

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

Before:
The Hon'ble Justice Shampa Sarkar

AP-COM/991/2024

BVEPL BHARTIA (JV)
VS
STATE OF WEST BENGAL AND ORS

For the petitioner : Mr. Krishnaraj Thaker, Sr. Adv.
Mr. Indranil Munshi

For the respondent No.1./State : Mr. Sirsanya Bandopadhyay, Sr. Adv.
Mr. Paritosh Sinha, AoR.
Mr. Arindam Mandal,
Ms. Swagata Ghosh

For the respondent Nos.2 & 3 : Mr. Suddhasatva Banerjee,
Mr. Shashwat Nayak,
Mr. Dipankar Das

Hearing concluded on : 21.03.2025

Judgment on : 22.05.2025

Shampa Sarkar, J.:-

1. This is an application for appointment of an arbitrator in terms of Article 26.3 of the Engineering, Procurement and Construction Agreement dated December 2, 2019, (hereinafter referred to as the said agreement). The petitioner is a joint venture between Bharat Vanijya Eastern Pvt. Ltd. and Bharat Infra Projects Ltd. and was formed on May 20, 2019. Bharat Vanijya Eastern Pvt. Ltd. is an infrastructure development company in India. Bharat

Infra Projects Ltd. is an item rate contractor involved in the construction of highways, bridges, roads, tunnels, railways, mining buildings, etc. in the north-east part of India. The two entities entered into a joint venture.

2. The West Bengal Highway Development Corporation in short (WBHDCL) is a company incorporated under the Companies Act, 1956. In 2019, WBHDCL invited request for proposals from eligible bidders as per the technical and commercial terms provided therein, for execution of work relating to a project of construction, widening, and strengthening of Bongaon-Chakdaha Road from the existing two-lane with paved shoulder to a standard four-lane.

3. Pursuant to the request for proposal, the petitioner submitted its bid and the said bid was accepted. The letter of acceptance was issued on September 17, 2019, at the contract price of Rs.379 crores. The said agreement was executed between the parties on December 2, 2019. The appointment date was February 28, 2020 and the project was to be completed within the 912th day from the date of appointment. The project was to be executed in the Engineering, Procurement and Construction Mode (EPC).

4. The case of the petitioner as run in the application was that, the petitioner had completed and fulfilled its obligations under the project on April 27, 2022, i.e., well before the scheduled date of completion, in respect of the area over which the right of way had been handed over on the date of appointment. The rest of the work could not be completed as the right of way had not been handed over.

5. The petitioner contended that even though land for construction of the two truck terminals and partial width of the toll plaza could not be handed over within 150 days as per Schedule-A of the EPC agreement, WBHDCL did not extend the date of completion.

6. According to the petitioner, non-completion of the remaining work, was attributable to the lack of access to the land. Such incomplete work should have been deemed to be withdrawn in terms of Clause 8.3(iii) of the agreement. The term was not applied at the appropriate stage, WBHDCL withdrew the unfinished work from the scope of the work, after a lapse of 592 days, although the withdrawal should have been done within the 180th day from the appointment date. Resultantly, the petitioner suffered damages to the tune of Rs.2,01,87,7471/- due to the delay in handing over of the site. The manpower, machineries, etc. remained idle during the entire period. The petitioner requested WBHDCL to pay the aforesaid amount, but the said request was in vain.

7. The petitioner's further case was that a supplementary agreement was executed between the parties on March 15, 2022 and the contract price was brought down to Rs.322.58 crores. On account of reduction of the contract price, the petitioner suffered further damages to the tune of Rs.5,64,16,019/-. According to the petitioner, such amount was payable in terms of the EPC agreement. The petitioner completed the project prior to the completion date and claimed bonus in terms of Clause 19.20 of the EPC agreement. The completion certificate indicated that the project was completed 122 days prior to the scheduled date of completion and recommendation for payment of bonus for 122 days was made. The

petitioner claimed bonus for an amount of Rs. 11,68,95,793/-. To the utter dismay of the petitioner, by a letter dated September 19, 2022, the competent authority of WBHDCL informed the petitioner that, the recommendation of the engineer was reviewed and queries were raised. The queries were answered. Once again, similar queries were raised and the engineer replied to the same.

8. By a letter dated March 11, 2023, the petitioner requested WBHDCL to release the claim for bonus and also raised a claim for delayed payment in terms of Clause 27.3 of the contract. The invoice raised by the petitioner on April 30, 2021, for cutting of trees, transportation, stacking at the stack-yard, also remained unpaid. The amount was claimed in terms of Clause 9.4 of the EPC agreement. According to the petitioner, interest was also payable at the rate prescribed in the said agreement on account of delayed payment under the various heads. The petitioner alleged that WBHDCL had not fulfilled its obligations under the different clauses of the agreement and had failed and neglected to clear the outstanding dues of the petitioner. Thus, disputes arose.

