IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO. 93 OF 2026

Hitesh Coal Traders ... **Applicant**

: VERSUS :

Indapur Dairy & Milk Products Ltd. ... **Respondent**

Mr. Chinmay Mehta *i/b. RVJ Associates, for the Applicant.*

Ms. Akanksha Helaskar, *for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

Reserved On : 20 APRIL 2026.

Pronounced On: 5 May 2026.

JUDGMENT :

1) This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)** for appointment of Arbitrator for adjudication of disputes and differences that have arisen between the parties out of the Purchase Orders placed by the Respondent and Tax Invoices raised by the Applicant. The Purchase Orders placed by the Respondent for supply of imported coal does not include arbitration agreement. However, while supplying the coal, the Applicant has raised Tax Invoices, which provides for settlement of disputes through arbitration under the provisions of the Arbitration Act. According to the Respondent, Purchase Orders constitute the primary contract between the parties which do not contain arbitration agreement. On the other hand, it is the contention of the Applicant that since the delivery of goods

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covered by Invoices is accepted and since payments are made in respect of some of the Invoices, the arbitration clause printed in the Tax Invoices is accepted by the Respondent. In the light of rival positions taken by the parties, the issue that arises for consideration is whether reference of disputes which relates to supply of coal can be arbitrated by making a reference under Section 11(6) of the Arbitration Act.

2) A very brief reference to the facts of the case would be necessary. Applicant is engaged in the business of distribution and sale of imported Indonesian coal. Respondent approached the Applicant for purchase of Indonesian coal. By emails dated 18 September 2019, Applicant provided quotations for various quantities of coal. According to the Applicant, all the emails sent by it contained a specific stipulation that '*disputes and differences, if any will be referred to the provisions of Arbitration and Conciliation Act, 2015 as amended to date and shall be subject to the Courts having jurisdiction in Mumbai only*'.

3) Respondent went on placing various Purchase Orders for supply of Indonesian coal on the Applicant. After placing of Purchase Orders Applicant claims to have supplied requisite quantity of Indonesian coal to the Respondent. According to the Applicant, at the time of accepting the Purchase Orders, it had indicated to the Respondent that the terms and conditions mentioned in the Invoices and Delivery Challans raised simultaneously with the delivery, would be binding on the parties. According to the Applicant, the delivery of coal was commenced only after Respondent accepted the said terms. Applicant has placed on record some of the Purchase Orders. According to the Applicant, some of the

Purchase Orders were also placed verbally on the basis of emails sent by the Applicant. The Applicant has placed on record some of the emails by which Purchase Orders were communicated to the Applicant.

4) Applicant raised Tax Invoices on the Respondent from time to time. It has given details of several Tax Invoices during the period from 23 September 2019 to 3 April 2020 at Exhibit A to the Application. All the Tax Invoices bear a 'declaration' printed thereon containing seven clauses and one of the clauses provided for resolution of disputes by arbitration.

5) According to the Applicant, Respondent never objected to the aforementioned terms and conditions printed on the Tax Invoices and continued to accept delivery of coals and acknowledged invoices and Delivery Challans without raising any dispute. Applicant claims that the Respondent also made part payments against certain invoices thereby signifying their acceptance of contents of Invoices and Delivery Challans.

6) According to the Applicant, Respondent has failed and neglected to pay an amount of Rs.19,73,409/- under various invoices. On 11 November 2019, Respondent raised debit notes towards alleged quality and moisture deductions. Applicant protested the same by email dated 11 November 2019, 24 December 2019 and 24 February 2020. Thereafter, correspondence took place between the parties. The Applicant ceased all coal supplies after 5 March 2020. The Applicant thereafter sent several emails to the Respondents calling it upon to release the outstanding dues. By email dated 12 January 2023, Applicant invoked arbitration clause contained in the invoices and emails nominating a sole arbitrator. By email dated 25 January 2023, Respondents contended that there was no

provision for arbitration in its Purchase Order. The Applicant has filed the present Application on/or about 23 January 2026 seeking appointment of a sole arbitrator for adjudication of disputes and differences with the Respondent.

