

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO.212 OF 2024
WITH
COMMERCIAL ARBITRATION PETITION NO.429 OF 2024

S3 ConstructionApplicant/Petitioner

Versus

Dhanji Ghellabhai Gala Alias ShethRespondent

Mr. Vaibhav Parab, *Advocate for Applicant/Petitioner.*

Mr. Virendra Tulzapurkar i/b. *Mandar Soman, Advocate for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : SEPTEMBER 16, 2025

ORDER :

1. Commercial Arbitration Application No.212 Of 2024 is an Application under Section 11 of the Arbitration and Conciliation Act, 1996 (*“the Act”*) seeking reference of disputes and differences between the parties to arbitration pursuant to *“Articles of Agreement”* executed sometime in June 2014, pursuant to which claims have been made by the Applicant, *“S3 Construction”* against the Respondent, Dhanji Ghellabhai Gala Alias Sheth (*“Dhanji”*).

2. It is the case of S3 Construction that they had been carrying out work for Dhanji even prior to 2014, but a tender was floated in 2014 and pursuant to that tender, work was said to be continued. It is seen

from the record that the parties have signed the instrument titled Tender Document Volume I found at Exhibit 'A' (commencing at Page No.34 of the Application) with their signatures and stamp on every single page of the said document. In that document, Clause 50 (found at Page No. 66 of the Application) provided for the following :-

“50 Provision for settlement of disputes: If any disputes, differences of questions of any nature which at any time arise between the parties or their representatives, successors or assigns or any of them as to construction of this work order or concerning anything herein contained or arising out of this work order or as to the rights, liabilities or duties under this work order of the parties hereto respectively except in respect of matter of which it is provided herein shall be referred to a sole arbitrator to be appointed by the Client, who will decide the case in accordance with and subject to the provisions of the Indian Arbitration and Reconciliation Act, 1996 or any statutory modification or reenactment thereto or thereof for the time being in force and all proceedings of such arbitration will be held in Mumbai.”

3. Learned Counsel for S3 Construction would submit that this constitutes the arbitration agreement, in invocation of which, notice dated May 14, 2022 had been issued, to which there has been no reply and in 2024, this Application under Section 11 had been filed.

4. Learned Senior Counsel for Dhanji would draw my attention to Clause 33 (found at Page No. 38 of the Application) of the same document, which provides as follows :-

“33. The successful contractor shall enter into agreement on non-judicial stamp paper of appropriate value (as per the Proforma of Articles of Agreement) suggested by the Project Manager.”

5. The upshot of the submission is that, for the contractor to claim privity to the arbitration agreement, there ought to have been execution of an agreement on non-judicial stamp paper of appropriate value as per the proforma of the very same Articles of Agreement. In other words, the contention is that since the Articles of Agreement found at Exhibit ‘A’ have not been printed on a stamp paper and signed on such paper, the arbitration agreement cannot be said to have been issued for Arbitral Tribunal to be appointed.

6. Towards this end, judgment of the Supreme Court in ***Eastern Coalfields¹*** is cited by the Learned Senior Counsel, placing reliance on Paragraph 26 of the said judgment, which is extracted below:-

“26. What is clear from the judgment in Mahanadi Coalfields (supra) is that 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. In Jagdish Chander (supra), 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, were

1 BGM And M-RPL-JMCT (JV) v. Eastern Coalfields Limited – 2025 SCC OnLine SC 1471.

found not indicative of 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” would not constitute an arbitration agreement. Because 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. This is so, because such clauses require the parties to arrive at a further agreement to go to arbitration, as and when disputes arise. Therefore, 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.”

[Emphasis Supplied]

7. Having examined the record and the contentions of the parties, I am unable to agree that a case has been made out to state that the parties had a mere hope or a desire that they may, at some point, agree upon an arbitration agreement. Clause 50 in the Articles of Agreement is explicit in its terms of the commitment to proceed to arbitration. The only real question is whether this clause was actually executed or whether this clause contains any contingencies based on which the arbitration agreement may or may not be discerned. Further, what is to be considered is whether one of the clauses in the document that indicates that the parties would execute the same terms printed on a stamp paper would result in these terms not being an agreement.