9. Relying upon Article 26 of the EPC agreement dated December 2, 2019, Mr. Thaker, learned Senior Advocate for the petitioner submitted that the parties agreed to resolve the disputes amicably, failing which the disputes were to be referred to arbitration. In the instant case, despite several letters and communications between the parties, the disputes remained unresolved. Unnecessary queries had been raised time and again by the WBHDCL. The number of letters which the petitioner had written would indicate that, although the petitioner had approached the authorities

repeatedly, for liquidation of their dues, but the authorities remained silent and did not take any initiative to settle the matter.

10. Mr. Thaker referred to a letter dated September 20, 2022, by which the petitioner was informed that the claim had been raised before the competent authority of the respondent and that the respondent was in the process of constituting a Dispute Resolution Committee (DRC). However, the DRC was not constituted. Thus, amicable settlement was impossible. Reference was made to the decision of ***Oasis Projects Limited vs. Managing Director, National Highway and Infrastructure Development Corporation Limited*** reported in **2023 SCC Online Del 645**, in support of the contention that the clause requiring the parties to go for conciliation at the first instance, was directory and not mandatory. Further submission was that, the continuous exchange of letters between the parties since 2021, would clearly indicate that an further attempt at conciliation would be an empty formality. In this regard, reliance was placed on the decisions of ***Visa International Limited vs. Continental Resources (USA) Limited*** reported in **(2009) 2SCC 55** and ***Demerara Distilleries Private Limited and anr. vs. Demerara Distillers limited*** reported in **(2015) 13 SCC 610**. Therefore, according to Mr. Thaker, this was a fit and proper case for reference of the disputes to arbitration, in accordance with the dispute resolution clause. Mr. Thaker submitted that Clause 26.3 was a binding arbitration clause. The heading of the said clause clearly indicated that arbitration was the ultimate mechanism for dispute resolution, if the conciliation and amicable settlement failed. The use of the word “shall” in Clause 26.3(i) was indicative of the binding nature of the clause. Clause

26.3(v) also described the decision of the dispute resolution committee, as an award. Reference was further made to Clause 26.4 which stipulated that in the event of constitution of a statutory regulatory authority, tribunal or commission with the powers to adjudicate upon the disputes between the parties, the disputes would be referred to such body, instead of reference to arbitration under Clause 26.3. It was submitted that, the various clauses and the surrounding facts and exchange of letters, would indicate that the parties had agreed to refer the dispute to arbitration. The conduct of the parties would demonstrate that the parties had accepted the existence of an arbitration clause.

11. By letter a dated January 8, 2024, the petitioner called upon WBHDCL to agree to the constitution of an arbitral tribunal, as the DRC was not in place. The said respondent replied by a letter dated January 19, 2024, indicating that it would not give its consent under Clause 26.3, as the petitioner was seeking to bypass the conciliation process. Mr. Thaker submitted that WBHDCL did not deny the existence of the arbitration clause, but had mentioned that prior to arbitration, conciliation should have been initiated. When there was no progress in the conciliation process and WBHDCL had not agreed to the constitution of an arbitral tribunal, the petitioner sent its final demand letter dated September 17, 2024, for payment of Rs. 30,46,83,442/-. WBHDCL replied to the letter on September 20, 2024, indicating that the petitioner's demand had been placed before the competent authority for settlement of the disputes by the DRC, upon constitution thereof. According to Mr. Thaker, the said letter recorded the failure of conciliation. The decision to constitute the DRC was in

furtherance of Clause 26.3, i.e., for final settlement of the dispute. As the DRC was not constituted and furthermore, as unilateral constitution of a committee was invalid in law, by a learned Advocate's letter dated October 21 2024, the petitioner invoked arbitration and called upon respondents to appoint any one from the panel of learned advocates as was suggested by the petitioner. As the respondents did not agree to the request for appointment of an arbitrator, the petitioner filed the application before this Court.

