

**In The High Court at Calcutta
Original Civil Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

**AP NO.186 OF 2023
Chandan Chatterjee and others
VS.
Gita Sundararaman and others**

For the petitioners	:	Mr. Jishnu Chowdhury, Adv.,
For the respondents	:	Mr. Anubhav Sinha, Adv.,
Hearing concluded on	:	15.05.2023
Judgment on	:	08.06.2023

The Court:

1. The respondents entered into a partnership on June 1, 1979 to carry on business under the name and style of "Swarna School" with effect from July 1, 1979.
2. On September 15, 1992, a further deed of partnership was entered into, altering the profit-sharing ratio of the partners. On April 12, 1998, the deed of trust was executed by the respondents/partners, constituting the Public Charitable Trust which would run the secondary section of the Swarna School, which is an educational institution. The respondents themselves remained as trustees, retaining absolute right to appoint further trustees or trustees in lieu of themselves as well as to appoint an attorney who would be entitled to have all the powers of the trustees.

3. On April 1, 2003, a further deed of partnership was entered into, incorporating certain alterations in respect of remuneration etc.
4. A supplementary deed of trust was also executed, which entitles a Managing Committee to be formed to run the school.
5. On June 8, 2012, the respondent/partners and trustees entered into a Memorandum of Understanding (MOU) for the petitioners to take over control of Swarna School and for transfer of the partnership business and the trust.
6. Clause 2.5 thereof provides that the respondents shall assign the tenancy of the ground floor of the premises to the petitioners.
7. Clause 17 of the MOU provides for arbitration in case of disputes.
8. Subsequently, upon a dispute arising in June, 2021, the petitioners filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (in brief, “the 1996 Act”). The arbitration clause was invoked by a letter dated August 4, 2022, to which the petitioners allegedly did not respond, leading to the filing of the present application under Section 11 of the 1996 Act.
9. The respondents contest the proceeding on several grounds.
10. First, it is argued that the arbitration agreement annexed with the present application under Section 11 is a mere photocopy and neither the original nor a certified copy of the MOU dated June 8, 2012.
11. Learned counsel for the respondents relies on Clause 3(a) of the Scheme for Appointment of Arbitrators by the Chief Justice of this Court, 1996, which was notified on January 21, 1997, which provides that the original arbitration agreement or a duly certified copy thereof

has to accompany an application under Section 11, sub-sections (4), (5) or (6) of the 1996 Act.

12. Clause 7 of the same also provides for rejection of the request if the application is not in conformity with the Scheme. It is argued that Clause 3(a) of the said Scheme is mandatory in nature. For such proposition, learned counsel for the respondent places reliance on paragraph no.122 of the *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Ltd. And others*, reported at 2023 SCC OnLine SC 495.
13. It is next argued by the respondents that the MOU containing the purported arbitration clause is neither registered nor sufficiently stamped. In the said document, the petitioners described themselves as “purchasers”. The objective of the MOU was to take over the entire tenancy of the ground floor of premises no.126 A, Rashbehari Avenue, Kolkata – 700 029. The recitals in the same page indicate that the first and second parties shall ‘transfer’ to the petitioners and the petitioners would acquire complete management, control, right, title and interest in the partnership firm and the registered trust. The tenancy was also assigned. Hence, the agreement was to be compulsorily registered in terms of Section 17(1)(a) of the Registration Act, 1908 (for short, “the 1908 Act”), since the same purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.
14. By placing reliance on *N.N. Global (supra)*, learned counsel for the respondents submits that the MOU was printed on a non-judicial

stamp paper of Rs.100/-, whereas the rent of the premises was around Rs.4200/-. As per the Directorate of Registration and Stamp Revenue, even if the stamp duty is calculated on the basis of 20 years, since the transfer was made in perpetuity, the stamp duty would be Rs. 9,072/-, that is, much higher than Rs.100/-. Hence, the agreement is insufficiently stamped and cannot be acted upon, being debarred by Section 35 of the Indian Stamp Act and Section 49 of the Registration Act respectively.

