IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL APPLICATION
APPELLATE SIDE

Present:
Hon'ble Justice Shampa Sarkar

CO 4354 of 2023

Mr. Birendra Bhagat
vs.
Arch Infra Properties Private Limited

For the petitioner : Mr. Aniruddha Chatterjee
Mr. Aditya Kanodia
Mr. Rudrajit Sarkar

For the opposite party : Mr. Pronit Bag
Mr. Ashis Kr. Mukherjee
Mr. S. Prasad
Mr. Manmatha Mondal

Hearing concluded on: 08.03.2024
Judgment on : 07.05.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated October 18, 2023, passed by the learned Judge, Commercial Court at Rajarhat in Money Suit No.38 of 2022. The learned court allowed an application dated December 16, 2022, filed by the opposite party under Section 8 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to as said Act of 1996).

2. The learned court observed as follows:-

a) A commercial agreement between the parties had to be construed in a way that the terms used were understood in its plain, ordinary and popular sense.

b) The immediate intention of the parties should be gathered from the plain reading of the terms of the agreement.

c) The clause should be interpreted in such a manner, so as to give effect to the same, rather than invalidate the same.

d) While construing an arbitration clause, a court must adopt a pragmatic and not a technical approach. Section 7 of the said Act, 1996, did not provide any particular form of the agreement. It would not be appropriate for the court to desist from upholding the validity of an arbitration agreement.

e) The essential elements of an arbitration agreement had been fulfilled in the instant case, namely, existence of a dispute between the parties and intention of the parties to settle such dispute by a private tribunal.

f) The agreement was in writing, and the parties were ad idem.

g) Thus, the clause dealing with settlement of dispute by a skilled person, namely, the architect, was an arbitration clause. Although, the same may not have been happily drafted.

3. Mr. Aniruddha Chatterjee, learned Advocate for the plaintiff/petitioner/contractor, drew the attention of this Court to the plaint case. The case of the plaintiff is discussed hereunder.

4. The suit was filed for recovery of money valued at Rs.6,68,24,995/-. The plaintiff as the proprietor of Bharat Construction (contractor) and the defendant had entered into a development agreement for construction of a residential housing complex, namely, 'Starwood'. The proposed project comprised of seven buildings. The location of the same was Chinar Park,

Rajarhat. Total number of eight (08) towers were to be constructed in the said complex.

5. The contractor started work on the basis of a letter of acceptance issued by the defendant on December 18, 2015. The possession was handed over to the contractor. On March 20, 2016, additional miscellaneous piling work was further awarded, which resulted in enhancing the scope of the original contract. Along with the contract, the defendant also made over a copy of the bill of quantity and/or schedule of items as also the work order. The bill of quantity and schedule of items were later modified to some extent. The work granted by the defendant to the plaintiff was such that time was the essence and the entire project was agreed to be completed with 20 months from December 18, 2015. As time was the essence of the contract, obligations were cast on both sides. The obligations, as entailed in the agreement, could be summed up as follows :-

a. The defendant would ensure a hindrance-free worksite immediately upon issuance of the letter of acceptance.
b. The defendant as the contractor would ensure smooth access to the worksite for the plaintiff to commence and carry on the project within the stipulated time.
c. The defendant would take all necessary steps to ensure that earth excavated at the construction site was shifted and disposed of at a suitable place.
d. The defendant would ensure reasonable land space for labour hutments at the project site.
e. The defendant would also ensure sufficient land for construction of site office by the plaintiff at the project site.
f. The defendant would ensure sufficient storage space for the cement to be used at the project site.
g. To ensure that the work is carried out efficaciously and smoothly, the defendant would make payment of the Running Account Receipted bills -
(i) 70% of the value within 10 days and balance,
(ii) 30% within the next 28 days.

6. At the time of commencement of the contract, the contractor and defendant carried out their obligations without any breach. As the work progressed, the defendant failed, neglected and refused to make payments in terms of the contract. For the payments made, the defendant retained 5% of the bill amount on account of security deposit/retention money, thereby exercising a right under the contract. The contractor altered his position on the representation of the defendant. The contractor honoured his commitment and discharged the obligation under the contract. The defendant continued to commit further breach, i.e., the defendant failed to grant proper access, the defendant refused to discharge its other obligations, the defendant was unable to provide space for constructions of the labourers' huts and the defendant did not make timely payment.

7. On July 4, 2016, additional works were awarded to the contractor for supply of labourers and J.C.B. tools. Despite facing hardships, the contractor, to the best of his ability, continued with the work. On January 8, 2018, additional civil construction works were further awarded by the defendant. Even though the contract stipulated that the prices would be firm and no escalation would be permitted, the defendant by letters dated August 2, 2018, and January 28, 2019, agreed to revise the rate of the various items and also specifically agreed to permit escalation of all items of the B.O.Q.