12. According to Mr. Thaker, the use of expression "may" must be interpreted in the context as 'shall', to mean that the parties agreed to refer the dispute to arbitration. In this case, no option was left to the parties to further agree to refer the disputes to arbitration. It did not contemplate that at a future date, a further agreement should be arrived at, before a party could seek redressal of the dispute by an arbitral tribunal. Mr. Thaker relied on the following decisions:-

(a) Oriental Insurance Co. Ltd. vs Raj Kumari (SMT) and Ors.
reported in ***(2007) 12 SCC 768***,

(b) Oriental Insurance Co. Ltd. vs Shakuntala Garg and Ors.
reported in ***(2007) 12 SCC 773***

(c) Powertech World Wide Limited vs Delvin International General Trading LLC reported in ***(2012) 1 SCC 361***

(d) Jagdish Chander vs Ramesh Chander and Ors. reported in ***(2007) 5 SCC 719***.

(e) Mahanagar Telephone Nigam Limited vs Canara Bank and Ors.
reported in ***(2020) 12 SCC 767***.

13. Mr. Sirsanya Bandopadhyay, learned Senior Standing Counsel appeared on behalf of the respondent No.1 and submitted that, the series of correspondence would indicate that the process of conciliation had not been completed and the matter had been placed before the competent authority for a decision on the claims made by the petitioners. According to Mr. Bandopadhyay, Clause 26.1 made it mandatory for the parties to resolve the dispute amicably, failing which the conciliation procedure set forth under Clause 26.2 would follow. Clause 26.2 provided that, in case of any dispute, either party could call upon the authority's engineer or such other person as the parties would mutually agree upon, as a Conciliator, to mediate and assist the parties in arriving at an amicable settlement.

14. Failing mediation by the conciliator or in the absence of any intervention by the conciliator, either party could refer the dispute to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor, for amicable settlement. Upon such reference, the said persons were to meet no later than seven business days from the date of reference to discuss and attempt to amicably resolve the dispute. If the meeting did not take place within seven business days or the dispute was not amicably settled within 15 days of the meeting or the dispute was not resolved by filing the terms of settlement within 30 days of the notice in writing as referred to in Clause 26.1(i), either party may have referred the dispute to arbitration in accordance with the provisions of Clause 26.3, but before further agreeing to such arbitration, the parties were bound to explore conciliation by a conciliation committee of independent experts, to be set up by the authority. In the event the conciliation was successful, the

parties would then sign the written settlement agreement and the conciliator would authenticate the same. Such settlement agreement would be binding on the parties in terms of Section 73 of the Arbitration Act. A harmonious construction of Clauses 26.1, 26.2 and 26.3 would indicate that the parties were required to resolve the dispute by a conciliatory process. Such steps were not fulfilled by the petitioner, prior to filing the application. Mr. Bandopadhyay, thus, submitted that the disputes could not be referred to arbitration, as the application was premature.

15. Mr. Suddhasatva Banerjee, learned Advocate for the respondent Nos. 2 and 3 submitted that the use of the expression 'may' in Clause 26.2 would clearly indicate that there was no binding arbitration clause either in the EPC agreement or the Supplementary Agreement. Clause 26.1 of the said agreement mandated amicable settlement in terms of Clause 26.2 (conciliation). Clause 26.2 laid down the procedure for conciliation of the disputes through a conciliator, i.e., the authority's engineer. Clause 26.3 although had a heading, 'arbitration', the sub-clauses thereunder were deleted prior to execution of the agreement dated December 2, 2019. The deletion of the explicit provision for mutual reference to arbitration, clearly displayed intention of the respondents to do away with the process of settlement of disputes by arbitration.

16. The deletion was incorporated at the Board's meeting held on September 12, 2018. The Government of West Bengal had highlighted the problems in arbitration cases relating to government departments. It was decided by the Board that Article 26 may be provisionally deleted, especially with regard to the portions which dealt with reference to arbitration. The

deletion of such clauses prior to issuance of the letter of acceptance to the petitioner, demonstrated that the respondent was opposed to resolution of dispute by arbitration.

17. Moreover, the expression “may” in Clause 26.2 did not make it mandatory for the parties to go for arbitration in case of failure of conciliation. The reference of the dispute to arbitration was optional. It postulated a fresh agreement to be entered into between the parties. Reference was placed on the decisions of ***Jagdish Chander vs. Ramesh Chander and ors.*** reported in ***(2007) 5 SCC 719, BGM And M-Rpl-Jmct (jv) vs. Eastern Coalfields Limited*** reported in ***2024 SCC OnLine Cal 486*** and ***Blue Star Limited vs. Rahul Saraf*** reported in ***2023 SCC OnLine Cal 1406***. It was further submitted that the heading of the said Clause 26.3, i.e., Arbitration, would not automatically lead to the conclusion that the parties had agreed to resolve their disputes by arbitration. WBHDCL, did not accept the existence of the arbitration clause, in any of its letters. Rather, the said respondent insisted on the dispute resolution mechanism as contemplated under Clause 26.2. WBHDCL refused to consent to the proposal of the petitioner to refer the dispute to arbitration made by the petitioner.