15. By placing reliance on the Division Bench Judgment of this Court in *Ranjiv Kumar and another Vs. Sanjiv Kumar and another*, reported at AIR 2018 Cal 130, it is argued that all challenges to admissibility of the arbitration agreement have to be taken at the stage of Section 11 of the 1996 Act and not before the Arbitral Tribunal.
16. That apart, the MOU is, according to the respondents, void in the eye of law. Section 5(6) of the West Bengal Premises Tenancy Act, 1997 precludes a tenant, without the previous consent of the landlord, from transferring or assigning his right in the tenancy or any part thereof. In 2012, at the time of signing of the MOU, the rent of the premises, located within the Kolkata Municipal Corporation area, was below Rs.10,000/- and hence the 1997 Act was applicable.
17. Moreover, Section 11(2) of the Specific Relief Act, 1963 debars specific performance of contracts which are in excess of powers given to the trustees.
18. The MOU purports to transfer the business, management and property rights by the trust and to transfer and assign the entire

business and work of the trust itself, which could not be to the benefit of the business or the trust.

19. The trust concerned is a public charitable trust and is to the administered as per the Charitable and Religious Trusts Act, 1920 (hereinafter referred to as “the 1920 Act”). This Court, *In the matter of Dhanalal Karnawat and another*, reported at AIR 1975 Cal 67 and in *Mohan Lall Seal and others Vs. Kanak Lall Seal and others*, reported at (2010) 3 CHN 597, held that the provisions of Section 36 of the Indian Trust Act, 1882 have to be followed in case of trusts governed under the 1920 Act. As such, it is argued that for transfer of lease rights in perpetuity in favour of the petitioners, permission of the concerned civil court is mandatory. Hence, it is beyond the scope of the Arbitrator or this Court to grant such relief.
20. The respondents next argue that the instant proceeding is bad for non-joinder of the trust, which is itself a necessary party, more so, since the letter of invocation dated August 4, 2022 was issued against the present respondents as also Meenakshi Sundararaman Education Trust. A perusal of the pleadings in the present application also indicates that after the execution of the MOU dated June 8, 2012, the payments were made by one third party, namely, Ashok Sharma who was supposed to replace respondent nos.2 and 3. The said Ashok Sharma has also not been impleaded in the present proceeding.
21. Thus, the application should be dismissed for non-joinder of necessary parties.
22. It is next contended by the respondent that the application under Section 11 of the 1996 Act is not maintainable in view of pendency of

a prior application under Section 8 of the 1996 Act, filed in a pending suit in August, 2022. It is argued that there may a conflict of decisions otherwise. An anomalous situation may arise if the application under Section 8 is rejected, as the same issues and facts in simultaneous judicial proceedings would continue before the Arbitrator and the Civil Court. Since the civil suit was prior in point of time, no Arbitral Tribunal could be constituted or be allowed to proceed with the hearing. Learned counsel places reliance *South City Projects (Calcutta) Limited Vs. Jugal Kishore Sadani and others*, reported at (2010) 4 Cal LT 55 in support of such proposition.

23. Learned counsel for the respondents then argues that the transactions between the petitioners and respondents were to be concluded 12 months after signing of the MOU, that is, by June 8, 2013. Time was the essence of the agreement and the date of non-performance would start from June 9, 2013. Even the alleged subsequent payment still 2016, as contended by the petitioners, cannot help the petitioners insofar as the invocation of the arbitration clause in 2022 is concerned. Learned counsel places reliance on *Vidya Drolia Vs. Durga Trading Corporation*, reported at (2021) 2 SCC 1 in support of the said proposition.