8. There were severe delays in timely release of the payment to the contractor for the works done. Thus, from the very beginning, the contractor had been reminding the defendant to make payment for the works already completed. At least eleven of such letters were written to the defendant

reminding the defendant to pay the bills on time. The parties agreed to maintain a running account and it was agreed that the payment would be made on the submission of the running account receipts and bills. Plaintiff raised 19 running account receipts of bills (for short R.A.R bills) in total. Out of which, partial payment had been made by the defendant. Such payment constituted acceptance by the defendant that the quality of work was satisfactory. The R.A.R. bills were prepared on the basis of the mutually accepted measurements taken by the parties and duly endorsed by the defendant.

9. Thereafter, the defendant started delaying release of payments. Civil works of eight towers in the project in terms of contractual obligations had been completed. The plaintiff kept writing letters to the defendant for payment of the legitimate dues. The defendant alleged that there was delay in completion of the work, but did not raise any dispute with regard to the quality of the work.

10. On July 4, 2022, the defendant threatened to terminate the agreement and engage a third party. On July 9, 2022, the defendant terminated the contract. Till that time, the unpaid dues of the plaintiff had accumulated to Rs.6,34,56,754.71. Out of construction of eight buildings, constructions of six buildings had been completed and the flats in the said buildings were also sold.

11. The contractor apprehended that the defendant could become a dormant entity and the persons in control of the defendant would be untraceable. Since several rounds of negotiations had failed, any further mediation would be an idle formality. Thus, upon failure of talks of

settlement, the plaintiff filed the suit claiming unpaid amounts as per the bills raised, totaling to Rs.6,68,24,995/-. The computation of the amount has been elaborated in paragraphs 59 and 60 of the plaint.

12. The prayers of the plaint are set out below :-

> "The plaintiff seeks dispensation of Section 12A of the Commercial Courts Act, 2015 and claim:
> a. Decree for a sum of Rs.6,68,24,995/- as pleaded in paragraph 59 above;
> b. Decree for a sum of Rs. 2,52,62,705/ on account of damages as pleaded in paragraph 60 above;
> c. Interest at the rate of 18%;
> d. Judgment upon admission;
> e. Attachment before judgment;
> f. Interest pendente lite and interest upon judgment;
> g. Injunction;
> h. Receiver;
> i. Attachment;
> j. Other reliefs."

13. According to Mr. Chatterjee, neither clause 29(a) of the contract dated December 18, 2015 nor clause 28(a) of the contract with regard to additional work dated January 8, 2018, could not be termed as an arbitration clause for settlement of the petitioner's money claim. The said clause was at best a mechanism by which dispute with regard to work arising out of drawings and materials could be settled by the architect. The settlement contemplated in this clause was with regard to the settlement of the disputes during the execution of the work in terms of the quality, materials, drawings etc., and the same could not be construed as a written agreement between the parties to refer all present and future disputes to an arbitrator, thereby, making themselves bound by the decision of the arbitrator.

14. It was further contended by Mr. Chatterjee, that the architect was a interested person as he had a relationship with the defendant and thus, disqualified to be an arbitrator under the said Act.

15. Taking the court through the other clauses of the contract, Mr. Chatterjee submitted that the terms and conditions provided that total scope of the work would be completed under the direction of the architect/engineer-in-charge. With regard to supply of materials also, the architect's decision would be final. The drawings, specifications, relevant codes, norms, would be as per the direction of the architect/consultant/engineer in-charge. All materials used for the construction was to be approved by the architect. Thus, a composite reading of all the clauses along with clause 29(a) and 28(a) of the two documents would indicate that the architect/engineer in-charge was responsible to test the quality of material, to approve the drawings, to ensure that the works were executed in terms of the norms of the PWD and also grant necessary permission for execution of the work. For procuring materials and supplies for such construction also, the decision of the architect would be followed. While in the process of such work, in case of any dispute relating to the above issues, the architect would settle the same and his decision would be final.

16. Mr. Chatterjee submitted that essential elements of an arbitration clause were missing in the instant case. The nature of the dispute to be settled by the arbitrator were restricted to the quality of work, materials and drawings. In this case, the expression "quality of work" should be read in consonance with the other clauses which have been mentioned in the terms

and conditions. The suit had been filed for recovery of unpaid bills and the agreement did not talk about settlement of money claim or any dispute with regard to such claim, by the architect. In fact, the architect was a specialist, who was required to give the necessary permissions, guidance and directions for execution of the building contract.