18. Considered the rival contentions of the parties. Mr. Bandopadhyay’s contention that the application is premature and the provision for conciliation and amicable settlement should have been first exhausted, is not accepted. Innumerable letters were written by the petitioner. The respondent assured that the competent authority was looking into the matter and a DRC would be constituted. In my view, relegation of the matter

to further rounds of conciliation would be a futile exercise. Adequate opportunity was available to the respondents to take a decision on the demands made by the petitioner. WBHDCL neither appointed a conciliator nor referred the dispute to the Chairman of the Authority and Chairman of the Board of Directors of the contractor. The DRC was not constituted. The court holds that relegating the parties to a further attempt at amicable settlement through conciliation, will be a futile exercise. The respondents did not display any intention to resolve the dispute. Reference is made to the decisions of ***Visa International (supra) and Demerara Distilleries (supra)***.

19. In the decision of ***Visa International Ltd. v. Continental Resources (USA) Ltd.***, reported in ***(2009) 2 SCC 55***, the Hon'ble Apex Court held as follows:-

“38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated “... since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed”. In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause.”

20. In the decision of *Demerara Distilleries Private Limited and Another v. Demerar Distillers Limited* reported in **(2015)13 SCC 610**, the Hon'ble Apex Court held as follows:-

“**5.** Of the various contentions advanced by the respondent Company to resist the prayer for appointment of an arbitrator under Section 11(6) of the Act, the objections with regard the application being premature; the disputes not being arbitrable, and the proceedings pending before the Company Law Board, would not merit any serious consideration. The elaborate correspondence by and between the parties, as brought on record of the present proceeding, would indicate that any attempt, at this stage, to resolve the disputes by mutual discussions and mediation would be an empty formality. The proceedings before the Company Law Board at the instance of the present respondent and the prayer of the petitioners therein for reference to arbitration cannot logically and reasonably be construed to be a bar to the entertainment of the present application. Admittedly, a dispute has occurred with regard to the commitments of the respondent Company as regards equity participation and dissemination of technology as visualised under the Agreement. It would, therefore, be difficult to hold that the same would not be arbitrable, if otherwise, the arbitration clause can be legitimately invoked. Therefore, it is the objection of the respondent Company that the present petition is not maintainable at the instance of the petitioners which alone would require an in-depth consideration.”

21. The next question which falls for decision is whether the clauses relied upon by the petitioner, are binding arbitration agreement or not. Article 26 of the contract deals with dispute resolution. Clause 26.1 provides that any dispute, difference, or controversy of whatever nature, arising out of the said agreement, including interpretation of the provisions thereof between the parties and notified in writing by either party to the other party, shall in the first instance, be attempted to be resolved amicably in accordance with the procedure set forth in Clause 26.2. Thus, the expression “shall” in Clause 26.1.1 clearly indicates that the parties agreed to first resolve the disputes

amicably, in accordance with the conciliation procedure. The conciliation procedure is mentioned in paragraph 26.2, that is, either party could call upon the authority's engineer or such other person as the parties would mutually agree, to be the conciliator, who would mediate and assist the parties in arriving at an amicable settlement. Failing such mediation by the conciliator or in the absence of intervention by the conciliator, either party could require such dispute to be referred to the Chairman of the Authority and the Chairman of Board of Directors of the Contractor, for amicable settlement.

22. If the above mechanism failed, in that event, a party may refer the disputes to arbitration, in accordance with the provisions of Clause 26.3. Thus, before resorting to such arbitration, the parties agreed to explore conciliation by the conciliation committee of independent experts. The expression used in Clause 26.1.1 is “shall” and not “may”. In case of failure of the conciliation process, even at the level of the conciliation committee, either party may refer the dispute to arbitration in accordance with the provisions of Clause 26.3. Thus, although the expression “shall” has been used with regard to the process of conciliation and amicable settlement, the expression “may” has been used under Clause 26.2, at two places. This indicates that a party had an option to refer the disputes to arbitration in case of failure of the conciliation mechanism provided under Clause 26.2. The incorporation of the word “shall” under Clause 26.1(i) and 26.2 and “may” in Clause 26.2, was not casual, but a conscious act of the contracting parties. It has been judicially settled that terms of a contract must be strictly construed. Reference is made to the decision of

Oriental Insurance Co Ltd.