24. Learned counsel for the respondents also argues that the present dispute includes a dispute with regard to the registered power of attorney executed by the respondents, the cancellation of which has been sought by the respondents in Title Suit No.537 of 2021, pending before a civil court. The said issues relate to rights *in rem* and are not arbitrable and cannot be referred to arbitration. In this context,

learned counsel for the respondents cites *Booz Allen Vs. SBI Home Finance*, reported (2011) 5 SCC 532, where the Supreme Court held that rights *in rem* are not arbitrable, which observation holds true even after insertion of Section 11(6A) of the 1996 Act.

- 25.** Clause 8 of the MOU clearly provides for a registered power of attorney, which is a part and parcel of the dispute.
- 26.** Learned counsel for the respondents further argues that it is trite law that there cannot be bifurcation of causes of action, as held by the Supreme Court in *Sukanya Holdings (P) Ltd. Vs. Joyesh H. Pandya and another*, reported at AIR 2003 SC 2252. In the instant case, the petitioners submit that even if some of the prayers could not be arbitrated upon, other aspects of the dispute in relation to some parties could be referred to arbitration, which would lead to bifurcation of causes of action. A major component of the dispute is already sub judice before a civil court in Title Suit No.537 of 2021 pending in the Ninth Court of Civil Judge (Senior Division) at Alipore.
- 27.** The respondents contend that the petitioners would not be rendered remediless even if the arbitration agreement is void, as per Section 65 of the Contract Act, 1872, as recognized in paragraph no.65 of *N.N. Global (supra)*. The remedy of the petitioners would then lie in a civil suit for recovery of moneys advanced. It is reiterated that since the respondents have not used any affidavit, they did not have any opportunity to provide any document relating to the applicable rent in June, 2012 and to controvert various averments in the petition, which include vexatious and fluctuating averments relating to negotiations in August, 2021 between the parties, which are intended to negate the

arguments on limitation. Hence, it is submitted that the application under Section 11 ought to be dismissed.

28. Learned counsel for the petitioners refutes the arguments of the respondents and places reliance on *Rajeev Maheshwari and others Vs. Indu Kocher and others*, reported at 2011 SCC OnLine Cal 1243 and *Deo Kumar Saraf Vs. Mangal Keshav Securities Limited*, reported at (2009) SCC OnLine Cal 1003, for the proposition that if both parties agree on the arbitration clause/agreement, the requirement of producing original or certified copy of the document is waived. If, in a stricter situation under Section 8, the same is the rule, it would definitely apply to an application under Section 11 of the Act, which does not incorporate the strict language of Section 8(2) of the 1996 Act. It is disputed that the Scheme of 1996 framed by this Court is mandatory, as it is not couched in negative language.
29. In paragraph 34 of the application under Section 9 of the 1996 Act, the petitioners referred to the arbitration agreement, which was not denied in paragraph no.47 of the respondents' affidavit-in-opposition thereto, which dealt with paragraph no.34 of the application.
30. In an application under Section 11 of the 1996 Act, the production of the original or a certified copy of the arbitration agreement is not a mandatory requirement, as held in an unreported judgment of this Court in *AP 195 of 2023 [Rupa Mukherjee Vs. M/s. Simplex Infrastructures Limited]*. At the worst, it would be a curable defect and the petitioners herein undertake to file a certified copy if so directed. For the proposition that such defect is curable, the petitioners rely on

Vidyawati Gupta and others Vs. Bhakti Hari Nayak and others, reported at (2006) 2 SCC 777.

31. As regards the argument that the agreement is void, it is contended by the petitioners that the scrutiny of the court would be confined to be existence of an arbitration agreement, as stipulated in Section 11(6A) of the 1996 Act.
32. In the present case, if the petitioners are able to obtain consent of the landlord, the assignment would be absolutely legal and the bar under the 1997 Act would not apply.
33. Similarly, the petitioners can always obtain permission from court for the purpose of transfer of trust property, if at all required.
34. In the present case, the petitioners submit that the transfer contemplated under the MOU is for the benefit of the trust and, as such, no permission of court is required.
35. If a permission is required at all under the statute, law treats the contract to be a contingent one, the contingency being the permission or the consent as the case may be. In such cases, the form of decree would be to allow the petitioners' claim for specific performance, subject to the permission of fulfilment of the condition within a designated time.
36. The petitioners rely on the following judgments in support of such proposition:
 - a) *Mrs. Chandnee Widya Vati Madden Vs. D.R. C.L. Katial and others, reported at (1964) 2 SCR 495;*
 - b) *Smt. Anjali Das Vs. Bidyut Sarkar, reported at 1991 SCC OnLine Cal 186;*

