



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Civil Application (CAO) No. 1125 of 2025
in
Misc. Civil Application (ARBN) No. 67 of 2022
(disposed of on 17/02/2023)

M/s Sunflag Iron and Steel Co. Ltd. Nagpur

Versus

M/s Vedanta Limited, Mumbai

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.C. Dharmadhikari, Advocate for the applicant.

Shri A.A. Naik, Senior Advocate assisted by Shri A.R. Deshpande,
Advocate for the non-applicant.

CORAM : NIVEDITA P. MEHTA, J.

Reserved on : 16th October, 2025.

Pronounced on : 3rd November, 2025.

The original Respondent in MCA (Arbitration) No. 67 of 2022, has moved the present application seeking clarification of the order dated 17th February, 2023 passed by this Court on an application under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of an arbitrator.

2. By the order dated 17th February, 2023, this Court, after due consideration of the submissions advanced by both parties, appointed Hon'ble Mr. Justice A.B. Chaudhary (Retd.), Former Judge of this Court, as the sole arbitrator for adjudication of disputes between the parties. The said order dated 17th February, 2023 reads as follows :

“The application seeks appointment of an arbitrator. On 7.10.2022, the following order was passed.

“The purchase order dated 12.11.2020 (page 23) as its stand amended by the amendment dated 17.11.2020 (page 22) contains an arbitration clause vide clause No.15 (page 27) which is not disputed by Mr. Jaiswal, learned counsel for the non-applicant. He however, disputes the execution of the second purchase order also dated 12.11.2020 (page 29), which also contains an arbitration clause vide clause No.15 (page 34) and seeks time to place on record his submission, considering which lis the matter on 14.10.2022.”

There are two purchase orders, the first is dated 12.11.2020 bearing no. 4700141851 (pg.22) and the other also of the same date bearing no. 4700141856.

2] Mr. Jaiswal, learned counsel for the non-applicant does not dispute the execution of both these purchase orders. It is his contention that the first purchase order is a concluded contract, and therefore, he has no objection for appointment of an arbitrator considering that the dispute exist and in view of the arbitration clause No.15 contained therein (pg.27). In so far as the second purchase order is concerned, it is contended that it is not a concluded contract as an amended purchase order, as well as the letter of credit was not received.

3] *A perusal of clause (1) of the general terms and conditions of this purchase order, indicates that it shall constitute contract between the parties and in case the acceptance is not received within two days, there shall be a deemed acceptance.*

4] *Mr. Jaiswal, learned counsel for the non-applicant has been unable to point out to me any clause in this purchase order, which makes it dependent upon the receipt of the letter of credit as a primary condition for the contract to be concluded, considering which I do not see any justification in the said contention.*

5] *Since the Clause 15 in both the purchase orders contemplates a sole arbitrator to be nominated by the company, the same would clearly be covered by the mandate of Section 12(2) of the Arbitration & Conciliation Act, resulting in the requirement to appoint a sole arbitrator by this Court, considering which Justice A.B.Choudhari, Former Judge of this Court is hereby appointed as an arbitrator to decide the dispute between the parties.*

6] *The parties shall appear before him on 26.2.2023 and present a copy of this order, prior to which the processing charges shall be first deposited in this Court, without which a copy of the order will not be issued.*

7] *The application is disposed of accordingly.”*

3. The Respondent now contends that the observations in paragraphs 3 and 4 of the said order may prejudice its case before the Learned Arbitrator and, therefore, seeks clarification of the same.

4. The Respondent asserts that it had raised preliminary objections to the Section 11 application, contending inter alia:

(a) that the purchase order bearing No. 4700141851 (“Amona PO”) was not a concluded contract, and therefore, disputes arising therefrom cannot be referred to arbitration; and

(b) that receipt of the Letter of Credit (LC) was a condition precedent to the conclusion of the contract between the parties.

5. It is argued by the Respondent that this Court, while passing the order dated 17th February 2023, observed that Clause 1 of the General Terms and Conditions of the Purchase Order provides that the same shall constitute a contract between the parties and, in the absence of acceptance within two days, deemed acceptance shall ensue. The applicant further submits that the Court observed that no clause in the purchase order makes the contract contingent upon receipt of the Letter of Credit.