7) The Application is opposed by the Respondent contending that there is no arbitration agreement between the parties and that therefore reference to arbitration cannot be made. The learned counsel appearing for both the parties have tendered brief notes of written submissions and I have also heard oral submissions canvassed by the learned counsel appearing for the parties.

8) Mr. Mehta, the learned counsel appearing for the Applicant submits that since the dispute pertains to non-payment of monies covered by the Tax Invoices for supply of coal, the arbitration clause printed on the Invoices would constitute arbitration agreement between the parties. He further submits that even the Delivery Challans contain similar arbitration clause printed thereon. That the challans have been duly stamped and acknowledged by the Respondent without any protest or demur. That the Purchase Orders nowhere indicates that the terms contained therein are final or conclusive between the parties or that the Purchase Orders alone constitute final and binding contract between the parties. That Invoices and Delivery Challans issued after the Purchase Orders would constitute final agreement between the parties governing the entire transaction. That except raising issues relating to quality of coal, the Respondent never raised any dispute about arbitration clause in the Invoices and Delivery Challans.

9) Mr. Mehta further submits that the Respondent has not only accepted the invoices but also made part payments under them, which signifies acceptance of arbitration agreement printed on the invoices. He relies on judgment of this Court in ***Bennett Coleman and Co. Ltd. Versus. MAD (India) Pvt. Ltd.***[1]. He also relies on judgment of Delhi High Court in ***Radico Khaitan Limited Versus. Harish Chouhan***[2] and of Calcutta High Court in ***R.P. Infosystem Private Limited Versus. Redington India Limited***[3]**.** He also relies on judgment of this Court in ***Sanjiv Mahmohan Gupta Versus. Sai Estate Consultants Chembur Private Limited,***[4] in which this Court has reiterated the principle that acceptance and part payment of invoices constitutes arbitration agreement in the light of a clause printed on the tax invoice. He prays for appointment of an Arbitrator for adjudication of disputes between the parties.

10) Ms. Helaskar, the learned counsel appearing for the Respondent opposes the application submitting that there is no arbitration agreement between the parties as the Respondent has not given its consent for referring the disputes to arbitration. She submits that supply of coal is made based on Purchase Orders placed by the Respondent. That the Purchase Orders did not contain arbitration clause. She relies on judgment of this Court in ***Parekh Plastichem Distributors LLP Versus. Simplex Infrastructure Limited***[5] in support of her contention that the Purchase Orders constitute primary contract between the parties. She also relies on judgment of this Court in ***TCI Infrastructure Limited***

1 2022 SCC Online Bom 7807
2 MANU/DE/1729/2025
3 MANU/WB/2343/2023
4 Comm. Arbitration Petition No. 458 of 2024 decided on 11 March 2025
5 2023 SCC Online Bom 1942

Versus. Kirbi Building Systems [6] in which it has been held that Purchase Order would prevail over proposal unilaterally signed on behalf of one party and that arbitration clause in proposal would not constitute arbitration agreement between the parties when Purchase Orders is silent about arbitration. She distinguishes judgment of this Court in ***Bennett Coleman*** (supra).

11) Ms. Helaskar submits that arbitration forms a part of alternate dispute resolution process and the same cannot be resorted to in absence of express agreement between the parties. The arbitration forum is creation of contract and that when the main contract is silent about arbitration, the Court cannot foist arbitration upon the parties. That in the present case, there is no *consensus ad-idem*, between the parties for resolution of disputes through arbitration. She therefore prays for dismissal of the Application.

12) Rival contentions raised on behalf of the parties now fall for my consideration.

