

OCD 7

ORDER SHEET
AP-COM/606/2025
IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

POONAWALLA FINCORP LTD.
VS
ADITYA LANDS PVT. LTD. AND ANR.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 18th August, 2025.

Appearance:
Mr. Ayan Chakraborty, Adv.
Mr. Dhilan Sengupta, Adv.
Mr. Sohini Mukherjee, Adv.
Ms. Sharmistha Das, Adv.
...for the petitioner

Mr. Ayan Poddar, Adv.
Mr. Gaurav Ghosh, Adv.
Mr. Soham Dutta, Adv.
...for the respondent.

1. This is an application for appointment of an arbitrator under Clause 23 of the Deed of Lease dated April 2, 2019.
2. Mr. Sengupta, learned advocate for the petitioner submits that the respondent no.1 leased out the property to the petitioner for a period of nine years. On August 1, 2019, an addendum was executed by which the area leased out to the respondent No. 1 was reduced. Accordingly, the lease rent was also reduced to Rs.85,000/- per month, exclusive of the GST. It was further agreed that upon completion of every one year, the

lease rent would be enhanced by 5% over the last paid rent. At the time of execution of the deed of lease, the petitioner made over to the respondent no.1, a sum of Rs.5,70,000/- by way of interest free refundable security deposit. The petitioner continued business from the said premises.

3. By a letter dated July 20, 2023, the petitioner informed the respondent no.1 that the petitioner did not intend to continue with the lease agreement and would terminate the agreement upon expiry of 30 days. Clause 16 of the lease agreement allegedly permitted premature termination of the agreement, upon issuing 30 days notice. The petitioner wanted to deliver peaceful possession and claimed refund of the security deposit, but the respondent no.1 failed to take steps. By a letter dated November 14, 2024, the petitioner through its learned advocate terminated the agreement and demanded a sum of Rs.12,19,313/- towards outstanding security deposit, interest and other incidental charges. The respondent replied to the said letter through the learned advocate on January 6, 2025. The respondent alleged non-compliance of the terms and conditions of the lease deed and wrongful termination thereof, in violation of the agreement. The petitioner invoked the arbitration clause. A learned advocate was appointed as the sole arbitrator, to adjudicate upon the dispute between the parties.
4. The petitioner unilaterally appointed the arbitrator. The respondents raised a dispute with regard to such unilateral appointment and by a letter dated May 5, 2025, the learned arbitrator recused. Thus, this application has

been filed for adjudication of the dispute arising out of non-refund of the security deposit along with interest and other incidental charges.

5. Mr. Poddar, learned advocate for the respondents, submits that Clause 23 is not a binding arbitration agreement. It is further submitted that the petitioner has violated all the terms and conditions of the lease deed and as such, the claims are inadmissible. Mr. Poddar relies on the decision of this Court in ***AP/15/2022 [Sunil Kumar Samanta v. Smt. Sikha Mondal] (decided on 7th April 2025)***, in support of his contention. This Court had held that the arbitration clause should indicate that the parties had agreed that they shall refer the dispute to arbitration i.e. to a private tribunal and be bound by the said decision of the tribunal. Further reliance was placed on the decision of ***BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Limited*** reported in ***2025 SCC OnLine SC 1471***, in support of the contention that where there was a possibility of the parties agreeing to refer dispute to arbitration in future, as contrasted from an obligation to refer the dispute to arbitration, the said clause would not be treated as a valid arbitration clause. It was further contended that the use of the expression 'shall endeavour' in the subject agreement would not indicate that the parties had explicitly expressed their willingness to refer their disputes arising out of the said agreement to arbitration. Instead, the parties agreed that they would 'endeavour' to refer disputes. Mere use of the expression 'arbitration' as a heading to Clause 23, would not *ipso facto* make Clause 23 a binding arbitration agreement. A further agreement was to be executed between the parties, in order to refer the dispute to arbitration.