6. It is, therefore, Respondent’s apprehension that these observations may influence the decision of the Learned Arbitrator while deciding the disputes on merits. The Respondent submits that it has

already filed an application under Section 16 of the Arbitration and Conciliation Act, 1996, challenging the jurisdiction of the Arbitrator on similar grounds, and that the said application has resulted in framing of preliminary issues regarding the existence of the contract.

7. The learned Senior Counsel for the respondent argued that this Court has inherent powers to clarify its orders in case any ambiguity arises. He further submitted that the respondent is not seeking to set aside or modify the order; rather, a limited observation is sought to the effect that the learned Arbitrator shall not take into consideration the findings recorded in paragraphs 3 and 4 of the order in a manner prejudicial to the respondent's objections. The learned Senior Counsel placed heavy reliance on paragraphs 164 to 169 of the judgment titled ***Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Stamp Act, 1899, In Re, reported in (2024) 6 SCC 1***. The relevant paragraphs are reproduced as under:

“164. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the referral court to look into the *prima facie* existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the

examination of the *existence* of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of *Patel Engineering* where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a *prima facie* determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera*, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in *Vidya Drolia* in the context of Section 8 and Section 11 of the Arbitration Act.

166. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-

competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.

167. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*¹⁴⁹

168. In *Shin-Etsu*, this Court was called upon to determine the nature of adjudication contemplated by unamended Section 45 of the Arbitration Act when the objection with regards to the arbitration agreement being "null and void, inoperative or incapable of being performed" is raised before a judicial authority. Writing for the majority, Justice B N Srikrishna held that Section 45 does not require the judicial authority to give a final determination. The court observed that: (SCC p.267, para 74)

"74. There are distinct advantages in veering to the view that Section 45 does not require a final determinative finding by the court. First, under the Rules of Arbitration of the International

Chamber of Commerce (as in force with effect from 1-1-1998), as in the present case, invariably the Arbitral Tribunal is vested with the power to rule upon its own jurisdiction. Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration. Since the arbitrator's finding would not be an enforceable award, there is no need to take recourse to the judicial intercession available under Section 48(1)(a) of the Act."

169. When the referral court renders a prima facie opinion, neither the Arbitral Tribunal, nor the court enforcing the arbitral award will be bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the referral court, it still allows the Arbitral Tribunal to examine the issue in-depth. Such a legal approach will help the Referral Court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the Arbitral Tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement."

8. It is, therefore, urged that a clarification by this Court is necessary to ensure that the observations made in paragraphs 3 and 4 of the order dated 17.02.2023 do not prejudice the Arbitrator's independent adjudication.

9. Per contra, the Learned Counsel for the Applicant opposes the present application and *inter alia* submits that:

- (i) The present application is not maintainable as this Court lacks jurisdiction to entertain it;
- (ii) The application is a dilatory tactic aimed at obstructing the expeditious continuation of the arbitration proceedings and defeating the purpose of the Arbitration and Conciliation Act, 1996;
- (iii) The application is, in substance, a review petition camouflaged as a clarification application;
- (iv) The Respondent had an efficacious statutory remedy against the order dated 17th February 2023, but failed to avail the same within the prescribed limitation period; and
- (v) The application has been filed after an inordinate delay of over two years and at a stage when the arbitration proceedings have reached the stage of evidence of the Respondent's witnesses.

10. It is further submitted that the Act of 1996 contains no provision empowering this Court to "clarify" an order once pronounced. On merits, it is contended that this Court, while passing the order dated

17th February 2023, had duly considered the documents and submissions of both parties and rendered its observations upon due satisfaction before appointing the Learned Arbitrator.

11. Reliance is placed upon the order of the Hon'ble Supreme Court by the Learned Counsel for Applicant in Miscellaneous Application Nos. 548–549 of 2018 in C.A. No. 5924 of 2005 (decided on 12th September 2018), holding that an application for clarification is, in effect, an application for review in disguise. In the said order, reference is made to the judgment in *Delhi Administration v. Gurdeep Singh Uban* [(2000) 7 SCC 296], wherein it was held that the Court should not entertain applications styled as clarifications or modifications when, in substance, they seek review of an earlier order.