13) The case involves supply of imported Indonesian coal by the Applicant and purchase thereof by the Respondent. The supply and purchase are made through numerous Purchase Orders, Delivery Challans and Tax Invoices. It appears that the Respondent used to seek quotations from the Applicant from time to time. Applicant has placed on record copy of email dated 27 March 2019 sent by the Purchase Manager of the Respondent to the Applicant seeking quotations in respect of the quantity

6 2022 SCC Online Bom 28

of 3000 MT imported Indonesian coal giving various technical particulars of contents of ash, moisture etc. Upon receipt of emails from the Respondent, Applicant used to give quotations of rates. It would be apt to refer to Applicant's email dated 18 September 2019 by which quotations of rate of Rs.5,020/- was given by the Applicant to the Respondent. It appears that the email by which the Applicant used to send quotations contained following disclaimer:

> This message and any attachments (the "message") are intended solely for the addressees and are confidential if you receive this message in error, please delete it and immediately notify the sender Any use not in accord with its purpose, any dissemination or disclosure, either whole or partial, is prohibited except formal approval. The internet cannot guarantee the integrity of this message. The Views expressed, if any are of the author. The author shall not be held responsible for any acts or deeds done on the views. We hold no responsibility of any part of the message if the whole or a part of the message is modified Disputes and differences, if any will be referred to provisions of Arbitration and Conciliation Act, 2015, as amended to date and shall be subject to the courts having jurisdiction in Mumbai only.

14) It is contented by the Applicant that right since giving quotations, the Respondent was made aware of condition of arbitration for resolution of disputes and differences. After receipt of quotations from the Applicant from time to time to time, it appears that the Respondent placed Purchase Orders for various quantities of imported coal on the Applicant. In the column of 'terms of delivery' following conditions were printed in the Purchase Orders:

> Immediate
>
> Transport Including
>
> State Compensation Cess Including
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> Note:-Deduction Below GCV=5600 Kcal/kg Moisture Above 41%.

15) Purchase Orders raised by the Respondent did not contain any arbitration agreement. In pursuance of the Purchase Orders, the Applicant delivered coal to the Respondent from time to time. Applicant relies on Delivery Challans which are stamped and acknowledged by the Respondent. The Delivery Challans contained following terms and conditions:

> Terms and Conditions:
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> 1) Goods once unloaded will not be taken back.
>
> 2) Sampling and testing, if any, to be carried out during unloading process only.
>
> 3) We hold no responsibility of whatsoever nature, once the goods are unloaded and our vehicle leaves your premises.
>
> 4) Interest, as applicable, will be charged on delayed payment of invoices against this delivery challan.
>
> **5) Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 2015 as amended to date. Subject to Mumbai jurisdiction only.**
>
> *(emphasis added)*

16) Applicant also raised Tax Invoices for each supply made by it and each of the Tax Invoices again contained following conditions:

> (1) We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct.
>
> (2) Goods once sold will not be taken back.
>
> (3) TCS Reversal is subject to sumission of Form 27C.
>
> (4) Interest @36% p.a. will be charged on delayed payment of invoice.
>
> (5) We hold no responsibility once the goods are unloaded.

(6) Disputes, if any, subject to provisions of Arbitration and Conciliation Act, 2015 as amended to date.

(7) Our MSME UAN: MH19D0005453

(emphasis added)

17) There is no dispute to the position that the Tax Invoices have been acknowledged by the Respondent. However, it is sought to be contended that the Delivery Challans and Tax Invoices are signed by the gatekeeper and that therefore there is no acceptance by the Respondents in respect of the arbitration clause printed on the Tax Invoices.

18) Apart from Respondents signing and acknowledging the Delivery Challans and Tax Invoices, it is an admitted position that no dispute was created by the Respondent at any point of time in relation to the condition for resolution of disputes through arbitration. The transaction of purchase of coal has ensued between the parties from 23 September 2019 to 3 April 2020 and in this period there are numerous transactions of purchase of coal. Thus, while accepting the delivery, acknowledging Delivery Challans and acknowledging the Tax Invoices, Respondent never raised objection about condition of arbitration printed on Delivery Challans and Tax Invoices. More importantly, Respondent has made payments against most of the Tax Invoices. It is only in respect of some of the Tax Invoices that there is dispute between the parties relating to the quality of coal supplied by the Applicant. Otherwise, the Respondent has paid various invoices raised by the Applicant from time to time without creating any dispute in relation to the clause printed on the invoices for arbitration.