17. The contract also did not provide that the R.A.R bills would be endorsed or signed by the architect. The dispute in this regard was not with regard to the quantity of the materials, nature of the work and the norms etc. The defendant had stopped releasing the legitimate payments and thereafter, had terminated the contract. Although there was a reference to some delay on the part of the plaintiff by the defendant but, delay in completion was not covered by clauses 29(a) and 28(a) of the contracts.

18. Referring to the decision of ***Food Corporation of India vs. National Collateral Management Services Limiited (NCMSL)***, reported in ***(2020) 19 SCC 464***. Mr. Chatterjee submitted that an arbitration clause had to be clear and unambiguous. The intention of the parties to refer all present and future disputes to an arbitrator, should be evident. Further, the clause should provide that the arbitrator was to hear the parties in accordance with law and make an award which would be binding upon the parties. Although, no particular format or use of the expressions 'arbitrator', 'arbitration' were not essential requirements in the clause, but the basic intension of the parties to refer the disputes to arbitration should be available on mere perusal of the said clause. For a court to construe whether a clause was an arbitration clause or not, reading between the lines to decipher the actual intension of the parties was not an exercise to be undertaken. The clause

should be either explicit, or even if implied, a reading of the clause should be sufficient for the court to conclude that there was an arbitration clause by which the parties had agreed to refer all present and future disputes between them to arbitration and to be bound by the award.

19. The dispute resolution clause in the agreement, did not indicate that all other kinds of disputes, not arising out of materials, drawings and the quality of the work vis-à-vis such materials and drawings, had been included in the said clause. Thus, the suit was maintainable and the order impugned should be set aside.

20. According to Mr. Chatterjee, the learned Judge had confused himself by importing the facts of another case to the facts of the present case and passed the order impugned on a wrongful understanding of the facts. The order impugned was perverse.

21. Mr. Chatterjee referred to some decisions of the Hon'ble Apex Court by specifically mentioning the dispute resolution clauses therein to point out that under similar circumstances, with regard to similar clauses, the Hon'ble Apex Court had held that such clauses should not be treated as arbitration clause. They are as follows :-

Decisions	Subject clause in dispute	Conclusion of the Hon'ble Apex Court
Arbitration clause in the instant matter	Clause 29(a) Disputes/Arbitrations: "For all disputes arising out regarding quality of work, drawings, materials, -The Architect's decision will be a binding for the employer and the contractor."	

(2020) 19 SCC 464 (Food Corporation of India vs. National Collateral Management Services Limited)	"Any dispute between the parties arising out of this agreement or pertaining to any matter which is subject matter of this agency agreement shall be referred to the chairman and managing director of FCI/principal and agent."	This was not an arbitration clause.
(2014) 2 SCC 201 (P. Dasaratha Rama Reddy Complex vs. Govt. of Karnataka)	"29. (a) Settlement of dispute time limit for decision if any dispute or difference of any kind whatsoever were to arise between the executive engineer/superintending engineer and the contractor regarding the following matters, namely, - (i) The meaning of the specifications designs, drawings and instructions hereinbefore mentioned; (ii) The quality of workmanship or material used on the work; and (iii) Any other questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications, estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of being requested by the contractor to do so, given written notice of his decision to the contractor. (b) Chief Engineer's decision final. Subject to other form of settlement hereafter provided, the Chief Engineer's decision in respect of every dispute or difference so referred shall be final and binding upon the contractor. The said decision shall forthwith be given effect to and contractor shall proceed with the execution of the work with all due diligence. (c) Remedy when Chief Engineer's decision is not acceptable to contract. In case the decision of the Chief Engineer is not acceptable to the contractor, he may approach the law courts at Karwar for settlement of dispute after giving due written notice in this regard to the Chief Engineer within a period of ninety days from the date of receipt of the written notice of the decision of the Chief Engineer. (d) Time-limit for notice to approach law court by contractor. If the Chief Engineer has given written notice of his decision to the contractor and no written notice to approach the law court has been communicated to him by the contractor within a period of ninety days from receipt of such notice, the said decision shall be final and binding upon the contractor. (e) Time-limit for notice to approach law court by contractor when decision is not given by Chief Engineer as at (b). If the Chief Engineer fails to give notice of his decision within a period of ninety days from the receipt of the contractors request in writing for settlement of any dispute or difference as aforesaid, the contractor may within ninety days after the expiry of the first-named period of ninety days approach the law courts at Karwar, giving due notice to the Chief Engineer. Contractor to execute and complete work pending settlement of disputes. (f) Whether the claim is referred to the Chief Engineer or to the law courts. As the case may be, the contractor shall proceed to execute and complete the works with all due diligence pending settlement of the said dispute or differences. Obligations of the Executive Engineer and contractor shall remain unsettled during consideration of dispute. (g) The reference of any dispute or difference to the Chief Engineer or the law court may proceed notwithstanding that the works shall then be or be alleged to be complete, provided always that the obligations of the Executive Engineer and the contractor shall not be altered by reason of the said dispute or difference being referred to the Chief Engineer or the law court during the progress of the works."	Not an arbitration clause.

