and acted upon by the parties. Learned Advocate submitted that the Applicant has accepted the subsequent Purchase Orders and Work Order. Those documents contained the General Conditions and Special Conditions of Contract. The arbitration clause contained in those General Terms and Conditions provides for arbitration at Kolkata. Therefore, according to the Respondent, even if the existence of an arbitration agreement is accepted, the relevant question is as to which arbitration clause governs the disputes between the parties. She submitted that the present case is therefore not a case where the Respondent has denied the existence of an arbitration agreement altogether. The Respondent's

case is that the arbitration clause relied upon by the Applicant from the tender document does not govern the subsequent contractual relationship between the parties. The parties, according to the Respondent, acted under the Purchase Orders and Work Order containing different General Terms and Conditions and a different arbitration clause.

21. Learned Advocate therefore submitted that the question of the applicable arbitration clause cannot be decided merely by referring to the tender document. The subsequent contractual documents, the General Terms and Conditions forming part thereof and the jurisdiction clause contained therein have to be given due consideration. She submitted that the Applicant's allegation of suppression is material. According to the Respondent, the Applicant did not fairly place the subsequent General Terms and Conditions before the Court while seeking appointment of an Arbitrator on the basis of Clause 18 of the tender document. The Respondent has therefore placed reliance upon Clauses 20 and 21 of the subsequent General Terms and Conditions to demonstrate the actual agreement between the parties.

22. Learned Advocate submitted that the Court exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 cannot proceed on the assumption that the arbitration clause contained in the tender document necessarily continued to operate after the parties entered into subsequent contractual arrangements. The Court must first examine whether the subsequent documents superseded the earlier terms and, in particular, which arbitration clause was agreed between the

parties. She submitted that the Applicant's claim for appointment of a Sole Arbitrator under the arbitration clause contained in the tender document is therefore misconceived. The subsequent General Terms and Conditions contain an arbitration agreement which provides for arbitration at Kolkata. Clause 21 provides for exclusive jurisdiction of the Courts at Kolkata. On the Respondent's case, the present Application before this Court is consequently not maintainable. Learned Advocate submitted that the Respondent's case is supported by the manner in which the contractual documents came into existence. The tender was initially issued for inviting offers. After the Applicant was selected, the Respondent issued the Letter of Intent dated 2 May 2023. Thereafter, the Purchase Orders and Work Order were issued together with the General Conditions and Special Conditions of Contract. It is these subsequent documents which, according to the Respondent, governed the actual performance of the work. She therefore submitted that the Applicant cannot treat the earlier tender document as the final and binding contract for the purpose of invoking the arbitration clause contained therein, while at the same time relying upon the subsequent Purchase Orders for establishing its contractual rights and monetary claims.

23. Learned Advocate accordingly submitted that the present Application deserves to be rejected on the ground that the arbitration clause relied upon by the Applicant does not govern the disputes between the parties and that the subsequent arbitration clause provides for arbitration at Kolkata. In view of Clause 21 conferring exclusive jurisdiction upon the Courts at Kolkata, this

Court, according to the Respondent, ought not to exercise jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996.

24. Ms. Parasnis, learned Advocate for the Respondent, placed reliance upon the judgment of the Supreme Court in *Duro Felguera, S.A. v. Gangavaram Port Limited,* reported in (2017) 9 SCC 729. She submitted that, after the amendment to Section 11 of the Arbitration and Conciliation Act, 1996, the Court is required to examine the existence of an arbitration agreement within the limited scope of Section 11. The Supreme Court has observed in paragraph 13 that, after insertion of Section 11(6A), the power of the Court is confined to examining the existence of an arbitration agreement. Learned Advocate submitted that, in the present case, the existence of an arbitration agreement cannot be examined by referring only to Clause 18 of the earlier tender document. According to her, the Court has to consider the subsequent contractual documents relied upon by the Respondent. Her submission is that the subsequent General Terms and Conditions contain a separate arbitration clause and that the said clause governs the relationship between the parties.