8. The language of the said clause is distinguishable from the remarks made by the Supreme Court in *Eastern Coalfields*, which discussed *Mahanadi Coalfields*² and *Jagdish Chander*³ in which the clause in question was interpreted in Paragraph 26 extracted above.

9. Section 7(4)(a) of the Act provides that the arbitration agreement would be considered to be in writing if it is contained in a document signed by the parties. The agreement in question is contained in a document, which is executed by the parties and the parties have conducted themselves pursuant to the various terms contained in the said document. It is another matter that Clause 33 in that document provided for the execution of the very same document printed on a stamp paper of appropriate value which admittedly has not been done. This, if at all, will raise a question of existential substance over the terms of the contract to be interpreted, rather than place a cloud over the existence of an arbitration agreement that is in conformity with Section 7(4)(a) of the Act.

10. In these circumstances, in my opinion, no useful purpose would be served keeping this Application pending any further. Needless to say, should the substantial questions arise, including existential questions beyond the formally executed arbitration agreement, that would fall in the realm of Section 16 of the Act for the Arbitral Tribunal

² *Mahanadi Coalfields Ltd. And Another v. IVRCL AMR Joint Venture* – (2022) 20 SCC 636

³ *Jagdish Chander v. Ramesh Chander* – (2007) 5 SCC 719

to consider. The document signed by both parties indeed contains an arbitration clause in Clause 50. Whether the requirement to further execute the very same agreement on a stamp paper is a procedural requirement or a substantial requirement, and whether that has implications for discerning the very existence of a formally executed arbitration agreement is a question that can be determined by the Learned Arbitral Tribunal.

11. In view of the catena of judgments on the Section Court 11 having to restrict itself to examining a formally executed document being now clearly declared law, I am unable to agree that the Section 11 application cannot be allowed.

12. The scope of review under Section 11 is explicitly set out in Section 11(6A) of the Act. It is now trite law, with particular regard to the decisions of a seven-judge bench in the *Interplay Judgement*⁴ followed by multiple others, including *SBI General*⁵ and *Patel*⁶ that the Section 11 Court ought not to venture beyond examining the existence of a validly existing arbitration agreement that has been formally executed. Even questions of existential substance is a matter that falls squarely in the domain of the arbitral tribunal, in view of Section 16 of the Act.

⁴ In Re: *Interplay Between Arbitration Agreement under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899* – (2024) 6 SCC 1

⁵ *SBI General Insurance Co. Ltd. v. Krish Spinning* – 2024 SCC OnLine 1974

⁶ *Ajay Madhusudan Patel v. Jyotindra S. Patel* – 2024 SCC OnLine, 2597

13. Being satisfied that an arbitration agreement is validly in existence, and that arbitration has been duly invoked, it is in the fitness of things to refer the disputes and differences between the parties in connection with the aforesaid agreement to arbitration by a Sole Arbitrator.

14. Commercial Arbitration Petition No.429 Of 2024 (“**Section 9 Petition**”) relates to the very same matter between the very same parties, seeking certain interlocutory protective reliefs. The Section 9 Petition shall be treated as an Application under Section 17 of the Act by the arbitral tribunal appointed hereby. Given the efflux of time, the Petitioner is at liberty to modify or mould the contents of Section 9 Petition for its consideration as a Section 17 Application.

15. In these circumstances, both these proceedings are hereby ***finally disposed of***, in terms of the following order:

A] Ms. Aneesha Cheema, a learned advocate of this Court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Office Address:-C/o Mayur Khandeparkar,
102, 1st Floor, Oval House,
Old British Hotel Lane,
Kala Ghoda, Fort,
Mumbai – 400 001.

Email ID :- aneesa.cheema@outlook.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Petitioner/Applicant within a period of one week from the date of upload of this order. The Petitioner/Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

16. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

17. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]