c) *Nathulal Vs. Phoolchand*, reported at (1969) 3 SCC 120.

37. In the present case, it is further argued, the trustees are entitled under Clause 4(b) of the Trust Deed to appoint further trustees and can very well transfer control of the trust by retiring as trustees and by appointing the petitioners and their nominees as trustees, which will be a relief claimed in arbitration. Such remedy is not illegal.
38. If nothing else, the petitioners can have a claim for damages in the alternative to specific performance under Section 73 of the Indian Contract Act, 1872.
39. In any event, even if a part of the agreement is ultimately held to be void, the remainder can be performed and the petitioners' right to have arbitration cannot be curtailed at this stage.
40. Furthermore, the respondents have derived benefits from the MOU, having accepted payment to the extent of Rs.60,00,000/- from the petitioners in terms of the MOU, which is admitted in the letter issued by the respondents' advocate on June 1, 2021. Hence, having derived such advantage, the respondents cannot contend now that the MOU is void.
41. As regards registration, such objection is not a bar to entertain an application under Section 11, for which proposition the petitioners cite *SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited*, reported at (2011) 14 SCC 66. In any event, the petitioners have sued for specific performance and thus fall within the exception contained in Section 49 of the Registration Act, 1908.

42. Nothing has been shown, it is argued, by the respondents with reference to the Stamp Act or the agreement to establish that the document is inadequately stamped.
43. As regards limitation, the petitioners have clearly brought out their case for specific performance in their application under Section 9 of the 1996 Act, which is governed by Article 54 of the Schedule I of the Limitation Act, 1963. Refusal for the first time was in June, 2021 and the cause of action of the petitioners is not time-barred.
44. By placing reliance on *Bharat Sanchar Nigam Limited and another Vs. NORTEL Networks India Private Limited*, reported at (2021) 5 SCC 738, it is argued that the present application cannot be said to be *ex facie* barred by limitation and not even was argued to be so by the respondents.
45. The Trust is not a juristic entity and, hence, need not be sued in its own name, the petitioners argue.
46. No authority has been produced in support of the contention that power of attorney creates a right in *rem* and that cancellation is only possible in a court and not in arbitration. Hence, the argument regarding cancellation of power of attorney not being arbitrable is refuted.
47. Learned counsel for the petitioners distinguishes *South City Projects (supra)*, where the suit was filed against the parties to the agreement and other third parties. In such context, the court held that unless there is adjudication on the effect of arbitration agreement on third parties, the application under Section 11 cannot be entertained. However, the present respondents have not impleaded any third party

in the suit pending at their behest before the Civil Judge (Senior Division), Ninth Court at Alipore, due to which the proposition laid down in *South City Projects (supra)* is not applicable.