25. Learned Advocate placed reliance upon the judgment of the Supreme Court in *Indus Mobile Distribution Private Limited v. Datawind Innovations Private Limited,* reported in (2017) 7 SCC 678. She submitted that the Supreme Court has held that once the seat of arbitration is designated, it is akin to an exclusive jurisdiction clause. The Court observed that, once the seat is determined, the Courts having jurisdiction over the seat have

exclusive jurisdiction for regulating the arbitral proceedings.

26. Learned Advocate relied upon the judgment of the Supreme Court in *Ravi Ranjan Developers Private Limited v. Aditya Kumar Chatterjee,* 2022 SCC OnLine SC 568. She submitted that the Supreme Court has explained the scope of the jurisdiction of a High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. The Court held that an application under Section 11(6) cannot be filed before any High Court in India merely because it is a High Court. The provision has to be read with Section 2(1)(e) of the Act and the application has to be made before the High Court having the requisite supervisory jurisdiction over the Court contemplated under Section 2(1)(e). She submitted that, in Ravi Ranjan Developers, the Supreme Court considered the argument based upon Indus Mobile that designation of the seat of arbitration confers exclusive jurisdiction upon the Courts at the seat. The Supreme Court clarified that the Court must examine the actual intention of the parties as disclosed from the arbitration agreement. It was held, on the facts of that case, that Kolkata was intended only as the venue for holding the arbitration sittings and was not the seat of arbitration. Consequently, the Calcutta High Court was held to lack jurisdiction.

27. Learned Advocate therefore submitted that the Applicant's reliance upon the arbitration clause contained in the original tender document cannot confer jurisdiction upon this Court when the subsequent contractual documents contain a different arbitration arrangement. On this basis, she submitted that the present Application deserves to be dismissed for want of

jurisdiction.

REASONS AND FINDINGS:

28. I have considered the submissions made on behalf of both sides. The first question which has to be seen is whether there is an arbitration agreement between the parties. On this issue, it is difficult to accept the case of the Respondent that there was no arbitration agreement at all. The tender document relied upon by the Applicant contains a separate Clause 18.7 relating to arbitration. Clause 18.5 provides for two stages for settlement of disputes. First is negotiation and thereafter arbitration. Clause 18.7 provides what will happen if the dispute is not settled through negotiation. The language used in Clause 18.7 is quite clear. It starts in the following manner:

> "If the efforts to resolve all or any of the disputes, differences or controversy through negotiation fail, then such disputes or differences or controversy, whatsoever arising between the Parties, arising out of or relating to the manufacture/construction, measuring operation or effect of the Contract or the breach thereof shall be referred to arbitration in accordance with the following provisions:"

29. Thus, from the tender document, there is an agreement between the parties to refer the disputes arising from the contract to arbitration. It provides the manner in which the arbitrator is to be appointed. There may be a dispute whether this clause continued to apply after the subsequent documents were issued. But that is different from saying that the tender document did not contain any arbitration agreement.

30. Another part of Clause 18.7 is important for considering the objection regarding jurisdiction. Clause 18.7(b) specifically provides:

> "The arbitration proceedings shall be held in Mumbai."

31. These words are quite direct. Mumbai is not mentioned only as the address or place of either party. It is mentioned with reference to "the arbitration proceedings". Therefore, under the tender document, the parties had provided that the arbitration proceedings would be held in Mumbai.

32. The Respondent, however, submits that the Applicant cannot rely only upon the tender document. According to the Respondent, the tender was only one part of the tender process. After the Applicant was selected, contractual documents were issued between the parties. The Respondent says that those documents contained different General Terms and Conditions and Clause 20 of those conditions contained another arbitration clause. According to the Respondent, that clause provides for arbitration at Kolkata. The Respondent relies upon Clause 21, under which the Courts at Kolkata are given exclusive jurisdiction. Therefore, the Respondent's case is not really that there was no arbitration agreement between the parties. The case of the Respondent is that the Applicant is relying upon an earlier arbitration clause which is no longer applicable. According to the Respondent, the arbitration clause contained in the tender document was replaced by the contractual documents issued thereafter.