Vs.

Narbheram

Power and Steel (P) Ltd., reported in (2018) 6 SCC 534.

Moreover, although Clause 26.3 contains the heading “Arbitration”, mere use of the word arbitration in the heading, would not be sufficient to hold that the said clause was a binding arbitration clause. The Clauses 26.3 (iii) and (iv) were consciously deleted and the contract with the petitioner was entered into after such deletion. The minutes of the Board meeting has been relied upon by the respondents which indicates that the authority had decided to provisionally delete the said clause. In case of failure of conciliation, the DRC would settle the dispute. The DRC is not an independent and impartial tribunal. An essential ingredient of an arbitration agreement is to have the dispute resolved by a private tribunal, which would impartially decide the disputes. Such requirement is absent. The DRC was to be constituted by the respondent itself and the petitioner had requested for constitution of such committee. Although, in Clause 26.3(v), the decision of the DRC has been mentioned as an award, Clause 26.4 provides that all disputes arising after the constitution of a statutory regulatory authority or tribunal or commission, will be adjudicated by the said authority, tribunal or commission instead of a reference to arbitration under Clause 26.3 and the parties agreed that the adjudication shall not be final and binding until an appeal against such adjudication is decided by an appellate tribunal or court of competent jurisdiction as the case may be.

23. Thus, the dispute resolution clauses under the said agreement do not attach any finality to the decision to be taken under Clause 26.3. The provision that the dispute shall be finally settled by a DRC, does not indicate

that the parties had agreed to treat the DRC as the arbitral tribunal and be bound by its decision. The petitioner requested for the constitution of DRC and on the failure of respondent to constitute the DRC, invoked arbitration.

24. The procedure for dispute resolution is quoted below:-

"Article 26: Dispute Resolution

26.1 Dispute Resolution

(i) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by the either Part to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

(ii) The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 thirty) days of the notice in writing referred to in Clause 26.1. I or such longer period as may be mutually agreed by the Parties, either Party **may** refer the Dispute to arbitration in accordance with the provisions of Clause 26.3 but before resorting to such arbitration, the parties agree to explore conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments. In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the conciliators would authenticate the same.

Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. In case of failure of the

conciliation process even at the level of the Conciliation Committee, either party **may** refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

(i) Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by a Dispute Resolution Committee.

(ii) Deleted

(iii) Deleted

(iv) Deleted

(v) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award of the Dispute Resolution Committee proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.

(vi) Deleted”

25. In *Wellington Associates Ltd. vs. Kirit Mehta* reported in (2000) 4 SCC 272, a similar clause was taken up and considered. 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.

23. A somewhat similar situation arose in *B. Gopal Das v. Kota Straw Board* [AIR 1971 Raj 258 : 1971 Raj LW 151] . In that case the clause read as follows:

“That in case of any dispute arising between us, the matter *may* be referred to arbitrator mutually agreed upon and acceptable by you and us.”

It was held that fresh consent for arbitration was necessary. No doubt, the above clause was a little clearer there than in the case before me. In the above case too, the clause used the word “may” as in the present case. The above decision is therefore directly in point.

24. Before leaving the above case decided by the Rajasthan High Court, one other aspect has to be referred to. In the above case, the decision of the Calcutta High Court in *Jyoti Bros. v. Shree Durga Mining Co.* [AIR 1956 Cal 280 : 60 CWN 420] has also been referred to. In the Calcutta case [AIR 1956 Cal 280 : 60 CWN 420] the clause used the words “can” be settled by arbitration and it was held that fresh consent of parties was necessary. Here one other class of cases was differentiated by the Calcutta High Court. It was pointed out that in some cases, the word ‘may’ was used in the context of giving choice to one of the parties to go to arbitration. But, at the same time, the clause would require that once the option was so exercised by the specific party, the matter was to be mandatorily referred to arbitration. Those cases were distinguished in the *Calcutta case* [AIR 1956 Cal 280 : 60 CWN 420] on the ground that such cases where option was given to one particular party, the mandatory part of the clause stated as to what should be done after one party exercised the option. Reference to arbitration was mandatory, once option was exercised. In England too such a view was expressed in *Pittalis v. Sherefettin* [(1986) 1 QB 868 : (1986) 2 All ER 227 (CA)] . In the present case, we are not concerned with a clause which used the word “may” while giving option to one party to go to arbitration. Therefore, I am not concerned with a situation where option is given to one party to seek arbitration. I am, therefore, not to be understood as deciding any principle in regard to such cases.

