Case Citation: (2026) ibclaw.in 6509 HC

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VINAY SARAF

ARBITRATION CASE No. 88 of 2026

CNR No.: MPHC020232272026

M/S GLOBAL BUILDOCON THROUGH ITS PARTNERS TEJKUMAR TANTED AND OTHERS

Versus

HARSH S/O BHARAT SING CHAUHAN THROUGH POA HOLDER ANAND AND ANR

Appearance:

Shri Vishal Baheti - Senior Advocate assisted by Shri Nipun Soni - Advocate for the applicants.

Shri Aniket Naik - Advocate for the non-applicants

RESERVED ON : 05/10/2026

PRONOUNCED ON : 29/10/2026

ORDER

This application is moved under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter for short referred to as, 'Act of 1996') for appointment of sole Arbitrator to arbitrate the dispute between the parties, on the ground that the applicant entered into an agreement with the non-applicant, which contains the Arbitration Clause.

2) The short facts of the case are that a Development Agreement was executed between the applicant and non-applicant on 26/03/2015, which was registered on 15/04/2015 for developing the lands owned by the non-

applicants situated at survey No. 276/3 admeasuring 0.275 hectare, survey No. 277/1/2/3 admeasuring 0.343 hectare, survey No. 276/2 admeasuring 0.271 hectare and survey No. 277/1/2/2 admeasuring 0.336 hectare, total admeasuring 1.225 hectare of Village Bada Bangarda, Tehsil Hatod, District Indore.

2.1) The non-applicants obtained the permission from Town and Country Planning Department for development of the lands and also obtained the diversion order under Section 172(1) of M. P. Land Revenue Code, 1959 from Sub-Divisional Officer (Revenue), District Indore on 06/09/2014. Thereafter, the non-applicants entered into Development Agreement at 26/03/2015 to develop the said land and construct P+6 Multi Dwelling Unit Residential Complex in the name and style of "Global Towers".

2.2) As per the terms and condition of the agreement, the permission, which were obtained from Town and Country Planning Department were required to be renewed and the physical possession of the land ought to have been handed over to the applicant Developer after demarcation and measurement. The non-applicants failed to comply with the conditions of the permission granted by Town and Country Planning Department on 28/12/2011 and the part of the land was notified as "Green Area" by the state government, consequently, no development could take place.

2.3) The applicant paid Rs. 1 Crore to the non-applicants and spent Rs. 25 lakhs on registration of document, stamp duty etc. and therefore, a demand was raised by the applicant for return of that amount along with interest. A communication was issued by the applicant on 30/03/2026,

whereby the applicant demanded the said amount. The non-applicant refuted the demand.

2.4) The applicant submitted that there is an arbitration Clause in the Development Agreement, which contains that in case of any kind of dispute between the parties, it will be referred to the Arbitrator or Arbitrators and an award will be obtained from the Arbitrator. It is also mentioned in the clause that in case the dispute could not be resolved through arbitration, both the parties will be free to approach to the Civil Court or any other Court.

2.5) The applicant invoked the Arbitration Clause and issued a notice to the non-applicants, however, non-applicants denied the existence of Arbitration Clause and not extended consent, therefore, the present application has been moved by the applicant for reference of the dispute to the sole Arbitrator for decision according to law.

2.6) The non-applicant denied the allegations in *toto* and submits that the applicant has not paid Rs. 1 Crore as claimed. The cheques amounting to Rs. 37 Lakhs only have been encashed and the balance cheques were never handed over to the non-applicants. The claim of the applicant towards Stamp Duty, Registration Fee or other expenses of Rs. 25 Lakhs was also denied by the non-applicants and non-applicants submitted that there is no Arbitration Clause as the alleged clause no. 5 itself provides that if the dispute could not be resolved through arbitration, the parties will be free to approach to the Civil Court or any other Court.

2.7) The non-applicants submit that as per the clause no. 5 of the development agreement, the decision of the Forum would not be final and

binding upon the parties without recourse to any other remedy and both would not abide by such decision, therefore the clause cannot be treated as arbitration clause. The non-applicants prayed for dismissal of the application.