48. Insofar as *Sanjay Sinha Vs. Sri Pinaki Chaudhury*, reported at (1999) SCC OnLine Cal 615, is concerned, the said judgment of this Court did not consider the effect of Section 8(3) of the 1996 Act, in terms whereof an arbitration may be commenced or continued and an arbitral award be made, notwithstanding the issue pending before a judicial authority.
49. The judgment of this Court in *Sanjay Sinha (supra)*, it is argued, cannot be considered to be good law in view of the judgment of the Supreme Court in *Vijay Kumar Sharma alias Manju Vs. Raghunandan Sharma alias Baburam and others*, reported at (2010) 2 SCC 486.
50. Upon hearing learned counsel for the parties, the first question which arises for consideration is whether non-filing of the original or certified copy of the arbitration clause/agreement entails, mandatorily, the rejection of the application under Section 11 of the 1996 Act.
51. A perusal of the 1996 Scheme framed by the then Chief Justice of this Court shows that Clause 3 thereof is preceded by the expression “shall be made in writing and shall be accompanied by.....”. Sub-clause (a) thereof stipulates that the original arbitration agreement or a duly certified copy thereof has to be produced with such application.
52. The sanction for non-filing of the same, however, finds place in Clause 7 which deals with rejection of such a request under Clause 3. The first sentence thereof provides that the Chief Justice or his designate “may” reject the application if it is not in accordance with the

provisions of the Scheme. Hence, an element of discretion has been introduced and it is not always mandatory to reject such an application on such score alone.

- 53.** The second sentence of Clause 7 provides that if the rejection is by reason of a technical defect or an omission to furnish details as required under Clause 3 and its sub-paragraphs, the party applying would be at liberty to apply afresh upon obtaining prior approval of the Chief Justice in the matter of initiation of a fresh reference.
- 54.** The use of the expression “Chief Justice”, obviously, also includes his designate, as in the present case.
- 55.** Hence, a two-fold layer of protection has been given to an applicant who has failed to comply technically with all terms of Clause 3. Not only has the rejection been made optional, even on such rejection the petitioner has the further option to apply afresh upon obtaining an approval of the Chief Justice for initiation of a fresh reference.
- 56.** A composite reading of the entire clause unerringly indicates that it is discretionary for the Chief Justice or his designate to reject an application or not on such technical score.
- 57.** In the present case, moreover, the petitioners have expressed through counsel that they are agreeable to produce a certified copy of the agreement containing the arbitration clause, if so directed. In view of such error being patently technical and curable, and since a photocopy has been annexed to the application under Section 11, there is, thus, scope of non-rejection of the same.
- 58.** In any event, a bare reading of Section 8 in conjunction with Section 11 of the Arbitration Act shows that there is no provision in Section

11 corresponding to the negative clause in sub-section (2) of Section 8 which stipulates that the application under Section 8 “shall not be entertained” unless it is accompanied by an original arbitration agreement or a duly certified copy thereof. In absence of the same, the intention of the legislature is very clear.

59. Hence, at the worst, non-filing of the original or a certified copy of the agreement may render the application under Section 11 irregular at the worst, but not outright unlawful.
60. In the present case, the respondents have challenged the invocation on certain points of maintainability. However, the very existence of the agreement has not been disputed.
61. Hence, within the limited scope of Section 11 (6A) of the 1996 Act and the tenor of the judgment of the Supreme Court in *Vidyawati Gupta (supra)*, the application under Section 11 ought not to be dismissed on technical and/or procedural grounds.
62. In fact, it has been repeatedly held by this Court that the requirement under the rules of procedure to file original arbitration agreement or certified copy thereof may be waived by the Court where the arbitration agreement is admitted, as held by the learned Single Judge in *Deo Kumar Saraf (supra)*. Such ratio is squarely applicable to the present case, since the very physical existence of the arbitration agreement has not been impugned, although challenge has been thrown on certain legal grounds to the validity of the same.
63. In *Rajeev Maheshwari (supra)*, the learned Single Judge had observed that the mandatory requirement would have to be met, in case of an application under Section 8 of the 1996 Act, of the production of an

original or certified copy of the agreement, if there was a dispute as to the existence of the arbitration agreement.