25. Suffice it to say, that the words “may be referred” used in clause 5, read with clause 4, lead me to the conclusion that clause 5 is not a firm or mandatory arbitration clause and in my view, it postulates a fresh agreement between the parties that they will to go to arbitration. Point 2 is decided accordingly against the petitioner.”

26. In the above matter, the learned counsel before the Hon’ble Apex Court submitted that the word “may” should be construed as “shall” and the true intention of the parties must be looked into. The Hon’ble Apex Court was of the view that the words “shall” and “may” were used for a purpose and the general intention of the parties was to go to a civil court by filing a

suit, but the party could also go for arbitration. The use of the expression “may” and “shall” in two different clauses of the same contract led the Hon’ble Apex Court to hold that the expressions were consciously used after due deliberation and “may” could not be construed as “shall”. The questions which were answered by the Hon’ble Apex Court were as follows:-

“7. On the above submissions, the following points arise for consideration:

(1) Whether clause 5 amounted to an arbitration clause at all and whether such a question amounted to a dispute relating to the “existence” of the arbitration clause? Whether such a question should be decided only by the Arbitral Tribunal under Section 16 and could not be decided by the Chief Justice of India or his designate while dealing with an application under Section 11?

(2) If the Chief Justice or his designate could decide the said question, then whether clause 5 of the agreements dated 15-8-1995 which used the words “may be referred” required fresh “consent” of the parties before a reference was made for arbitration?

(3) What relief?”

27. In *Jyoti Bros. vs. Shree Durga Mining Co.* reported in **AIR 1956**

Cal 280, the arbitration clause read as follows:-

“In the event of any dispute arising out of this contract, the same can be settled by Arbitration held by a Chamber of Commerce at Madras. Their decision shall be binding to the Buyers and the Sellers.”

28. The Calcutta High Court held that the same was not a valid arbitration clause. The conclusion is quoted below:-

"4. I know of no reported decision where any Arbitration clause used the word "can" as in this case. The Arbitration Clause in this case can at best mean that the dispute "can" be settled by Arbitration. But that does not mean that the dispute shall be settled by Arbitration. It only means this that after the dispute has occurred, the parties may go to Arbitration as an alternative method of settling the dispute instead of going to the Courts. But that means that after the dispute has arisen,

the parties will have to come to a further agreement that they shall go to Arbitration.

In other words, the clause at best means that it is a contract to enter into a contract. It denotes the possibility of Arbitration in the event of a future dispute. I do not consider a contract to enter into a contract to be a valid contract in law at all. I am, therefore, of the opinion that this is not a valid submission to Arbitration. The word "can" by the most liberal interpretation only indicates a possibility. A legal contract is more than a mere possibility. It is possibility added to obligation. If a seller says "I can sell goods" that does not mean an immediate or present contract to sell.

Similarly, if a person says "I can go to arbitration"

29. 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, the requirement of first attempting to resolve the disputes amicably by referring to Conciliation, was expressed in a definite language. It was 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.”

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

“**5.** The appellant has challenged the said order appointing the arbitrator. It is submitted that the power under Section 11 of the Act, to appoint an arbitrator, can be exercised only if there is a valid arbitration agreement between the parties, and that as there is no arbitration agreement between the parties, the arbitrator could not

have been appointed. Strong reliance was placed by the appellant on the decision in *Wellington Associates Ltd. v. Kirit Mehta* [(2000) 4 SCC 272] where a designate of the Chief Justice of India held that the following clause was not an “arbitration agreement”:

“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.”

He also held that the use of the word “may” could not be construed as “shall” and that the clause was only an enabling provision and a fresh consent was necessary to go to arbitration. The decision of the Calcutta High Court in *Jyoti Bros. v. Shree Durg Mining Co.* [AIR 1956 Cal 280] was also cited with approval.

* * *

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.”

31. 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.”

32. Thus, applying the ratio of ***Jagdish Chander (supra)***, this Court is constrained to hold that mere use of the expression “Arbitration” in the heading of Clause 26.3 under Article 26, would not itself make the clause a binding arbitration agreement as envisaged under Section 7 of the Arbitration Conciliation Act, 1996. The use of the word ‘may’ contemplates a consent or consensus of the parties before referring to arbitration. The clause is not a binding arbitration agreement, but an agreement that the parties may in future, refer the dispute to arbitration.