3) Heard Shri Vishal Baheti, learned Senior Advocate with Shri Nipun Soni, Advocate on behalf of the applicant and Shri Aniket Naik, Advocate on behalf of the non-applicants.

4) Shri Baheti submits that the parties entered into a Development Agreement on 26/03/2015, which was registered on 15/04/2015 and Clause 5 of that Development Agreement contains the Arbitration Clause. The applicant has paid Rs. 1 Crore to the non-applicants and spent Rs. 25 Lakhs in respect of the subject land, but the non-applicants failed to comply with the conditions of the Development Agreement and therefore, the development could not be implemented and the applicant has issued a notice for refund of the advance amount of Rs. 1 Crore with the amount of expenses Rs. 25 Lakhs and interest by invoking the Arbitration Clause, but the non-applicants have denied the Arbitration Clause. Hence, this application has been preferred by the applicant for appointment of the Arbitrator.

4.1) The counsel for the applicant relied upon the judgment delivered by the Supreme Court in the matter of **Babanrao Rajaram Pund Vs. Samrat Builders and Developers and Another** reported in **(2022) 9 SCC 691** , wherein the Supreme Court has held that even in the absence of the term to the effect that the parties agreed in writing to be bound by the decision of the Arbitral Tribunal or that decision of the Arbitrator shall be final and binding in

Arbitration Agreement, the agreement to the clause will be treated as an Arbitration Clause, when there is discernible intention of parties in the agreement to refer the disputes to arbitration appears.

4.2) He further relied upon the judgment delivered by Supreme Court in the matter of **Tarun Dhameja Vs. Sunil Dhameja and Another** reported in **2024 SCC Online SC 3715**, wherein the Supreme Court held that when the first portion of the Arbitration Clause is clear and states that at any time during the continuance of the partnership or after the retirement of any Partner, the dispute or differences arises between the partners and their respective heirs or anyone claiming from them, the same shall be referred to arbitration, the clause will be treated as arbitration clause and it is a valid clause, which can be invoked by any of the party. The Supreme Court has further considered that the second portion of the arbitration clause states that if any dispute arises the arbitration shall be option and the arbitrator will be appointed by Partners with their mutual consent. This does not mean that the arbitration clause cannot be invoked by any aggrieved party, who wants to take recourse to the arbitration and therefore, the arbitration clause have to be read in a pragmatic manner. The intent of the parties, while executing the arbitration clause in the partnership deed to be looked into. He submits that the Supreme Court has considered that by not using the specific words or by mentioning that even after the arbitration, the parties will be entitled to approach to the Civil Court, it will not frustrate the arbitration clause and the clause is valid arbitration clause.

4.3) He further relied on the judgment delivered by Supreme Court in

the matter of **Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited Vs. Jade Elevator Components** reported in **(2018) 9 SCC 774**, wherein it is held by the Supreme Court that agreement between the parties giving an option to the parties to choose dispute resolution by arbitration or by Court, even it is a valid arbitration agreement. He relied upon para 4 to 10 of the judgment, which read as under:

> *"4. To appreciate the controversy, it is required to be seen whether there is an arbitration clause for resolution of the disputes. Clause 15 of the agreement as translated in English reads as follows:*
>
> > *"15. Dispute handling:- Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court."*
>
> *5. It is submitted by learned counsel for the petitioner that if the clause of "dispute handling" is scrutinized appropriately, the disputes are to be settled through consultation and, if the consultation fails by treatment of to the arbitration body for arbitration or Court and, therefore, the matter has to be referred to arbitration. It is canvassed by him that the clause is not categorically specific that it has to be adjudicated in a court of law. It leads to choices and the choice expressed by the petitioner is arbitration.*
>
> *6. Learned counsel for the respondent, in his turn, would urge that when it is stated arbitration or Court, the petitioner should knock at the doors of the competent court but not resort to arbitration, for the clause cannot be regarded as an arbitration clause which stipulates that the disputes shall be referred to arbitration.*
>
> *7. To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause „dispute handling". It states that the disputes should be settled through consultation and if the*

consultation fails by treatment of to the arbitration body for arbitration or the court. On a query being made, learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that the words "arbitration or the court" are undisputable as far as the adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law.