6. Having considered the rival contentions of the parties, this Court deems it fit to set out the arbitration clause for convenience:-

“23 Arbitration

23.1 If any dispute and/or difference arises between the parties hereto during the subsistence of this Deed or any renewals of the same or thereafter, in connection therewith including the validity, interpretation, implementation or alleged material breach of any provision of this Deed or regarding any question, the Parties hereto shall endeavour to settle such dispute amicably on mutual agreement appoint a sole arbitrator in terms or provisions contained in the arbitration and conciliation Act 1996 or any subsequent law for the time being in force.

23.2 The proceedings of arbitration shall be in English language.

23.3 The provisions of this clause shall survive the termination of the Deed for any reason whatsoever.

23.4 That the place of Arbitration shall be in Kolkata.”

7. Upon a comprehensive and meaningful reading of this clause, this Court finds that the parties had agreed that in the event of any dispute arising out of the said agreement, the parties shall endeavour to settle such dispute amicably or on mutual agreement, appoint a sole arbitrator. It is true that clause 23.1 could have been more articulately drafted. In my view, if a comma is incorporated after the word amicably and a coordinating conjunction ‘or’ is incorporated after the comma, the same would read as follows :-

23.1 If any dispute and/or difference arises between the parties hereto during the subsistence of this Deed or any renewals of the same or thereafter, in connection therewith including the validity, interpretation, implementation or alleged material breach of any provision of this Deed or regarding any question, the Parties hereto shall endeavour to settle such dispute amicably, or on mutual agreement appoint a sole arbitrator in terms or provisions contained in the arbitration and conciliation Act 1996 or any subsequent law for the time being in force.”

8. Such incorporation of the comma, and or, would make the clause more coherent and effective. Thus, Mr. Poddar’s contention is not accepted. Mr. Poddar has tried to convince the Court that the expression ‘endeavour’ which has been used, would mean that the parties shall try to settle the dispute amicably or on a further agreement, refer the dispute to arbitration. The intention of the parties, from a reading of the clause, is clear. The parties agreed that they shall either endeavour to settle the dispute amicably or mutually appoint an arbitrator. Thus, the meeting of the minds to refer the dispute to arbitration, is inbuilt in the said clause. The requirement for amicable settlement is optional, but referring to arbitration is not. If the amicable settlement was not availed of, or failed, the parties agreed to appoint a sole arbitrator on mutual consent. The ‘mutual agreement’ referred to by Mr. Poddar indicates consensual appointment of the arbitrator i.e. agreement on the person to be appointed as an arbitrator and not a further agreement to refer. The agreement to refer is already incorporated in the clause, the syntax of the sentence may not be happy.

9. In today's commercial world, interpretation of an arbitration clause should be in consonance with business common sense. The text of the agreement should be interpreted in a way that it is reasonable, practical and meets the commercial expectation of the parties. The contract and the dispute resolution clause must work effectively. The Arbitration Act has been promulgated, to encourage party autonomy and to ensure that disputes and differences arising out of commercial transactions are settled expeditiously. Under the law, the parties are free to decide on the mechanism for resolution of disputes amongst them. The true intent and purport of clause 23.1 is available from the subsequent clauses. Clause 23.2 mentions that the arbitral proceeding shall be in English language. The next provision states that the clause will survive the termination of the deed and the place of arbitration shall be Kolkata. These clauses were incorporated with a purpose. If Mr. Poddar's interpretation is accepted, the subsequent clauses will be rendered otiose. It is well settled that the agreement should be read as a whole, to enable the referral court to give primacy to party autonomy, upon taking into account what the parties had actually intended. In ***K.K. Modi v. K.N. Modi*** reported in **(1998) 3 SCC 573**, the Hon'ble Apex Court held that the referral court should decide and consider the intention of the parties, by constructing the arbitration agreement broadly. The true intention must be gathered from the surrounding in circumstances. The relevant paragraphs are quoted below:-