33. This submission requires consideration because the question of jurisdiction depends upon which contractual document governs the parties. The matter cannot be decided merely because two arbitration clauses are found in two different documents. It has to be seen whether the later terms were accepted by both sides as part of the contract and, if they were accepted, whether those terms replaced the earlier arbitration clause. In this connection, the Purchase Order dated 2 May 2023 is an important document. Under the heading "General Terms & Conditions", it records:

> "General terms & condition as mutually agreed between Jayanta Infratech Limited & RCCPL Private Limited."

34. The same Purchase Order records:

> "Detailed Order / Contract along with the Scope of Service, Technical specifications including applicable other terms and condition as discussed and agreed will be released in due course."

35. The Purchase Order bears the acceptance of the Applicant. Therefore, this document does not show that the tender conditions came to an end on issuance of the Purchase Order. On the contrary, the Purchase Order shows that the work was being placed on the basis of the discussions and terms which had taken place between the parties. It shows that a detailed contract was to be issued later. The Respondent relies upon the later General Terms and Conditions, particularly Clause 20. According to the Respondent, Clause 20 first provides for an attempt to settle the dispute by mutual discussions and thereafter provides for reference to a sole arbitrator to be mutually appointed by the parties. Clause 20(c)

says:

> "The arbitration shall be held at Kolkata"

36. The Respondent relies upon Clause 21 which provides for exclusive jurisdiction of the Courts at Kolkata. If these later terms were executed and accepted by both parties as the final and complete terms of the contract, then the submission of the Respondent would have substance. In such a situation, the Applicant could not rely upon the earlier Mumbai provision while ignoring the later terms agreed between the parties. The later agreement would then have to be given effect. But the question before the Court is not merely what the Respondent says about the later documents. The question is whether the material placed before the Court shows that the parties replaced the earlier arbitration agreement by another arbitration agreement under which Kolkata was made the seat or legal place of arbitration.

37. On the material which is before the Court, such replacement is not shown with sufficient clarity. The Purchase Order does not state that Clause 18.7 of the tender document was cancelled or superseded. It does not state that Mumbai was being replaced by Kolkata. It does not state that all the earlier tender conditions stood deleted.

38. The subsequent conduct of the Applicant is relevant. It does not support the Respondent's case that the tender document had become irrelevant. In the communication seeking release of the balance retention amount, the Applicant relied upon the tender document. It stated that the work had been completed on 28

February 2024, that EIG sanction for energisation was received on 8 April 2024 and that the OHE was energised on 10 April 2024. The Applicant relied upon Clause 1.1.29 of the tender document relating to the twelve months Defects Liability Period and stated that the DLP therefore expired on 10 April 2025. The EIG document shows that sanction for energisation was granted in respect of the concerned railway siding and OHE work at Mukutban. This is relevant as it shows that the contractual arrangement was acted upon, and the work was completed. This is therefore not a case where the tender process ended without any work being performed. There was actual performance under the arrangement arising from the tender and the subsequent Purchase Orders. For this reason, I am unable to accept the Respondent's submission in its wider form that the tender document lost all contractual relevance after the Purchase Order was issued. The later Purchase Order refers to the General Terms and Conditions as “mutually agreed” and states that a detailed contract was to be released. The Applicant thereafter relied upon the tender conditions while claiming its contractual dues. The conduct of the parties therefore shows that the contractual arrangement continued, though there remains a dispute regarding the exact terms which govern the parties.