19) In the light of the above position, the short issue that arises for consideration is whether absence of arbitration clause in the Purchase Orders would nullify the arbitration clause printed on the Tax Invoices. It is sought to be contended on behalf of the Applicant that Purchase Order constitutes primary document between the parties and therefore the terms and conditions printed therein would govern the transaction. It is contended that Tax Invoices unilaterally raised by the Applicant cannot be treated as binding contract between the parties.

20) Reliance is placed by the Respondent on judgment of this Court in ***Parekh Plastichem Distributors LLP*** (supra) in which it is held in para-23A as under :

> 23.A. **The purchase orders issued by the Respondent constitute the main agreement between the parties which contained the terms and conditions on which the goods had to be supplied by the Applicant to the Respondent.** These purchase orders contained the description of the goods to be supplied, the quantity, the rate at which they were to be supplied, the delivery schedule, the tax and fees schedule, the terms of payment, site for inspection, the test certificate to be furnished, the place of delivery and various other terms and conditions. **These purchase orders, being the main agreement between the parties, it cannot be disputed that the Arbitration Clause contained in the said purchase orders had been agreed to by the parties.**
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> *(emphasis and underlining added)*

21) However, the judgment in ***Parekh Plastichem Distributors LLP*** does not provide much assistance for answering the issue involved in the present case as even the Purchase Order in that case contained arbitration clause. The opposition to arbitration by the Respondent in the present case is premised on absence of arbitration clause in the Purchase Order. Also, the judgment relies squarely on the Order passed by this

Court in ***Concrete Additives and Chemicals Versus. S.N. Engineering Services Pvt. Ltd.***[7] noting that the Order was challenged before the Supreme Court, which is clear from the following observations:

> 26. Although it has been pointed out that the Order of this Court in Concrete Additives (supra) has been challenged by filing a Special Leave Petition before the Hon'ble Supreme Court, there is no stay on the said Order granted by the Hon'ble Supreme Court.

The judgment in ***Parekh Plastichem Distributors LLP*** was rendered on 14 September 2023 and shortly thereafter on 28 September 2023, the Order in ***Concrete Additives and Chemicals*** is set aside by the Apex Court, which is discussed in the latter part of the judgment.

22) Ms. Helaskar has invited my attention to the judgment of Delhi High Court in ***Alupro Building Systems Pvt. Ltd. Versus. Ozone Overseas Pvt. Ltd.*** [8] which again appears to be relied on by this Court in ***Parekh Plastichem Distributors LLP.*** In case before the Delhi High Court, the Purchase Order did not contain arbitration clause but the invoices contained one. It is held in para 18 to 22 of the judgment as under:

> **18. At this stage, it must be noticed that the POs admittedly did not contain any arbitration clause.** They only state that disputes arising therefrom would be subject to the jurisdiction of the courts at Bangalore. **The question then arises whether the mere acceptance of supplies by the Petitioner on the basis of invoices containing an arbitration clause would amount to acceptance by the Petitioner of such arbitration clause?**
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> 19.1 In ***Taipack Limited v. Ram Kishore Nagar Mal*** (supra), the facts were that the Petitioner therein had placed an order on the Respondent therein for the supply of BOPP films. On the rear of the said PO dated 13 th February 1997, it was mentioned that in Clause 10 "any terms

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8 2017 SCC Online Del 7228

stipulated in seller's confirmation or any other documents in addition or contradiction to what is mentioned in this order will not be acceptable to us unless specifically agreed to in writing. Clause 11 stated that any dispute arising out of the contract would be subject to the jurisdiction of Courts in Delhi "and the supplier expressly agrees to submit to such jurisdiction." Condition No. 4 read as under:

> "In case of any dispute the judgment of the Tribunal or any other authority appointed by the Paper Merchants Association (Regd.) Delhi will be final and binding."