21. Therefore our courts have laid emphasis on (1) existence of disputes as against intention to avoid future disputes; (2) the tribunal or forum so chosen is intended to act judicially after taking into

account relevant evidence before it and the submissions made by the parties before it; and (3) the decision is intended to bind the parties. Nomenclature used by the parties may not be conclusive. One must examine the true intent and purport of the agreement. There are, of course, the statutory requirements of a written agreement, existing or future disputes and an intention to refer them to arbitration. (Vide Section 2 Arbitration Act, 1940 and Section 7 Arbitration and Conciliation Act, 1996.)

* * *

26. In the case of J&K State Forest Corpn. v. Abdul Karim Wani [(1989) 2 SCC 701] (SCC para 24) this Court considered the agreement as an agreement of reference to arbitration. It has emphasised that (1) the agreement was in writing; (2) it was a contract at the present time to refer the dispute arising out of the present contract; and (3) there was a valid agreement to refer the dispute to arbitration of the Managing Director, Jammu and Kashmir State Forest Corporation. The Court observed that endeavour should always be made to find out the intention of the parties, and that intention has to be found out by reading the terms broadly and clearly without being circumscribed.

* * *

28. The Court has further observed that it is to be decided whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, depends on the intention of the parties to be gathered from the relevant documents and surrounding circumstances.

10. In ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in **(2009) 2 SCC 55** the Hon'ble Apex Court held that:

“25. The submission is unsustainable for more than one reason. No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances.

26. What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties. The respondent in none of its letters addressed to the applicant suggested that the dispute between the parties is required to be settled through conciliation and not by arbitration. In response to the applicant's letter invoking the arbitration clause the respondent merely

objected to the names inter alia contending that the suggested arbitration would not be cost-effective and the demand for arbitration itself was a premature one.”

11. The Hon’ble Apex Court held that, the courts should adopt a pragmatic approach and not a pedantic one, while interpreting or construing an arbitration agreement or an arbitration clause. It is the duty of the Court to make the same workable within the permissible limits of law, without stretching it beyond the boundaries of recognition. A common sense approach has to be adopted. The clause should be interpreted just as a reasonable businessman, having business common sense, as well as being equipped with the knowledge that may be peculiar to the business venture, would interpret the same. If a detailed, semantic and syntactical analysis of the words in a commercial contract leads to a conclusion that flouts business common sense, the agreement must be made workable.
12. Interpreting the arbitration clause in the said agreement, the Hon’ble Apex Court held that it was a well-recognized principle of arbitration jurisprudence in almost all jurisdictions, especially, those following the Uncitral Model Law, that Courts should play a supportive role in encouraging arbitration, by following the practice of least intervention by Courts. Upon considering the principles behind the enactment of the law, the Hon’ble Apex Court found that an arbitration clause could not be frustrated on the ground that it was un-workable and any obvious omission could be set right by Court.

13. The decision in **BGM and M-RPL-JMCT (JV)** is distinguishable, inasmuch as, the arbitration clause, which is quoted below, used the expression ‘may’:-

“In case of parties other than Govt. Agencies, the redressal of the dispute **may** be sought through ARBITRATION AND CONCILIATION ACT, 1996 as amended by AMENDMENT ACT OF 2015”.

14. Under such circumstances, the Hon’ble Apex Court held that when the expression ‘may’ was used, it meant that the parties may or may not refer the dispute to arbitration. It was an option. Thus, if they wished to refer the dispute, there should be a further agreement. This was also the view of this Court in **Sunil Kumar Samanta vs Smt. Sikha Mondal** decided in **AP. 15 of 2022**, as the expression ‘may’ had been used in the arbitration clause.
15. Under such circumstances, the application is allowed. This Court appoints Mr. Rohit Banerjee, Advocate (Mobile: 9163891670), as the arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.
16. The application is disposed of.

(SHAMPA SARKAR, J.)