2022 SCC Online SC 960 (Mahanadi Coalfields – vs –IVRCL AMR JV)	"15. – Settlement of Disputes/Arbitrations. 15.1. – It is incumbent upon the contractor to avoid litigation and disputes during the course of execution. However, if such disputes take place between the contractor and the department, effort shall be made first to settle the dispute at the company level. The contractor should make request in writing to the Engineer-in-charge for settlement of such disputes/claims without 30 (thirty) days of arising of the case of disputes/claim failing which no dispute/claim of the contractor shall be entertained by the company".	Supreme Court held not an arbitration clause.

22. Mr. Promit Bag, learned Advocate appearing on behalf of the opposite party submitted that the suit was filed for recovery of a sum of Rs.6,68,24,995/- and a further sum of Rs.2,52,62,705/- as damages. The said claim in the suit arose from purported unpaid bills and concomitant charges arising out of a contract. The essential ingredients of a valid arbitration clause were (a) an indication of the intention of the parties to the agreement to refer all disputes to a private tribunal for adjudication, (b) the willingness to be bound by the said decision, (c) the agreement should be in writing, (d) the clause should not indicate any contemplation of the parties to approach the arbitrator, if the parties so desired.

23. According to Mr. Bag, a conjoint reading of Section 7 of the said Act and the decisions of the Hon'ble Apex Court, would clearly indicate that clause 29(a) and 28(a) in the instant case, were both arbitration clauses. The parties had agreed that all disputes arising out of the quality of work, drawings and materials, would be referred to the architect and the architect's decision would be binding on the employer and the contractor. The clauses were in writing. It was stipulated in clear terms that the parties intended to refer the disputes to the architect with regard to the quality, drawing and materials.

24. Referring to the decision of the Hon'ble Apex Court in ***Govind Rubber Ltd. vs. Louis Dreyfus Commodities Asia Pvt. Ltd.***, reported in ***(2015) 13 SCC 477***, Mr. Bag submitted that arbitration clause in a commercial document should be interpreted in such a manner, so as to give an effect to the said clause, rather than invalidate the same.

25. In ***Pravin Electricals Pvt. Ltd. vs. Galaxy Infra and Engineering Pvt. Ltd.***, reported in ***(2021) 5 SCC 671***, the Hon'ble Apex Court held that Section 8 and Section 11 (6) (a) of the Act, should be treated in the same footing and all that the court was required to look into was whether an arbitration clause existed or not. The court had to confine itself to a, prima facie, examination of the arbitration clause and leave all other preliminary issues arising therefrom, including its arbitrability to the decision of the arbitrator concerned.

26. In ***Gujarat Composite Ltd. vs. A Infrastructure Ltd. and Ors***., reported in ***(2023) 7 SCC 193***, the Hon'ble Apex Court held that an application under Section 8 of the Act, could be refused only on two counts ; (a) if there existed no arbitration agreement and, (b) if the arbitration agreement was null and void.

27. The parties, according to Mr. Bag, could be relegated to a suit only if the dispute related between non-signatories of the arbitration agreement or the reliefs claimed in the suit fell partly beyond the scope of the arbitration agreement. The learned judge had laid down the essential elements of the arbitration agreement in the order impugned and had rendered a correct finding that the parties had intended that in the event of any dispute arising

out of the construction and contractual obligations, the dispute would be resolved by the architect, whose decision would be final.

28. The court was of the opinion that in the present case, the parties had agreed amongst themselves that the dispute out of such contract would be resolved by an arbitrator, who must be a skilled person in the field.

29. Whether clause 29(a) or 28(a) of the contract and the additional works contract respectively, were arbitration clauses or not, is the moot question to be decided in this case. Clauses 29(a) and 29 (b) of the 2015 contract are quoted below:-

> "29 Disputes/Arbitrations:
> (a) For all disputes arising out regarding quality of work, drawings, materials – The Architects decision will be a binding for the Employer and the Contractor.'
> (b) Disputes with suppliers etc. : All disputes with suppliers/others and interrelated problems are to be settled by the Contractor and no claim whatsoever will be entertained."