33. In the decision of ***Powertech World Wide Limited vs Delvin International General Trading LLC*** reported in **(2012) 1 SCC 361**, the Hon’ble Apex Court held as follows:-

“**24.** In a recent judgment of this Court in *Visa International Ltd. v. Continental Resources (USA) Ltd.* [(2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379] this Court was concerned with an arbitration clause

contained in the memorandum of understanding that read as under: (SCC p. 61, para 12)

“12. ... ‘Any dispute arising out of this agreement and which cannot be settled amicably shall be finally settled in accordance with the Arbitration and Conciliation Act, 1996.’ ”

25. The disputes having arisen between the parties, the respondent, instead of challenging the existence of a valid arbitration clause, took the stand that the arbitration would not be cost-effective and will be premature. In view of the facts, this Court held that there was an arbitration agreement between the parties and the petitioner was entitled to a reference under Section 11 of the Act and observed: (*Visa International Ltd. Case*).

“25. ... 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. It is in light of these provisions, one has to construe whether the clause in the present case, reproduced above, in para 3, constitutes a valid and binding agreement. It is clear from a reading of the said clause that the parties were ad idem to amicably settle their disputes or settle the disputes through an arbitrator in India/UAE. There was apparently some ambiguity caused by the language of the arbitration clause. If the clause is read by itself without reference to the correspondence between the parties and the attendant circumstances, may be the case would clearly fall within the judgment of this Court in Jagdish Chander [(2007) 5 SCC 719] . But once the correspondence between the parties and the attendant circumstances are read conjointly with the petition of the petitioner and with particular reference to the purchase contract, it becomes evident that the parties had an agreement in writing and were ad idem in their intention to refer these matters to an arbitrator in accordance with the provisions of the Act.”

34. Reliance is placed on the decision of *Visa International (supra)*, the relevant paragraph of which is quoted below:-

“**16.** The Court is required to decide 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, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties and the surrounding circumstances.”

35. In the case in hand, the correspondence show that the petitioner asked for the consent of the respondent to refer the dispute to arbitration.

36. In the decision of *Mahanagar Telephone Nigam Limited vs. Canara Bank and ors.* reported in **(2020) 12 SCC 767**, there Hon'ble Apex Court held as follows:-

“9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words “including communication through electronic means” in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement.

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation.

* * *

* * *

9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in *Enercon (India) Ltd. v. Enercon GmbH* [*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.

9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings:”

37. Upon a harmonious construction of Clauses 26.1, 26.2 and 26.3, the inevitable conclusion is that although attempts at settlement of disputes amicably through a conciliatory mechanism was made compulsory under

the clause 26.1(i), the use of the expression “may” at two places in Clause 26.2 was an option and that is why, by a letter dated January 8, 2024, the petitioner had requested WBHDCL to consent to arbitration and WBHDCL in reply, had refused to consent to arbitration. Clause 1.2(i)(d) of the agreement provides that the table of contents, headings or sub-headings in the agreement are for the convenience of reference only and should not be used as a construction of or interpretation of the agreement. Thus, the interpretation of the above clauses leads this Court to hold that use of the heading arbitration cannot make the clause a binding arbitration agreement.

38. In the above context, a future possibility encompasses a choice or a discretion available to the parties to refer to arbitration. This removes the element of compulsion to refer the dispute to arbitration and the conduct of the parties would indicate that the petitioner, being conscious of the fact that the expression “may” was a mere possibility, had called upon the WBHDCL to consent to reference of dispute to arbitration. The letter postulates a fresh consensus to be arrived at between the parties when the option became available, upon failure of the attempts at conciliation. The parties had carefully used the terms “shall” and “may” at different places and the respondent no.1 had consciously deleted the expression with regard to the binding reference clause.

39. Prior to deletion of Clause 26.3(i), the clause read as follows:-

“Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26,2, shall be finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).”

40. Post deletion, Clause 26.3(i) reads as follows:-

“Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by a Dispute Resolution Committee.”

41. The clauses do not indicate that the parties had agreed to refer the dispute to a binding arbitration in unequivocal terms, which did not leave any scope to depart from the arrangement. It was not an imperative mandate. 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 agreed that the same shall be settled by the DRC. Nothing in the contract indicates that the parties contemplated and agreed that the DRC was treated as the arbitral tribunal. Here, the parties had an option to refer the dispute to arbitration, a choice and/or a discretion was available to the parties and this would necessarily contemplate a future consent. A specific or direct expression of the intent of the parties to have the dispute settled by arbitration in accordance with the provisions of the Arbitration Act, is absent. The clause is not a binding arbitration clause.