8. This Court had the occasion to deal with such a clause in the agreement in Indtel Technical Services Private Limited vs. W.S. Atkins Rail Limited1. In the said agreement, clause No.13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were couched in the following language (SCC p. 311, para 6):

> *"6. ... '13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;*
>
> *13.3. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement."*

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus (Indtel Technical Services case [(2008) 10 SCC 308], SCC p.318, para 38:-

> *"38. Furthermore, from the wording of Clause 13.2 and Clause 13.3, I am convinced, for the purpose of this*

application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."

The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration.

***10.** In the case at hand, as we find, Clause 15 refers to arbitration or court. Thus, there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator and, accordingly, Justice Prakash Prabhakar Naolekar, formerly a Judge of this Court, is appointed as sole Arbitrator to arbitrate upon the disputes which have arisen between the parties. The learned Arbitrator shall be guided by the Arbitration & Conciliation (Amendment) Act, 2015. The learned Arbitrator shall make positive efforts to complete the arbitration proceedings as per the Act of 2015."*

He prays for allowing the application and for appointment of the Arbitrator.

5) Shri Aniket Naik, learned counsel appearing on behalf of the non-applicants raised the issue that the clause provides that if the arbitrators failed to decide the dispute between the parties, then both the parties will be free to approach Civil Court or any other Court and therefore, this clause cannot be treated as arbitration clause.

5.1) He relied upon the judgment delivered by Supreme Court in the matter of **Jagdish Chander Vs. Ramesh Chander and Others** reported in **(2007) 5 SCC 719**, wherein the Supreme Court after relying the judgment delivered in the matter of K.K. Modi Vs. K.N. Modi [1998 (3) SCC 573], and Bharat Bhushan Bansal Vs. U.P. Small Industries Corporation Limited

[1999 (2) SCC 166] as well as Bihar State Mineral Development Corporation Vs. Encon Builders (I) (P) Limited [1996 (2) SCC 216], held that a clause in a contract can be construed as an arbitration agreement only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. The Supreme Court has decided these principles for deciding the issues and the clause, which says that if either party is not satisfied with the decision of the authority may file a civil suit seeking relief, it cannot be termed as an arbitration agreement. He relied on para 8 of the judgment which reads as under:

> *"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K K Modi v. K N Modi [1998 (3) SCC 573], Bharat Bhushan Bansal vs. U.P. Small Industries Corporation Ltd. [1999 (2) SCC 166] and Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd. [2003 (7) SCC 418]. In State of Orissa v. Damodar Das [1996 (2) SCC 216], this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :*
>
> > *(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and an willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to*

arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the Private Tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to Arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to

act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

5.2) Mr. Aniket Naik further relied upon the judgment delivered by the Supreme Court in the matter of **P. Dasaratharama Reddy Complex Vs. Government of Karnataka and Another** reported in **(2014) 2 SCC 201**,

wherein the Supreme Court considering the ingredients of an agreement to be termed as arbitration agreement or arbitration clause in para 14 held as under:

> ***"14.*** *In Mysore Construction Company v. Karnataka Power Corporation Limited and others [ILR 2000 KAR 4953], the learned Designated Judge referred to the passage from Russell on Arbitration (19th Edition, page 59), the judgments of this Court in K. K. Modi v. K. N. Modi and others [*(1998) 3 SCC 573 *], Chief Conservator of Forests, Rewa v. Ratan Singh Hans [AIR 1967 SC 166[; Smt. Rukmanibai Gupta v. the Collector, Jabalpur* [(1980) 4 SCC 556*]; State of Uttar Pradesh v. Tipper Chand [(1980) 2 SCC 341]; State of Orissa v. Damodar Das [(1996) 2 SCC 216]; Bharat Bhushan Bansal v. Uttar Pradesh Small Industries Corporation Limited, Kanpur [(1999) 2 SCC 166] and observed:*
>
> > *"The above decisions make it clear that an agreement or a clause in an agreement can be construed as an arbitration agreement, only if,*
> >
> > *(i) it provides for or contemplates reference of disputes or difference by either party to a private forum (other than a Court or Tribunal) or decision;*
> >
> > *(ii) it provides either expressly or impliedly, for an enquiry by the private forum giving due opportunity to both parties to put forth their cases; and*
> >
> > *(iii) it provides that the decision of the forum is final and binding upon the parties, without recourse to any other remedy and both would abide by such decision.*
> >
> > *Where there is no provision either for reference of disputes to a private forum, or for a fair and judicious enquiry, or for a decision which is final and binding on parties to the dispute, there is no arbitration agreement."*