12. Upon hearing Learned counsel for both sides, the following points arise for consideration:

A. Whether the present application seeking clarification of the order dated 17th February, 2023 is maintainable in law? and

B. Whether any clarification is warranted in respect of the observations contained in paragraphs 3 and 4 of the said order?

13. Having heard both sides and perused the record, it is evident that while deciding the Section 11(6) application, this Court had “examined” whether there existed an arbitration agreement and a concluded contract between the parties. Upon such examination, the Court held that Clause 1 of the General Terms and Conditions of the Purchase Order constituted a contract and that no clause making it contingent upon receipt of the Letter of Credit was pointed out.

14. It is settled law that the scope of inquiry under Section 11(6) of the Arbitration and Conciliation Act, 1996 is confined to determining the existence of a valid arbitration agreement and a *prima facie* contractual relationship between the parties.

15. A holistic reading of the order dated 17th February, 2023 shows that the observations therein are based on examination of

documents on record and after duly considering the arguments of the parties.

16. As regards the argument advanced by the learned Senior Counsel for the respondent that this Court has inherent powers to clarify any ambiguity in its order, and his reliance on the judgment in *Interplay (supra)*, it is clear that the Hon'ble Supreme Court has unambiguously held that the scope of examination under Section 11(6A) of the Arbitration and Conciliation Act, 1996, is confined only to the existence of an arbitration agreement.

17. The learned Senior Counsel has placed heavy reliance on the expression "examination of the existence of an arbitration agreement" and has contended that the observations made in paragraphs 3 and 4 of this Court's order might prejudice the respondent's case before the learned Arbitral Tribunal.

18. In my considered view, this Court, in paragraphs 3 and 4 of the order, has rightly examined, within its scope, the existence of an

arbitration agreement. The observations therein merely indicate need for reference of disputes for arbitration. The language of the order, clearly and unequivocally demonstrates that this Court has only exercised its powers viz., to examine the existence of the arbitration agreement, as contemplated under Section 11(6A) of the Act.

19. Accordingly, the observations made in paragraphs 3 and 4 cannot be said to warrant any interference. If, in the facts and circumstances of the case, the same are sought to be modified or clarified in the manner suggested by the respondent, such an exercise would, in effect, amount to a review of the order, which is impermissible in present facts and circumstances.

20. It is now well settled that the scope of enquiry under Section 11 of the Arbitration and Conciliation Act, 1996, is limited. In my opinion, this Court has rightly exercised its jurisdiction under Section 11 without any transgression thereof.

21. Therefore, while it is not in dispute that this Court possesses inherent powers to clarify its orders, I am of the view that neither the observations in paragraphs 3 and 4, nor the order as a whole, warrant any clarification as prayed for by the respondent.

22. Furthermore, the arbitration proceedings have already progressed substantially and reached the stage of evidence. The present application has been filed after an unexplained delay of over two years. Even during the joint application under Section 29A of the Act filed on 9th May, 2025 for extension of time to complete the arbitration, no such grievance was raised.

23. The only reason now cited, that the need for clarification arose during recording of evidence cannot be accepted. The application appears to be an attempt to reopen an order which has attained finality and to delay the arbitral proceedings.

24. The observation by the Hon'ble Supreme Court vide order passed in Miscellaneous Application Nos. 548–549 of 2018 in C.A. No.

5924 of 2005 (decided on 12th September 2018) based on judgment in *Delhi Administration* (supra) squarely apply. The present application for clarification is nothing but an attempt to seek review and such application cannot be permitted when it is, in substance, a review application in disguise.

25. In view of the above discussion, I find that the present application seeking clarification of the order dated 17th February, 2023 is not maintainable; and no clarification is warranted, as the earlier observations were made on due consideration and evaluation of the documents filed on record and contentions of the parties.

Accordingly, the present application, being devoid of merits, is rejected.

[NIVEDITA P. MEHTA, J.]