39. The Respondent has alleged that the Applicant deliberately suppressed the later General Terms and Conditions and selectively relied upon the email dated 26 April 2023. I am unable to accept the allegation of deliberate suppression in the manner in which it has been stated. The Respondent has produced the later terms

before the Court and those documents have been considered. Once the documents are before the Court, the question has to be decided from those documents and their legal effect. Merely alleging that the other party acted wrongly cannot decide which contractual terms are applicable.

40. The Respondent has submitted that the email dated 26 April 2023 did not conclude the contract and only recorded discussions and changes relating to the Special Conditions of Contract. Even if this submission is accepted for the present purpose, it does not complete the Respondent's case. Even if the email was not the final contract, it still has to be seen what terms were incorporated into the Purchase Order and whether the later terms removed or replaced Clause 18.7 of the tender document. The Purchase Order dated 2 May 2023 is therefore important. It bears the acceptance on behalf of the Applicant and records the General Terms and Conditions as mutually agreed. At the same time, it states that the detailed Order or Contract containing the scope, specifications, and other applicable terms "will be released in due course". Therefore, merely from this wording, it would not be proper to assume that every later document relied upon by the Respondent automatically became a complete replacement of the earlier contractual arrangement.

41. I now come to the judgments relied upon by the Respondent. In *Duro Felguera*, the Supreme Court was considering Section 11(6A), as it then existed, and observed that the Court's consideration was limited to examining the existence of an arbitration agreement. The Respondent relies upon this principle

to submit that the Court should not decide all disputes relating to the contract while considering a Section 11 application. As a general principle regarding the limited nature of the Section 11 inquiry, this submission has to be kept in view. However, *Duro Felguera* does not mean that the Court should ignore the contractual documents placed before it. The Court has to see whether an arbitration agreement exists. If the Respondent says that the arbitration clause relied upon by the Applicant was replaced by another clause having a different seat, then the Court has to look at the documents relied upon by the Respondent for considering that objection. It is necessary to keep in mind that *Duro Felguera* was decided when Section 11(6A) was part of the statute. That provision was later omitted by the 2019 amendment. Therefore, paragraph 13 of *Duro Felguera* cannot be treated as the complete statement of the law applicable to the present case. The judgment may still be considered for the principle regarding limited examination at the Section 11 stage, but the law applicable to the present application has to be kept in view.

42. The Respondent next relies upon *Indus Mobile Distribution Private Limited*. The Supreme Court observed in paragraph 20:

> "the moment the seat is designated, it is akin to an exclusive jurisdiction clause."

43. The Court held that when Mumbai was the seat, the Mumbai Courts had exclusive jurisdiction to supervise the arbitration. There is no difficulty in accepting this principle. Therefore, if the later contract between these parties had validly fixed Kolkata as the seat of arbitration, the Courts at Kolkata would have supervisory

jurisdiction over the arbitration. In that situation, this Court could not assume jurisdiction merely because some part of the cause of action arose in Maharashtra. But the principle in *Indus Mobile* applies after the Court finds what seat was agreed between the parties. It does not answer the earlier question in the present case, namely, whether the parties replaced the Mumbai provision contained in Clause 18.7 by the later provision relied upon by the Respondent.

44. The judgment in *Ravi Ranjan Developers* helps in considering this issue. The Supreme Court held that a Section 11(6) application cannot be filed in any High Court in India merely according to the choice of a party. It has to be filed before the High Court having the jurisdiction contemplated under the Arbitration and Conciliation Act. The Court reiterated that where the seat is designated, the Courts at that seat exercise supervisory jurisdiction. At the same time, the Supreme Court cautioned that the words used in an arbitration agreement cannot be read separately from the facts and the surrounding contractual arrangement. In paragraph 41, the Court observed:

> "A judgment is a precedent for the issue of law that is raised and decided. The judgment has to be construed in the backdrop of the facts and circumstances in which the judgment has been rendered. Words, phrases and sentences in a judgment, cannot be read out of context."