30. Although, such clause has been titled as Disputes/Arbitrations, a meaningful reading of the same indicates that for all disputes arising out of, regarding quality of work, drawings and materials, the architect's decision would be binding on the employer and the contractor. This clause primarily seeks to address a dispute between the employer and the contractor with regard to the nature of works, drawings and materials. This is more of an in-house mechanism. During the execution of the contract, the architect would settle any dispute between the employer and the contractor with regard to the nature of the work and the quality of the work based on the materials, designs and drawings. Quality of work cannot be read in isolation, but has to be read *ejusdem generis* with drawings and materials.

31. Clause 29(b) talks about resolution of dispute with suppliers/others and related problems, to be settled by the contractor. The juxtaposition of the two clauses one after the other in the agreement clearly indicates that the parties had agreed upon a internal mechanism to settle disputes which would arise during the execution of the building contract. Just like a dispute between the employer and the contractor with regard to the quality, materials and drawings was to be resolved by the architect, similarly, conflict with the suppliers and all other inter-related issues was to be resolved by the contractor, i.e., by the plaintiff, the petitioner herein.

32. Neither of the clauses can be treated as an arbitration clause. All present and future disputes arising out of the contracts, were not referable under the said clauses to any independent tribunal. Although, no particular format or use of the expressions 'arbitrators' or 'arbitration agreement' were either essential or compulsory to constitute a valid arbitration clause, however, in this case the basic ingredients of an arbitration clause are absent.

33. Such interpretation would be further clear from the other terms and conditions of the original contract dated December 18, 2015 as contained in Annexure-A thereof. Clause 1 of the terms and conditions talks about the total scope of the work. It provides that for the construction of the pile caps, basements, the floors and the G+10 and G+8 storeyed residential building complex, the drawings, specifications, including supply of bricks, sand, stone, chips, shuttering materials, labourers, etc., would be as per the direction of the architect/engineer-in-charge.

34. With regard to supply of materials, clause 5 provided that no other brand of R.M.C. would be allowed, except as permitted by the architect/engineer-in-charge.

35. Clause 9 talks about the working guide. It states that drawings, specifications, relevant IS code, norms of PWD, would be followed as per directions of the architect/consultant/engineer-in-charge. All engineering goods required to execute the works as per the drawings were to be arranged by a qualified engineer of the contractor.

36. With regard to the technical specifications in Annexure-B, it has been provided that the layouts for the construction work would be given for checking and approval of the engineer-in-charge/architect/consultant. The subsequent contract for additional works dated January 8, 2018 also provides a similar clause for dispute redressal at paragraph 28(a) and all the other paragraphs in Annexure A and B as have been dealt with hereinabove, are similar to those in the contract of 2015.

37. The subsequent contract of 2018 had minor alteration and additions from the earlier contract, but the clause with regard to dispute resolution remained the same. The same is quoted below:-

> "28 Disputes/Arbitrations: For all disputes arising out regarding quality of work, drawings, materials. The Architect's decision will be a binding for the Employer and the Contractor."

38. Admittedly, the suit deals with non-payment of the bills raised by the petitioner/contractor. Clauses 13, 14 and 15 of the contract of 2015 and corresponding clauses 12, 13 and 14 of the contract of 2018, deal with terms of payment. They provide that monthly running bills were to be prepared and submitted to the site office. 70% of the value of the bill would

be paid within 10 days and the balance would be paid within 28 days. That 5% of the bill value would be deducted from every R.A.R. bill and kept as security deposit, which would be released after one year from the completion of the contract, i.e., defect liability period. 50% of the deducted amount could be released on submission of proper guarantee acceptable by the management. It provides that the defect liability period would be 365 days after satisfactory completion of the work. None of the clauses with regard to payment of the bills provide that the architect was required to endorse the said bills or that his opinion would either be sought for or the parties would approach him for adjudication of the quantum of bills. It has specifically been averred in the plaint that the R.A.R. bills were to be endorsed by or on behalf of the employer.

39. The intention of the parties to enter into an arbitration agreement cannot be gathered from the clauses as discussed hereinabove. Clause 28(a) and 29(a), do not clearly indicate any intention on the part of the parties to the contract to refer their present and future dispute to an independent private tribunal, for adjudication. While there is no specific form of an arbitration agreement, the words used should disclose a determination and an obligation to go to arbitration. The clauses provide specifically for settlement of disputes with the regard to the quality of the work, materials and the drawings, by the architect under whose overall supervision the entire work was to be executed.

40. Clause 20 of 2015 contract is also relevant and is quoted below :-

> "20 Testing of materials, concrete cubes: -

> The agency shall organize making (sic making) curing & testing of concrete cubes in time at site. The samples of materials supplied and used for construction is to be submitted to site office for testing at site laboratory before being used. No cost whatsoever will be paid to the contractor for cubes/materials submitted for testing. All materials used for the construction is to be approved by Architect/Project Manager."

