

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP/30/2025

SRI ABHIJIT BANERJEE
VERSUS
SRI NANDU SHAW @ NANDA SHAW & ANR.

BEFORE :
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 11th June, 2025.

Mr. Ayan Banerjee, Adv.
Mr. Arijit Bhowmick, Adv.
Ms. Debasree Mukherjee, Adv.
. . . . for the petitioner.

Mr. Kushal Chatterjee, Adv.
Mr. Shibjit Mitra, Adv.
Mr. Oishik Chatterjee, Adv.
. . . for the respondents.

1. This is an application for appointment of a learned Arbitrator in terms of Clause 15 of the development agreement dated April 18, 2016.
2. Mr. Ayan Banerjee, learned Advocate for the petitioner submits that clause 15 is an arbitration agreement. The parties had agreed that in the event of any dispute with regard to the terms and conditions of the said development agreement, the parties would settle the dispute under the provisions of the Arbitration and Conciliation Act, 1996

(hereinafter referred to said Act). The outcome of the arbitration would then be challenged before the appropriate forum. Such interpretation has been made by Mr. Banerjee, in view of the reference to the 'Arbitration and Conciliation Act, 1996' and use of the expression "settlement of disputes and differences" arising out of the said development agreement'. Mr. Banerjee submits that the clause can be divided into two parts. The first part provided that in case of any dispute, the parties would settle the matter under the provisions of the Arbitration and Conciliation Act, 1996. The second part of the said clause provided that any person aggrieved by the award or the decision of the Arbitrator, could approach a proper forum. The second part which allowed the parties to approach a higher forum upon conclusion of the arbitral proceedings, according to Mr. Banerjee, did not divest the Arbitrator appointed in the first part of the said clause from passing an award under the Act, upon adjudication of the dispute between the parties. Mr. Banerjee submits that an arbitration clause must be read as a whole and in the context of the agreement. A single sentence or expression from the said clause cannot be lifted or segregated and applied out of the context. The portion of the clause which deals with the rights of the parties to approach an appropriate forum or a higher forum should be read in the context that, upon conclusion of the arbitral proceedings, the remedy of the parties would be to approach the appropriate Court as defined under Section 2(i)(e). In this context, Mr. Banerjee relies upon

a decision of the Hon'ble Apex Court in the matter of *Tarun Dhameja Vs. Sunil Dhameja and Another* reported in 2024 SCC OnLine SC 3715.

3. Mr. Kushal Chatterjee, learned Advocate for the respondents submits that clause 15 of the said agreement was not an arbitration clause. The clause literally provided that if disputes and differences arose between the parties out of the said development agreement, then the parties would try to settle the dispute amicably, through discussions and deliberations. According to Mr. Chatterjee, the proper interpretation of such clause would be that if the parties would settle the disputes through negotiations and deliberations and arrive at a settlement or an understanding, the same shall be reduced to writing and signed as a settlement agreement. The same would then have the status of an arbitral award. Reference has been made to Section 73 sub-section 3 of the said Act, in support of such contention.
4. Having considered the rival submissions of the parties, this Court does not agree with Mr. Banerjee. The arbitration clause, although in vernacular, if translated into English would mean that the parties had agreed that in the event of any dispute or difference arising out of the development agreement, the parties would sit together and try to settle the dispute amicably, through discussions and deliberations. If such discussions and deliberations were successful, the parties would then sign a settlement agreement which would have the status of an arbitral award under Section 74 of the said Act. In this context,

the law i.e. The Arbitration and Conciliation Act, 1996 had been incorporated in Clause 15. The clause provided, that if the settlement did not materialise, in that event the parties would be at liberty to approach an appropriate court or forum.

5. An arbitration clause must be in writing. It should indicate meeting of the minds of the parties to refer the dispute to a private impartial Tribunal, whose decision would be final and binding. In the absence of any one of these parameters, the clause could not be treated as an arbitration clause. The law is well settled. The expression 'Arbitrator', 'arbitration' or reference to the Act in any clause, *ifso facto* would not make a clause, a binding arbitration agreement. The meeting of the minds had to be clear.
6. In the present case, the first portion of the clause provided that the parties agreed that in case of disputes and differences, parties would solve the same amicably through discussions in terms of the provision of the Arbitration and Conciliation Act, 1996. This means that the procedure of conciliation under Sections 61 to 81 of the said Act would be applicable. If the settlement was not achieved or actualized or arrived at, the parties would approach the appropriate court of law.
7. The decision in Tarun Dhameja (supra) does not help the petitioner, inasmuch as, the arbitration clause involved in the said matter had two parts. In the first part the parties agreed to refer their disputes to arbitration. The expression 'same shall be referred to arbitration' is of

primary importance. Such meeting of mind between the parties is absent in the case in hand. The arbitration clause in the case before the Hon'ble Supreme Court is quoted below:-

"23.Arbitration

That if at any time either during the continuance of the partnership or after the retirement of any partner, any dispute or difference shall arise between the partners or their respective heirs or any one claiming through or under them, the same shall be referred to arbitration.

Arbitration shall be optional & the arbitrator will be appointed by partners with their mutual consent. In any case of dispute arise then the Jurisdiction of Indore Civil Court shall be applicable & acceptable by the partners."