45. This observation is relevant in the present case. The Respondent relies upon the word "Kolkata" appearing in the later arbitration clause. But before giving effect to that clause, it has to be seen whether that clause became part of the final agreement

between the parties and whether the parties intended that it should replace the earlier Mumbai clause. The facts in *Ravi Ranjan Developers* are useful for this purpose. In that case, the agreement merely stated that the "sitting" of the arbitral tribunal would be at Kolkata. The Supreme Court found that Kolkata was only the venue and not the seat because the other terms of the agreement did not show an intention to give supervisory jurisdiction to the Calcutta High Court.

46. In the present case, there is one circumstance relied upon by the Respondent. According to the Respondent, later Clause 20(c) says: "The arbitration shall be held at Kolkata" and Clause 21 separately gives exclusive jurisdiction to the Courts at Kolkata. If these clauses are ultimately found to be the final agreed terms between the parties, they may together show that Kolkata was intended to be the legal seat of arbitration and not merely the place where the hearings were to be held. I therefore cannot accept the Applicant's submission in an absolute manner that the words "held at Kolkata" can never mean the seat merely because the word "venue" has not been used. The agreement has to be read as a whole. The separate clause giving exclusive jurisdiction to the Courts at Kolkata is a relevant circumstance. But this does not decide the matter. The existence of the later Kolkata clauses and their incorporation into the contract are two different things. The Respondent has shown that it relies upon those clauses. It has stated that the subsequent Purchase Orders and General Terms and Conditions were accepted by the Applicant. However, the material before the Court does not contain a clear provision stating that

Clause 18.7 of the tender document, including the Mumbai provision, was cancelled or superseded. In fact, the Respondent's own case, as stated in its submissions, is that the arbitration agreement in the tender "was superseded by subsequent agreements." If the earlier agreement was "superseded", it means that the earlier arbitration agreement existed and the Respondent says that a later agreement replaced it. Therefore, it is not enough merely to show that another arbitration clause exists. The Respondent has to show the later agreement and its acceptance in a manner which establishes that the earlier clause was replaced.

47. On the documents before the Court, I do not find such clear replacement. The Purchase Order dated 2 May 2023 does not state that Clause 18.7 of the tender was deleted. It refers to the General Terms and Conditions as mutually agreed and states that the detailed contract with the applicable terms was to be released later. The Applicant thereafter continued to refer to the tender document for the DLP and for payment of the retention amount. Therefore, there is sufficient material to hold that the parties had an arbitration agreement and that the Mumbai provision in Clause 18.7 formed part of the contractual arrangement arising from the tender. However, there is no sufficient clear material at this stage to hold that the Applicant knowingly and gave up the Mumbai seat and accepted Kolkata in its place.

48. I am conscious that the Respondent disputes this finding and says that the later General Terms and Conditions were the terms governing the parties. But that dispute cannot take away the arbitration agreement. Questions relating to incorporation,

interpretation, supersession, delay, liquidated damages, retention and the amount payable under the contract cannot all be made into grounds for refusing appointment of an arbitrator.

49. In the result, the Applicant has made out the necessary case for appointment of an Arbitral Tribunal. The disputes between the parties are required to be decided in arbitration in accordance with Clause 18.7 of the contractual arrangement. The Respondent may raise before the learned Arbitrator its objections regarding the alleged supersession of the tender terms, the later General Terms and Conditions, delay, liquidated damages, retention, and other monetary claims, in accordance with law. On the material before the Court, none of these objections is sufficient to refuse appointment of the Arbitrator.

50. In the aforesaid circumstances, the present Application under Section 11 of the Act, is deserved to be disposed of in terms of the following order:

> A) Mr Jash Gandhi, Advocate of this court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences arising out of contract in question, including claims and counter claims;
>
> Office Address:- 3rd Office, Brady House Building, 2nd Floor, Kala Ghoda, Mumbai – 400 001
>
> Email: jaasshgandhi@gmail.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;

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;

F) 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.

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

52. 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.)