64. Since such ratio has been laid down with regard to the stricter provision of Section 8, which stipulates in sub-section (2) that no such application shall be entertained without the original or a certified copy, the same is all the more applicable to an application under Section 11, which does not have any such bar.
65. The next question which falls for consideration is whether the arbitration clause can be said to be void in view of alleged illegalities in the agreement containing the same.
66. The first plinth of challenge of the respondents is that there cannot be any assignment of tenancy as envisaged in the agreement without the consent of the landlord.
67. It has to be kept in mind, in such context, that this Court is sitting in a limited jurisdiction under Section 11 and not deciding the arbitral dispute itself. Insofar as the question of assignment of tenancy is concerned, it is premature at this juncture to hold that there is no consent obtained from the landlord for such assignment. From the *prima facie* documents annexed to the application under Section 11, the physical existence of the agreement containing the arbitral clause cannot be negated. As regards the question of consent of the landlord, not only has the stage of pleadings regarding the same or establishing the same by evidence not arrived as yet, such defect is also curable. Hence, being arguable, such allegation made by the respondents cannot be a sufficient ground for refusing the invocation of arbitration clause itself at the Section 11 stage.

- 68.** Insofar as the second limb of the respondent's argument is concerned, it is contended that the trust property could not be transferred without the permission of Court.
- 69.** A perusal of the MOU containing the arbitration clause shows that the same speaks about three parties. The partners of Swarna School have been described as the first part, the Trust as the second and the present petitioners as the third part or the purchaser.
- 70.** The objective of the MOU as stipulated in Clause 1 thereof is to take over the entire business of the partnership firm and the trust which runs the Swarna School, together with the tenancy of the ground floor of premises No.126 A, Rashbehari Avenue, Kolkata. It is clear from the clauses of the agreement that the parties intended to transfer primarily the management, control and right, title and interest of the first part, that is, the partners and the trust, in favour of the present petitioners. It is indicated in the MOU itself that the first and second parts had decided to exit from the education profession due to their pre-occupation in other business areas including the decision to exit from running of the school, in respect of which the Trust had been created. On such premise, the partnership business and the trust was to be transferred in favour of the present petitioners, for expansion of their existing business.
- 71.** There is nothing in the agreement to pre-suppose that the same would be detrimental to the interest of the Trust and/or not for the benefit of the same.
- 72.** In any event, the question as to whether the transfer is for the benefit of the Estate is, at best, arguable and cannot be decided conclusively

at the Section 11 stage. It has been argued by the petitioners that a bar in the Trust Act could at best render the agreement to be a contingent contract, for which the petitioner has cited several judgments.

- 73.** Permission can be obtained for the transfer, if necessary, even later.
- 74.** However, such prospective requirement cannot render the agreement itself or the arbitration clause contained therein void for the purpose of the present consideration.
- 75.** In any event, if part performance of the agreement is possible, no such permission would be required at all.
- 76.** It is also arguable as to whether the transfer contemplated in the MOU comprised of the handing over of the control of the School and its management and not the corporeal physical rights in the property. The ancillary transfer of certain assets would go on to bolster such handing over of management, it may be argued.
- 77.** In any event, damages can be sought by the petitioners in the alternative before the Arbitrator.
- 78.** Hence, the said grounds raised by the respondents cannot be said to render the MOU itself void *ab initio*. To adjudicate such question, the interpretation of the terms of the agreement as well as application of the relevant law is required, which is only possible at the stage of the dispute itself being decided and not at the stage of reference to arbitration under Section 11 of the 1996 Act.
- 79.** Non-joinder of the Trust, in any event, cannot be a bar in the application under Section 11. All the trustees have been impleaded in

the present application, who were also the partners of the concerned partnership firm.