42. The letters annexed to the list of documents filed by the petitioner dated July 29, 2021 and July 13, 2021, indicate that the petitioner

requested for constitution of a conciliation committee and a dispute resolution committee of independent experts in terms of the contract agreement. The letter does not indicate that the petitioner had considered the said dispute resolution committee to be an arbitral tribunal. Thus, the attending circumstances also do not indicate that there was a binding arbitration clause and the parties by their conduct had treated clauses 26.2 and 26.3 as the arbitration clauses. The letter dated January 8, 2024 indicates that the petitioner had requested WBHDCL to agree to resolve the dispute by arbitration and the relevant portion of the said letter is quoted below for convenience:-

“The Managing Director,
West Bengal Highway Development Corporation Limited,
4th & 5th Floor, HRBC Bhawan,
Munsi Premchand Sarani, Kolkata – 700021

Subject: Construction of Widening & Strengthening of Bongaon-Chakdaha Road (SH-1) from lane with Paved shoulder to standard 4 lane configuration from 0+000 km to 6+717 and from 10+568 km to 31+328 km including 2 truck Terminals in Phase - I (Part A i.e., Total Project Length of 27.477 km) excluding Gopalnagar ROB & Flyover in the district of North 24 Parganas & Nadia to be executed through EPC Mode - Regarding Claim for Bonus on early completion of the project by EPC Contractor and Claim for Delayed Payment.

Further, there are many more outstanding claims as on 34st December, 2023 different heads are already accrued and payable by the authority as per different provisions of the agreement which will be submitted in due course of time.

Be that as it may, on 12 May 2023 further clarifications were sought by you from the Authority's Engineer which were also responded to in detail by the Authority's Engineer by its letter dated 25 May 2023.

However, despite seven months having been passed since our last correspondence in the matter, we have not heard from you. It is evident from your conduct that you are not inclined to settle our claims amicably. In the circumstances, we have no other alternative but to raise a dispute with respect to the aforesaid issue in accordance with the provisions of the Contract Agreement No.: WBHDCL/WORKS/06/2019-2020 entered between West Bengal Highway Development Corporation Limited and BVEPL-Bhartia (JV).

As per the contract, any dispute which is not resolved amicably shall be finally settled by a Dispute Resolution Committee in terms of Clause 26.3 which is reproduced below:

"26.3 Arbitration

(i) Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by a Dispute Resolution Committee.

(ii) Deleted

li) Deleted

(iv) Deleted

(v) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award of the Dispute Resolution Committee proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.

(vi) Deleted"

As no Dispute Resolution Committee in place for the aforesaid Contract, you are called upon to give us your consent to resolve the aforesaid dispute by way of arbitration. Should we not hear from you within 15 days, we will be constrained to issue Notice Invoking Arbitration for adjudication of the aforesaid dispute."

43. In the list of documents filed by the respondent, letters have been annexed which show that the petitioner was requested to provide detailed submissions along with supporting documents with regard to its claims, so that the same could be dealt with in the lines of Article 26 of the contract document. An inter-office memorandum has also been annexed, which indicates that a decision was taken to the effect that, on a provisional basis, Article 26 of the model EPC agreement, which deals with dispute resolution, should be provisionally deleted. The existing clause reads as "any dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by a Dispute Resolution Committee".

44. The letter dated January 19, 2024 written by WBHDCL is quoted below for convenience:-

“Reference: Letter ref. BVEPL-BHARTIA(JV)/HO/655 dated 08.01.2024

Dear Sir,

Pursuant to the subject works and connection with your letter under reference, it is noted that you have raised disputes w.r.t Claim for bonus on early completion of the project by EPC Contractor and Claim for Delayed Payment and requested therein WBHDCL’s consent to resolve the same by way of Arbitration under Cl. 26.3, Article 26 of Agreement bypassing Conciliation proceedings/process as per Cl. 26.2, Article 26 of Agreement.

In view of the above, your request for consent to resolve the dispute by way of Arbitration under Cl. 26.3, Article 26 of Agreement cannot be accorded at this juncture; as it is contrary to Contract provisions.

This is for your information & necessary action please.”

45. WBHDCL clearly refused to give consent to refer the dispute to arbitration. In this case, reference to arbitration had to be preceded by an agreement. The petitioner tried to urge before the court that reference to arbitration was the alternative to the resolution of dispute by the dispute resolution committee. The dispute resolution committee was not intended to be an arbitral tribunal, in the Court’s interpretation of Article 26 of the contract. An arbitration clause has to be strictly construed. The conduct of the parties demonstrate that they did not consider the clause as a binding arbitration agreement. The remedy of the petitioner is in a suit.

46. Thus, the prayer for reference to arbitration is rejected.

47. The application is dismissed as not maintainable.

(Shampa Sarkar, J.)