19.2 The Respondent issued demand notices which were denied by the Petitioner. On 20 th January 2001 the Petitioner received a notice of the claim filed by the Respondent before the Arbitrator appointed by the Paper Merchants Association. The objection by the Petitioner to the jurisdiction of the Arbitrator was negatived and the Respondent's claim was allowed. This Court held that there was in fact no arbitration clause contained in a document signed by the parties as contemplated under Section 7 (4) (a) of the Act. It held in para 16 as under:

> "16. In the present case, there is no arbitration agreement which could be said to be 'contained in a document signed by the parties.' [See Section 7 (4) (a) of the Act]. Therefore, one has to ascertain whether there is an arbitration agreement which could be said to be contained in 'exchange of letters, telex, telegrams or any other means of telecommunication, which provide a record of the agreement'. An "arbitration agreement" is a species of the genus, that is "agreement. There has to be, first and foremost an agreement." For the existence of an agreement there has to be "consensus ad idem" between the parties, i.e., there should be agreement to the same thing in the same sense."

19.3 **The Court in Taipack Limited v. Ram Kishore Nagar Mal (supra) concluded that when the Respondent supplied the goods in compliance of the PO, it accepted the terms and conditions stipulated therein. The mere printing of Condition No. 4 on the reverse of the invoice was, at the highest, an offer made by the Respondent to the Petitioner**. It was observed that "the making of the payment by the Petitioner for the supplies effected by the Respondent cannot be considered to be a step taken by the Petitioner to indicate its acceptance of the conditions mentioned by the Respondent on the reverse of the invoice." **Further, the signature of the Petitioner's agent on the Respondent's copy of the invoice cannot "tantamount to acceptance of the Respondent's so-called offer for arbitration.**" Further, the Condition No. 4 of the invoice did not use the expression 'arbitration' or 'arbitrator'. It did not make a reference to the

'Constitution and Regulations' of the Paper Merchants Association (Regd.), Delhi. There was also no document from which it could be inferred that the Petitioner had consented to the conditions on the reverse of the invoice. In the circumstances, the Court found that there was no arbitration agreement between the parties and that the arbitrator appointed by the Paper Merchants Association (Regd.) had no jurisdiction to adjudicate the disputes between them.

20. The Court finds that the facts of the case at hand are more or less similar to the facts of the above decision in Taipack Limited v. Ram Kishore Nagar Mal (supra). Here also, the Respondent seeks to rely upon the endorsement on each of the invoices. That endorsement is only for the quantities as indicated in the invoices having been received. There is no deemed acceptance of the conditions appended to the invoices. **The mere endorsement of Mr. Sanjeev that the quantity is ok cannot lead to an inference that the Petitioner agreed to the arbitration clause printed o the invoice.**

21.1 Turing next to the decision in NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited (supra), there the Respondent placed orders on the Petitioner through POs. Pursuant thereto, supplies were made under the invoices raised by the Petitioner. The invoices were governed by the terms and conditions as set out in the General Terms of Business (GTB). The GTB contained an arbitration clause in terms of which each party could appoint an independent arbitrator. The arbitration was to be held at Chennai in accordance with the Act.

21.2 Notice was sent by the Petitioner to the Respondent proposing its nominee arbitrator and calling upon the Respondent to do likewise. However, the Respondent contended that there was no valid arbitration agreement between the parties. Thereafter, the Petitioner filed an application under Section 11 of the Act. Reliance was placed on the Section 7 of the Act. It was contended that an inference could be drawn from the documents exchanged between the parties regarding the existence of an arbitration agreement.

21.3 The Madras High Court in NSK India Sales Company Private Limited v. Proactive Universal Trading Company Private Limited (supra) did not accept the plea of the Petitioner. It was observed in para 18 of the judgment, as under:

"18. In the sequence of documents issued, it is the respondent who first issued the purchase order. This does not contain an Arbitration Clause. The document of delivery of goods also does not contain an arbitration clause. It is stated to be signed by the 'gate keeper' of the respondent. It