41. It appears in various clauses that the expression "architect" has been used almost synonymously with Chief Engineer, Consultant and Project Manager. Thus, from a reading of the terms and conditions of the contract, architect does not appear to be an independent third party. Moreover, the dispute in the said clauses are also restricted to the quality of the work with reference to the materials and drawings. No further scope for challenge of such decision has been provided for. The dispute in the suit is with regard to the money claim. The claim has been elaborated in paragraphs 59 and 60 of the plaint. The payment dispute is not covered by the settlement clauses. The clauses have very limited scope.

42. Moreover, non-payment of the money is a subsequent event, which cropped up just before the contract was terminated and such non-payment continued even after the contract was terminated, making the dispute also a future dispute. The contract does not speak of resolution of a dispute arising out of any money claim, non-payment of bills, admissibility of the bills etc. No clear intention on the part of the parties to refer such dispute to an arbitrator, is available.

43. Sub-section (1) of Section 7 of the Act defines "arbitration agreement" as an agreement by the parties to submit to arbitration all or certain disputes which had arisen or which may arise between them in respect of a

defined legal relationship, whether contractual or not. Sub-section (2) provides that a desire to refer a dispute to arbitration may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Sub-section (3) requires an arbitration agreement to be in writing. Sub-section (4) provides that an arbitration agreement will also be considered to be in writing if it is contained in any document signed by the parties or by exchange of letters, telex, telegrams or other means of telecommunication which provided a record of such agreement or also by exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other

44. In the decision of ***Jagdish Chander vs. Ramesh Chander and Ors.*** reported in ***(2007) 5 SCC 719***, the Hon'ble Apex Court discussed what would be the essential element of an arbitration agreement, as hereunder:-

"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."

45. In this case, the arbitration clauses which have been discussed hereinabove do not reflect the intention of the parties to submit to the jurisdiction of an independent arbitrator. Neither, present and future disputes arising out the contract nor disputes with regard to payment or withholding of payment arising out of the said contract in present or in future, have been included in the settlement clause.

46. In ***Mahanadi Coalfields Ltd and Anr. vs. IVRCL AMR Joint Venture*** reported in ***2022 SCC OnLine SC 960***, the Hon'ble Apex Court held as follows:-

> "**10.** In the present case, clause 15 of the Contract Agreement is titled "Settlement of Disputes/Arbitration". However, the substantive part of the provision makes it abundantly clear that there is no arbitration agreement between the parties agreeing to refer either present or future disputes to arbitration.
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> **11.** Clause 15.1 contains a reference to the steps to be taken for settlement of disputes between the parties. Clause 15.2 stipulates that if differences still persist, the settlement of the disputes with government agencies shall be dealt with in accordance with the guidelines of the Ministry of Finance. In the case of parties other than government agencies, the redressal of disputes has to be sought in a court of law.
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> **12.** A clause similar to clause 15 of the Contract Agreement in the present case was considered by a bench of this Court in IB Valley Transport, Vijay Laxmi (P) Ltd. v. Mahanadi Coalfields Ltd. consisting of J Chelameswar and A. K. Sikri, JJ.8 In the said case, the clause was interpreted as an alternative remedy at the company level to be exhausted before taking recourse to other suitable legal remedies. It was observed:
>
> > "10. From the aforesaid narration of facts, it becomes clear that Clause 12 of the general terms and conditions provides for a mechanism of dispute resolution before resorting to the legal remedies. This clause specifically states that it is incumbent

upon the contractor to avoid litigation and disputes during the course of execution. If any dispute takes place between the contractor and the department, effort shall be made first to settle the disputes at the company level. Further, this clause states that the contractors should make request in writing to the Engineer Incharge for settlement of such dispute/claim within 30 days of arising of cause of dispute/claim."

(emphasis supplied)

13. The above extract makes it abundantly clear that clause 15 of the Contract Agreement is a dispute resolution mechanism at the company level, rather than an arbitration agreement. Consequently, in case of a dispute, the respondent was supposed to write to the Engineer-in-charge for resolving the dispute. Clause 15 does not comport with the essential attributes of an arbitration agreement in terms of section 7 of the 1996 Act as well as the principles laid down under Jagdish Chander (supra). A plain reading of the above clause leaves no manner of doubt about its import. There is no written agreement to refer either present or future disputes to arbitration. Neither does the substantive part of the clause refer to arbitration as the mode of settlement, nor does it provide for a reference of disputes between the parties to arbitration. It does not disclose any intention of either party to make the Engineer-in-Charge, or any other person for that matter, an arbitrator in respect of disputes that may arise between the parties. Further, the said clause does not make the decision of the Engineer-in-Charge, or any other arbitrator, final or binding on the parties. Therefore, it was wrong on the part of the High Court to construe clause 15 of the Contract Agreement as an arbitration agreement. 14. However, it has been urged on behalf of the respondent by Mr. S Niranjan Reddy that the first appellant is a subsidiary of CIL. It has been submitted that on 7 April 2017, CIL issued a policy document to its General Managers for the settlement of disputes or differences arising out of works and services contracts through arbitration. Clause 5 of the above communication provides as follows:

"Past/existing work order/contract:

> **5.** With regards to dispute/differences cropping up in existing work order/contract, employer (department) shall adopt procedure for settlement of the same, through arbitration process. As you are aware that neither the CIL Manuals nor contract document at present contains any clause regarding arbitration, therefore, dispute/differences cannot be referred to arbitration straight away. Hence, before referring the matter to arbitration, consent of the other party (contractor) is necessary for redressal of dispute/differences through arbitration. Once, the contractor agrees for settlement of dispute/differences arising out of contracts through arbitration, an agreement may be signed between employer and contractor for referring the dispute/differences to Sole Arbitration by a person appointed by Competent Authority of CIL/CMD of Subsidiaries (as the case may be). The rest of the procedure shall be as per the Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015 and also as per instruction incorporated in clause "Settlement of Disputes through Arbitration".

14. Hence, it is urged that the first appellant being a subsidiary of CIL and being a public sector undertaking may well consider as to whether the disputes which have arisen between the appellants and the respondent should be referred to arbitration. In this context, the appellants and the respondent placed reliance on an order dated 20 July 2018 of the Chief Justice of the High Court of Orissa in Arbitration Petition No 59 of 2016.

15. We are unable to subscribe to the submission which has been urged on behalf of the respondent based on the policy letter dated 7 April 2017. The communication which has been issued by CIL refers to the possibility of a consensual resolution of disputes or differences through arbitration as neither the CIL manuals nor the contract document, at the time, contained a clause regarding arbitration. However, it has been submitted that once the contractor has agreed to settle a dispute through arbitration, the agreement may be signed between the employer and the contractor for reference to arbitration, by a person to be appointed by the

competent authority of CIL or, as the case may be, the Chairman and Managing Director of the subsidiaries."

47. The arbitration clauses in the case in hand is almost similar to the clauses discussed in the judgment above. It is an in-house mechanism at the level of the parties. The parties agreed to a procedure for resolution of internal differences and disputes with regard to the ongoing work to be settled by the architect and that is why the scope of such settlement was limited to drawings and materials used, which could have an effect on the quality of the work. Such clauses read with the other clauses as discussed earlier, clearly indicate that the architect/engineer-in-charge would be responsible for the supervision and overall progress of the work. The entire execution of the work including finalization of the quality of materials to be purchased, the design and drawings were to be decided by the architect.

48. There is no quarrel with the proposition laid down in ***Govind Rubber (supra)***. It is true that an arbitration agreement is not required to be in any particular form, but what is required to be ascertained is whether the parties had agreed that all disputes which arose between them in respect of and arising out of the contract either in the present or in future, would be referred to arbitration. It is also true that a commercial document having an arbitration clause has to be interpreted in such a manner so as to give effect to the agreement, rather than invalidate the same. The courts should, if the circumstances allow lean in favour of giving effect to an arbitration clause. Meaning thereby, the court should seek to give effect to the intention of the parties. In the present case, on a meaningful reading of the arbitration

clauses and the circumstances leading to such clauses, I cannot conclude that the parties intended to refer all kinds of disputes including money claims, payment/non-payment of bills etc. to an arbitrator.

49. The spirit of the clauses have to be gathered by adopting a common sense approach. It is true that the clause should not be thwarted by a narrow, pedantic and legalistic interpretation. A common sense approach to the said clauses is that the architect who was in overall charge of the execution of the work would resolve all disputes with regard to the quality, materials and drawing of the ongoing project. The attending circumstances which can be gathered from the other clauses of the contract do not indicate that the architect had any role to play with regard to resolution of disputes arising out of such bills. Moreover, the architect did not sanction the bills.

50. Apart from arbitration, there is also another concept of expert determination. The idea of expert determination is that during the implementation of a contract between the parties, the experts perform all such acts to ensure that the contract is successfully completed.

An arbitral tribunal arrives at its decision on the evidence and submissions of the parties and must apply the law. An expert, unless it is agreed otherwise, makes his own enquiries, applies his own expertise and decides how to resolve a problem or a dispute or difference.