5.3) Mr. Naik also referred **BGM and M-RPL-JMCT- (JV) Vs. Eastern**

Coalfield Limited reported in **2025 SCC Online SC 1471**, wherein the Supreme Court considered the scope of examination under Section 11(6-A) and held that the Referral Court is required to weeding out *prima facie* non-existing arbitration agreements at the time of deciding the application. He relied upon para 15, 22 and 23, which reads as under:

> *"15. The legal principles deducible from the above decision qua the scope of Referral Court's power under Section 11 of 1996 Act are as follows:*
>
> *(a) Section 11 confines the Court's jurisdiction to the examination regarding the existence of an arbitration agreement.*
>
> *(b) The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination.*
>
> *(c) Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Such a legal approach will help the Referral Court in weeding out prima facie non-existent arbitration agreements.*
>
> *(d) The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. However, the expression "examination" does not connote or imply a laborious or contested inquiry.*
>
> *(e) The burden of proving the existence of arbitration*

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

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

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

"8. …..this Court held that a clause in a contract can be construed as an 'arbitration agreement' only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well settled principles in regard to what constitutes an arbitration agreement :

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal

for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words 'arbitration' and 'arbitral tribunal (or arbitrator)' are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are : (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of

an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically excludes any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the Authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the Authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word 'arbitration' or 'arbitrator' in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a

dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

(Emphasis supplied)

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

> *"16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine."*

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

> *"9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision*

which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16 relating to settlement of disputes. Therefore, it is not an arbitration agreement, as defined under section 7 of the Act. In the absence of an arbitration agreement, the question of exercising power under section 11 of the Act to appoint an Arbitrator does not arise."

(Emphasis supplied)

5.4) Judgment delivered by the Supreme Court in the matter of **Nagreeka Indcon Products P. Ltd. Vs. Cargocare Logistics (India) P. Ltd.** reported in **2026 SCC Online SC 630**, is also relied by non-applicant, wherein the Supreme Court has held that the law decided earlier in the matter of K.K. Modi Vs. K.N. Modi, by which the Supreme Court has set up the requirements of a clause to be treated as arbitration clause is a basic law and should be followed in all the cases. He relied upon the paragraphs 12 and 13 of the judgment which read as under:

"12. Having taken due note of the interpretation of the word 'can' as also well-established principles of contractual interpretation, we now move to consider whether Clause 25 actually constitutes an arbitration clause. Sujata Manohar J., in K.K. Modi (supra) spelt out the requirements of such a clause in the following terms:

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

These requirements have been repeatedly restated. [See: Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd (supra); Alchemist Hospitals Ltd. v. ICT Health Technology Services India (P) Ltd. and M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit v. Modi Transport Service. In Jagdish Chander v. Ramesh Chander, recently followed in BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd. (supra) the Court set out what constitutes an arbitration agreement. Raveendran J., writing for the Court, held that the words used in the agreement should disclose a determination and obligation to go for arbitration and not only provide for the possibility of going to arbitration. When the word provides only a possibility, the same does not constitute a valid arbitration agreement.

***13.** Turning to the words used in Clause 25, we find it to stipulate*

to the effect that if there is any dispute between the parties, they can settle the same by arbitration. In view of Jagdish Chander (supra) which holds as under:

> *"(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."*

The clause subject matter of dispute in this appeal indicates merely the future possibility of referring disputes to arbitration and as such, it cannot be said to be a binding arbitration agreement. In other words, the possibility of arbitration being used to settle disputes is open however, for the disputes to be settled by arbitration, further agreement between the parties would be

required and needless to add, such an agreement can only come into existence when both parties agree to the same. In that view of the matter, we are of the considered view that this appeal is bereft of merit. It is accordingly dismissed."