80. Hence, at least at this stage, the non-joinder of the trust itself, which is sufficiently represented by its trustees, cannot preclude the court from referring the matter to arbitration.
81. The bar of limitation, as also sought to be argued by the respondents, is, at best, arguable. In fact, on the basis of the pleadings made in paragraph no.29 of the application under Section 9 of the 1996 Act and paragraph 24 of the instant application of the petitioners, it is clear that the cause of action for the dispute arose in the year 2021. The invocation, having been sought in 2023, is well within time.
82. It has been categorically held by the Supreme Court in *BSNL (supra)* that the bar of limitation has to be shown to be *ex facie* revealed, for the purpose of rejection of an application under Section 11, which is not the case in the present proceeding.
83. None of the judgments of the Supreme Court cited by the respondents observes that even an arguable question as to whether the agreement is void has to be mandatorily decided at the stage of Section 11 of the 1996 Act.
84. Insofar as the argument as to the document being unregistered is concerned, it may very well be argued that the agreement contemplates assignment of tenancy and transfer of business which may not be compulsorily registrable. In this context, *SMS Tea Estates (supra)* is also relevant.
85. In any event, the argument of the petitioners that Section 49 exempts cases of specific performance of contract is at least arguable. Hence,

it cannot be said conclusively at this stage that the document containing the arbitration clause is mandatorily registrable.

86. The objection as to insufficiency of stamp is, at the worst, curable by impoundment. Even the five-Judge Bench of the Supreme Court in *N.N. Global (supra)* has not precluded such option for the court taking up a proceeding under Section 11 of the 1996 Act.
87. Insofar as the sufficiency of the stamp required for the agreement in the present case is concerned, which is embossed on a Rs.100 non-judicial stamp paper, *N.N. Global (supra)* has not held that even disputed questions of insufficiency of stamp can be a bar at the stage of reference under Section 11.
88. In *N.N. Global (supra)*, the said five-Judge Bench of the Supreme Court proceeded on the premise that the document containing the arbitration clause was *ex facie* insufficiently stamped. Reading the said judgment in the proper context of Section 11(6A) of the 1996 Act, which has been reiterated by the Supreme Court in several other cases, only *ex facie* invalidity of an agreement can be a ground for refusal of reference. However, the actual stamp payable for the agreement in the present case requires an interpretation of the terms thereof and the legal connotation of the rights created therein, which is best left for the adjudicating authority and not for this Court within the limited scope of Section 11(6A) of the 1996 Act.
89. The cancellation of a power of attorney is not a judgment *in rem*, as argued by the respondents. Section 41 of the Evidence Act clearly indicates that only judgments passed in probate proceedings, matrimonial suits, admiralty and insolvency jurisdictions can qualify

as judgments *in rem*. The present case does not involve any of the same and, thus, cannot be termed as a proceeding *in rem*. Hence, the respondent's argument that only a civil court can take up the issue is based entirely on conjecture. The future possibility of a counter-claim regarding cancellation of power of attorney cannot be sufficient to vitiate the reference itself on the ground that the Arbitrator does not have jurisdiction to adjudicate such issue. Hence, this Court chooses not to rely on such far-fetched possibility for the present purpose of considering whether the matter is to be referred to an Arbitral Tribunal within the limited conspectus of Section 11 of the 1996 Act.

90. In such view of the matter, there is no scope of refusal to refer the matter to arbitration, since admittedly there is the existence of an arbitral clause in the MOU-in-question entered into between the parties. The execution of the same and/or the physical existence thereof have not been challenged. The limited challenge to the validity of the same does not touch the realm of *ex facie* bar but, at the most, raise arguable questions required to be decided on merits, on interpretation of the documents and the law by the adjudicating authority.
91. Hence, AP No.186 of 2023 is allowed, thereby appointing Mr. Piyush Chaturvedi (Mobile No. 9831007327), an advocate practicing in this Court and a member of the Bar Association, as the sole Arbitrator to resolve the dispute between the parties, subject to obtaining his consent/declaration under Section 12 of the Arbitration and Conciliation Act, 1996. It is, however, made clear that all questions regarding the validity and legality of the arbitration clause as well as

the MOU itself containing the said clause, are left open along with all other issues raised by the parties to be decided on merits by the Arbitrator.

- 92.** It is made clear that the observations made in this judgment are tentative, arrived at solely for the purpose of deciding the application under Section 11 of the 1996 Act and shall be without prejudice to the rights and contentions of the parties in the arbitration proceeding.

(Sabyasachi Bhattacharyya, J.)