51. In ***Vishnu (Dead by L.R.S) vs. State of Maharastra and Ors.*** reported in ***(2014) 1 SCC 516***, the Hon'ble Apex Court held as follows:-

> "**13.3** since the Superintending Engineer was made overall in-charge of all works to be executed under the contract, he was considered by

the parties to be the best person who could provide immediate resolution of any controversy relating to specifications, designs, drawings, quality of workmanship or material used, etc; it was felt that, if all this was left to be decided by the regular civil courts, the object of expeditious execution of the work of the project would be frustrated; this was the primary reason why the Superintending Engineer of the Circle was entrusted with the task of taking decisions on various matters;

13.4 However, there was nothing in the language of the clause from which it could be inferred that the parties had agreed to confer the role of an arbitrator upon the Superintending Engineer of the Circle."

52. In ***Karnatak Power Transmission Corpn. Ltd. and Anr. vs Deepak Cables (India) Ltd.*** reported in ***(2014) 11 SCC 148***, the Hon'ble Apex Court held as follows:-

"24. The said clause read as follows:-

48.0 Settlement of disputes:

48.1 Any dispute(s) or difference(s) arising out of or in connection with the contract shall, to the extent possible, be settled amicably between the parties.

48.2 If any dispute or difference of any kind whatsoever shall arise between the owner and the contractor, arising out of the contract for the performance of the works whether during the progress of the works or after its completion or whether before or after the termination, abandonment or breach of the contract, it shall, in the first place, be referred to and settled by the Engineer, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the owner and the contractor.

48.3 Save as hereinafter provided, such decision in respect of every matter so referred shall be final and binding upon the parties until the completion of the works and shall forthwith be given effect to by the contractor who shall proceed with the works with all the due diligence.

48.4 During settlement of disputes and court proceedings, both parties shall be obliged to carry out their respective obligations under the contract." While interpreting these clauses, the Supreme Court observed that, on a careful reading thereof, it was demonstrable that it provided for the parties to amicably settle any disputes or differences arising in connection with the contract; this was the first part; the second part, as was perceptible, was that when disputes or differences of any kind arose between the parties to the contract, relating to the

performance of the works, during the progress of the works or after its completion or before or after termination, abandonment or breach of the contract, it was to be referred to and settled by the engineer who, on being requested by either party, shall give notice of his decision within thirty days to the owner and the contractor; there was also a stipulation that his decision, in respect of every matter so referred to, shall be final and binding upon the parties until the completion of works, and was required to be given effect to by the contractor who should proceed with the works with due diligence; to understand the intention of the parties, this part of the clause was important; on a studied scrutiny of this postulate, it was clear that it did not provide any procedure which would remotely indicate that the engineer concerned was required to act judicially as an adjudicator by following principles of natural justice or to consider the submissions of both the parties; that apart, the decision of the engineer was only binding until the completion of the works; it only cast a burden on the contractor who was required to proceed with the works with due diligence; besides the aforesaid, during the settlement of disputes and the court proceedings, both the parties were obliged to carry out their obligation under the contract; the said clause had been engrafted to avoid delay and stoppage of work, and for the purpose of smooth carrying on of the works; the burden was on the contractor to carry out the works with due diligence after getting the decision from the engineer until completion of the works; emphasis was on the performance of the contract; the language employed in the clause did not spell out the intention of the parties to get the disputes adjudicated through arbitration; and it did not really provide for the resolution of disputes."

53. The discussions of the relevant precedents and the law as hereinabove, leads this court to arrive at the inevitable conclusion that clauses 29(a) and 28(a) are not arbitration clauses. The settlement of dispute was limited to the resolution by the architect (an expert) with regard to the quality of the work and drawings, designs, materials etc. between the employer and the contractor. The decision of the architect would be relevant until completion of the work and future disputes with regard to money claims, termination etc., were not covered by such clause.

54. The substantial portion of the order impugned deals with a finding that the plaintiff was a private limited company incorporated under the

Companies Act, carrying on business of providing service in India and abroad, in telecom network and the defendant was carrying on business of supply and deployment of manpower project planning, engineering, implementation, monitoring and coordination. That the parties entered into a business transaction on April 2019, and various anomalies were located such as tax evasion, fund diversion and non-settlement of advance etc., which was ultimately discontinued since December 2019. The order again refers to cancellation of GST registration and collection of GST from the plaintiff, but not deposited by the defendant. Such facts were totally foreign and/or alien to the facts of the case and the learned court proceeded to hear the application under Section 8 of the said Act on the basis of different set of facts. Thus, the decision is perverse and misconceived.

55. The revisionsal application is allowed.

56. The order impugned is set aside. The suit shall proceed in accordance with law.

57. There shall be no order as to costs.

58. Parties are to act on the basis of the server copy of this judgment.

(Shampa Sarkar, J.)