5.5) He further relied upon the judgment delivered by the Supreme Court in the matter of **Alchemist Hospitals Ltd. v. ICT Health Technology Services India (P) Ltd.** reported in **2025 SCC Online SC 2354,** wherein the Supreme Court has considered that a clause, which do not provide that the decision of the arbitrator will be binding on the parties, cannot be treated as arbitration clause. He relied upon paragraphs 3C, 19, 22, 25, 27 and 31 which reads as under:

"3. The material facts relevant to decide the present appeal are as rashmi dhyani pant follows:

a. ...

b. ...

c. Clause 8.28 of the Agreement which forms the focal point of this lis is reproduced as follows:

*"8.28 – **Arbitration***

The parties shall attempt in good faith to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives, who have authority to settle the controversy and who are at a higher level of management, than the persons with direct responsibility for administration of this Agreement.

If the matter is not resolved by negotiation pursuant to paragraph above, then the matter will proceed to mediation as set forth below:

Any dispute, controversy or claim arising out of or relating in any way to the Agreement/the relationship,

> *including without limitation, any dispute concerning the construction, validity, interpretation, enforceability or breach of the Agreement, shall be resolved by arbitration through senior management comprising respective Chairmen of the two parties (Arbitrators). Should the dispute not be resolved within fifteen (15) days after arbitration, the complaining party shall seek remedies through the courts of law. The demand for arbitration should be made within a reasonable time (maximum 60 days) after the dispute or matter in question has arisen."*

19. Clause 8.28 of the Agreement states that the parties must first attempt to negotiate the dispute in good faith. This part of the clause is admittedly not disputed in its meaning. The next part of the clause specifies that if the negotiation fails, then the parties would be obligated to mediate in the stated procedure and is then followed by the punctuation (:) colon, following which it prescribes that any dispute arising out of or relating in any way to the Agreement shall be resolved by "arbitration" through senior management comprising respective Chairmen of the two parties (Arbitrators). Moreover, the agreement further stipulates that should the dispute not be resolved within fifteen (15) days after the proposed "arbitration", the complaining party shall seek remedies through the courts of law.

22. Since, at this stage, we are reminded of the decision in the case of Bangalore Electricity Supply Co. Ltd. v. E.S. Solar Power (P) Ltd., it would be apt to note what was observed. There occurs an interesting passage of what the Court should be minded about while gathering the intentions of the parties in a clause of the contract. It was observed:

> *17. The duty of the court is not to delve deep into the intricacies of human mind to explore the undisclosed intention, but only to take the meaning of words used i.e. to*

say expressed intentions [Kamla Devi v. Takhatmal Land, (1964) 2 SCR 152 : AIR 1964 SC 859]. In seeking to construe a clause in a contract, there is no scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is driven to the conclusion that clause is ambiguous, and that it has two possible meanings. In those circumstances, the court has to prefer one above the other in accordance with the settled principles. If one meaning is more in accord with what the court considers to be the (2021) 6 SCC 718 underlined purpose and intent of the contract, or part of it, than the other, then the court will choose the former or rather than the latter [Ashville Investments Ltd. v. Elmer Contractors Ltd., 1989 QB 488 : (1988) 3 WLR 867 : (1988) 2 All ER 577 (CA)]. The intention of the parties must be understood from the language they have used, considered in the light of the surrounding circumstances and object of the contract. [Bank of India v. K. Mohandas, (2009) 5 SCC 313 : (2009) 2 SCC (Civ) 524 : (2009) 2 SCC (L&S) 32] . Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Bihar SEB v. Green Rubber Industries [Bihar SEB v. Green Rubber Industries, (1990) 1 SCC 731].

25. Upon a perusal of Clause 8.28, we are of the view that there is no indication that the proposed "arbitration" was supposed to be final and binding. In fact, the penultimate sentence of the clause stipulates that should the dispute not be resolved within fifteen (15) days after arbitration, the complaining party shall seek remedies through the courts of law. This suggests an attempt at

amicable resolution inter se rather than a definitive submission to arbitration, failing which the party has the option to proceed to the courts of law.