> is only the invoice issued to the petitioner which contains the arbitration clause and it is stated to have been simultaneously issued in view of the factum of the same being interlinked to the goods received. This document neither contains the declaration in the prescribed form duly signed at the back nor is there any other endorsement so as to consider it as an acceptance on the part of the respondent. There is in fact thus no agreement whatsoever inter se the parties on the issue of the mode of resolution of the dispute through arbitration and there cannot be an arbitration clause by implication in any other document. In fact, the very fact that the respondent has not signed this document would show the unwillingness of the respondent to accept the arbitration as a mode of resolution of dispute, to which the petitioner had never protested."
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> 21.4 The Madras High Court in the above decision further observed that the Petitioner could not confuse the above issue with the one about the validity of the transaction for the purpose of Sale of Goods Act, 1930 wherein goods were retained by the Respondent, without returning them and not paying for them. While it might be that the sale was complete subject to any objection which may be raised by the Respondent, the question of the existence of a valid arbitration clause was different.
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> 22. In light of the legal position explained in the above decisions, the Court concludes that in the present case, there was no arbitration agreement between the parties which could be validly invoked by the Respondent. Consequently, the Arbitrator lacked jurisdiction to enter upon reference and proceed with the arbitration. The impugned Award must, therefore, be declared to be null and void."
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> *(emphasis and underlining added)*

23) It appears in ***Alupro Building Systems Pvt. Ltd.*** (supra) the Purchase Orders did not contain any arbitration clause, but the Invoices contained an arbitration clause. However, in the case before the Delhi High Court, there was endorsement on the Tax Invoices only relating to quantities indicated therein and mere endorsement of that quantity as 'OK' was treated to not constitute acceptance of arbitration clause printed on invoice. It is not very clear as to whether the case before the Delhi High Court in ***Alupro Building Systems Pvt. Ltd.*** involved making

payments against the Tax Invoices. Also, the law appears to have developed subsequent to the judgment of the Delhi High Court in ***Alupro Building Systems Pvt. Ltd.***

24) On the other hand, the judgment of this Court in ***Bennett Coleman and Co. Ltd.*** deals with the situation where the Tax Invoices were paid which act is construed by the Single Judge of this Court as acceptance of arbitration agreement printed on the invoices. The judgment of this Court in ***Bennett Coleman and Co. Ltd.*** conclusively rules that where parties act on the invoice and where there was no denial of Invoices, the condition contained in the Invoices requiring reference to arbitration deserves to be construed as arbitration clause. This Court referred to another judgment of this Court in ***Skanska Cementation India Ltd. Versus Bajranglal Agarwal***[9] and held in para-26 as under :

> 26. Another decision upon which Mr. Kamat has laid his hands is, in case of **Skanska Cementation India Ltd. v. Bajranglal Agrawal**, 2002 SCC OnLine Bom 1190, decided on 13/12/2002. The facts involved as narrated in the petition would reveal that the petitioners had placed purchase orders on the respondents and the dispute arose as regards the balance unpaid amount and the interest thereon. The petitioners contended that there was no Arbitration clause in the purchase order and when the respondent supplied the goods, it amounted to a contract which had come into force and it was invoked by the provisions of the terms and conditions of the purchase order, which contemplate that in case of any dispute, the decision of the Company shall be final and binding. Merely because the petitioners have signed some documents before the Arbitral Tribunal, was argued, not to confer jurisdiction on the Tribunal. Para-6 prefaces the background and in para-8, on analyzing the factual scenario, the discussion focus upon whether there existed an arbitration agreement. I deem it expedient to reproduce the same.
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> > "8 The main contention as raised on behalf of the petitioners is based on Clauses 1, 10 and 11 of the purchase order. The purchase order by itself would not be a contract between the parties. It is only on accepting the terms of the purchase order