8. The arbitration clause in this case is as hereunder.

১৫। উপরিউল্লিখিত শর্তাবলী লইয়া যদি ভবিষ্যতে পক্ষগণের মধ্যে কোনরূপ মনোমালিন্য বা বিবাদ বিসম্বাদের সৃষ্টি হয় তাহা হইলে উভয় পক্ষগণ প্রথমে আপোষে আলাপ আলোচনার মাধ্যমে আরবিট্রেশন এ্যাক্টের দ্বারা উক্ত বিসম্বাদের সমাধা করিবেন। যদি কোন কারণে উক্ত সালিশী বাস্তবায়িত না হয় তাহা হইলে পক্ষগণ উপযুক্ত আদলতে দেশীয় প্রচলিত আইন মোতাবেক উক্ত বিবাদ বিসম্বাদের সমাধান করিবেন।

9. In the matter before Hon'ble Supreme Court, the first portion of the arbitration clause was clear and unambiguous. It stated that, at any time during the continuance of the partnership or after the retirement of any partner, if any dispute or difference arose between the partners or their respective heirs or any one claiming from them, the same shall be referred to arbitration. Reference to arbitration was not optional, but it was held that the parties had the option to appoint

the arbitrator on mutual consent. The interpretation given was that either party had the option to invoke arbitration and to that extent there was a mutual agreement.

10. In the case before this Court, the parties agreed that, in case the settlement did not fructify through deliberation and discussion, they were entitled to approach the appropriate court of law. The moment a provision is made, granting an opportunity to the parties to approach the appropriate court, the arbitration clause ceases to be a binding clause.

11. In ***Wellington Associates Ltd. vs. Kirit Mehta*** reported in **(2000) 4 SCC 272** the Hon'ble Apex Court held as follows:-

“9. Before referring to the said sections, I shall refer to the relevant clauses 4 and 5 in the two agreements dated 15-8-1995. They read as follows:

“4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of the courts in Bombay.

5. It is also agreed by and between the parties that any dispute or differences arising in connection with these presents ‘may be referred’ to arbitration in pursuance of the Arbitration Act, 1940 by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.”

* * *

21. Does clause 5 amount to an arbitration clause as defined in Section 2(b) read with Section 7? I may here state that in most arbitration clauses, the words normally used are that

“disputes *shall* be referred to arbitration”. But in the case before me, the words used are “may be referred”.

22. It is contended for the petitioner that the word “may” in clause 5 has to be construed as “shall”. According to the petitioner's counsel, that is the true intention of the parties. The question then is as to what is the intention of the parties. The parties, in my view, used the words “may” not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the civil courts at Bombay are to be approached by way of a suit. Then follows clause 5 with the words “it is *also* agreed” that the dispute “*may*” be referred to arbitration implying that parties need not necessarily go to the civil court by way of suit but can also go before an arbitrator. Thus, clause 5 is merely an enabling provision as contended by the respondents. I may also state that in cases where there is a sole arbitration clause couched in mandatory language, it is not preceded by a clause like clause 4 which discloses a general intention of the parties to go before a civil court by way of suit. Thus, reading clause 4 and clause 5 together, I am of the view that it is not the intention of the parties that arbitration is to be the sole remedy. It appears that the parties agreed that they can “*also*” go to arbitration in case the aggrieved party does not wish to go to a civil court by way of a suit. But in that event, obviously, fresh consent to go to arbitration is necessary. Further, in the present case, the same clause 5, so far as the venue of arbitration is concerned, uses the word “shall”. The parties, in my view, must be deemed to have used the words “may” and “shall” at different places, after due deliberation.

12. An arbitration agreement has to be couched not in precatory, but obligatory words. Although, there is no particular form or universally practiced format in framing an arbitration agreement, but the words used must be certain, definite and indicative of a determination of the parties to go for arbitration and not a choice or

a mere possibility. In the case in hand, there was a mutual agreement, the parties agreed that, in case the settlement did not fructify through deliberation and discussion, they were entitled to approach the appropriate court of law. It was not an obligation. In ***Jagdish Chander (supra)***, the question before the Court was whether Clause 16 of the deed of partnership was an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act 1996 or not. The clause read as follows:-

“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.”

13. The Hon’ble Apex Court held as follows:-

“8. (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.”

14. In the course of discussions, the Hon’ble Court laid down the following principles to determine as to what would constitute an arbitration agreement:-

“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 v. U.P. Small Industries Corpn. Ltd.* [(1999) 2 SCC 166] and *Bihar State Mineral Development Corpn. 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 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 exclude 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.”

15. Although, the Hon’ble Apex Court in ***Enercon (India) Ltd. and ors. vs. Enercon GMBH and anr.*** reported in ***AIR 2014 SC 3152***, held that the courts must have a pragmatic approach and not a pedantic one in construing an arbitration agreement or arbitration clause, but

the referral court has to decide whether there exists an arbitration agreement with reference to the contract document. The contract document does not unambiguously indicate the intention of the parties to refer the dispute to arbitration. The clause clearly indicates that, in case of failure of the resolution of disputes by conciliation/amicable settlement, the parties were entitled to approach the appropriate court of law.

16. Under such circumstances, the application fails and is accordingly dismissed.

17. The petitioner is at liberty to take appropriate steps before the appropriate court of law.

(SHAMPA SARKAR, J.)