27. In our view, Clause 8.28 of the Agreement does not evince an intention to refer disputes to arbitration, for the above-mentioned reasons.

31. In the instant case, we agree that there has indeed been no denial of the existence of an arbitration agreement by the respondent in its responses to the notice issued by the appellant. However, here, when there has indeed been no arbitration agreement in the first place, therefore, subsequent correspondence between the parties cannot displace the original intention. Such correspondence would have indeed been sufficient to displace the original intention if it was unequivocally clear about referring the disputes to arbitration, i.e., the test mentioned under Section 7 of the A&C Act, which does not exist in the instant case. Once we take the view that there has, in (2009) 2 SCC 55 fact, been no arbitration agreement in the first place, there exists no option available to the appellant other than approaching the courts of law."

Learned counsel prays for dismissal of the application.

6) After hearing counsel for the parties and perusal of documents, especially the Development Agreement Clause 5, this Court is of the view that the Clause 5 cannot be treated as an arbitration clause, because the clause itself provides that if the arbitrators are failed to decide the dispute, the parties will be free to approach Civil Court or any other Court. Meaning thereby, the decision of the arbitrator will not be final and binding upon the parties and the intention of the parties was to approach to the arbitrator for the purpose of resolution of dispute, between the parties and though the word has been used arbitration in the first part of the Clause 5, but the intention of

the parties was not to resolve the dispute through arbitration and in the absence of any such stipulation that the decision of the arbitrator will be final and binding on the parties and no party will be entitled to approach to the court, the said clause cannot be treated as an arbitration clause.

7) It will be profitable to reproduce the Clause 5 of the development agreement which reads as under:

> "(5) उभयपक्ष के मध्य किसी भी प्रकार का विवाद उत्पन्न होने की स्थिति में दोनों पक्ष द्वारा मान्य पच अथवा पंचों की नियुक्ति की जावेगी और पंच निर्णय प्राप्त कर मान्य किया जावेगा । विवाद का निराकरण पंचों के मध्यम से नहीं होने की स्थिती मे दोनो पक्ष व्यवहार न्यायालय या अन्य किसी न्यायालय की शरण ले सकेंगे।"

8) From bare reading of the aforesaid clause and in view of the judgments delivered by the Supreme Court time to time from K.K. Modi Vs. K.N. Modi to the latest judgment delivered in **Alchemist Hospitals Ltd. (Supra)**, the aforesaid clause cannot be treated as arbitration clause and the parties are free to approach to the competent Civil Court for redressal of their dispute in accordance with law.

9) It is also examined by this court that whether the claim of the applicant is a live claim or dead wood. Ex-facie time barred claims, those on the "first glance" seems apparent as time barred based on the facts and circumstances of the dispute cannot be referred to arbitrate. While discussing the scope of section 8 and 11, in the case of ***Vidya Drolia vs. Durga Trading Corporation, (2021) 2 SCC 1,*** it was held that it is the duty of the Court to assess the section 11 application preliminarily to weed out "manifestly ex

facie non-existent and invalid arbitration agreements, or non-arbitrable disputes." The preliminary review at the reference stage serves to eliminate clearly baseless claims, where dismissal is obvious and unquestionable. This limited jurisdiction was "only" allowed to ensure that there is expeditious and efficient disposal of these "manifestly" ex-facie dead and time barred disputes.

10) In the case in hand, the development agreement was executed on 15/04/2015 and the advance amount was paid at the same time. Thereafter, nothing happened and no progress could be achieved in the matter. On 30/03/2026, the applicant raised a demand for return of advance amount etc., whereas the limitation for recovery of money is three years. By virtue of Section 43 of the Act of 1996, the provisions of Limitations are applicable to the arbitration proceedings also. The claim of the applicant is *ex-facie* time barred and can be considered as dead wood and it is no more *res integra* that the dead wood dispute cannot be referred to arbitrate.

11) Consequently, the application fails and is hereby dismissed. No order as to costs.

(VINAY SARAF)
JUDGE

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