9 2002 SCC Online Bom 1190

would a contract come into being. Clause 1 of the purchase order does provide that execution of this order shall be deemed to be acceptance of the conditions stated hereinabove. Clause 11 of the purchase order provided that the respondents could draw attention of the company to conditions which they find unacceptable. **By the terms contained in the delivery challan the petitioner-company is deemed to have been informed that the condition that their decision was final was not acceptable and that the dispute if any should be referred to Arbitration of the Bharat Chamber of Commerce.** As such even though the purchase order was received, the respondents did not accept the purchase order and drew the attention of the company that the term of resolving the dispute was not acceptable by sending the goods under delivery challan which contained Clauses 4 and 7. Clause 4 made it clear, that it is in the nature of counter offer by the respondents to the petitioners for accepting the goods. In other words the respondents had not agreed to Clause 10 of the purchase order. Even otherwise considering Clause 11 the respondent had specifically informed the petitioners that they were sending the goods under the delivery challan with a different condition. The petitioners accepted the goods under the challan without protest. As such pursuant to the counter offer or counter proposal the terms of the delivery stood amended even considering Clause 11 of the purchase order and accordingly the contract apart from the terms and conditions of the purchase order which were agreed by the parties would contain additional terms under which the goods were dispatched and accepted by the petitioners. The petitioners also sent invoices. **Under the invoices again there was an Arbitral clause. The invoices were accepted, money paid under the invoices without protest. To my mind, therefore, the contract between the parties clearly contemplated a provision for Arbitration,** The order dated 1 st August, 2001 of the Arbitral Tribunal has taken into account these terms in the delivery challan. To my mind, therefore, the issue having been in issue before the Arbitral Tribunal and the tribunal having taken decision, which it was capable of taking considering the construction of the terms the said view cannot be said to be a view impossible of being taken.

27. **Since in the present case, it can be clearly seen that the parties have acted upon the invoices and there was no denial of the invoices raised by the applicant, the clause contained in the invoices which clearly stipulate a reference to arbitration, deserve to be construed as an arbitration clause.** The decision of this Court in case of Concrete Additives

> (supra) is delivered in the peculiar facts of the case and **the law being well crystallized to the effect that any document in writing exchanged between the parties which provide a record of the agreement and in respect of which there is no denial by the other side, would squarely fall within the ambit of Section 7 of the Arbitration and Conciliation Act, 1996 and would amount to an arbitration clause.** The objection raised by the respondent thus stand overruled and by accepting that the clause contained in the tax invoice amount to an arbitration clause, I am persuaded to exercise the powers under sub-section 6 of Section 11 of the Act
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> *(emphasis and underlining added)*

25) In ***Sanjiv Mahmohan Gupta***, (supra) Single Judge of this Court has held that once the invoices are accepted and partly paid for, without challenging arbitration clause in them, there would be acceptance of arbitration agreement printed on the Invoices. This Court followed the ratio of the judgment in ***Bennett Coleman and Co. Ltd.*** and held in paras-6 and 7 as under:

> 6. The conduct of the parties evidently shows that there is a prima facie demonstration that advertising services were availed of by the Respondent from the Applicant-Petitioner, which were governed by exchange of correspondence and documentation in a continuum ranging from correspondence to the Letter of Confirmation to the invoices. The services were indeed covered by the invoices. **The invoices were accepted and partly paid for, without challenging the arbitration clause in them.** Multiple opportunities to question the arbitration clause were available each time an invoice was raised. **Even if the invoices were received subject to verification, they were indeed paid for initially without any protest about the arbitration agreement.** In fact, after the first demand notice was issued on August 2, 2019, the Respondent issued 20 cheques aggregating to Rs. 1 crore. Ten of these cheques were even honoured (the balance cheques are said to have been returned at the Respondent's request), indicating that the parties indeed acted upon the invoices.
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> 7-Evidently, the invoices are an integral part of the documentation executed by the parties, and on these very invoices, cheques were issued, which prima facie is adequate indication of the invoices having been

accepted. Such invoices containing an arbitration clause would point to the condition relating to arbitration being accepted. The invoices clearly had an arbitration clause. It is only later that disputes have emerged, and the Respondent took a stance that there is no arbitration agreement in place.

26) It appears that this Court in ***Concrete Additives and Chemicals*** (supra) had taken a view that when Purchase Orders are issued not containing any arbitration clause and subsequently Invoices are issued containing an arbitration clause, there was no arbitration agreement between the parties. Paras-2 to 6 of the judgment in ***Concrete Additives and Chemicals*** (supra) read thus:

> 2. The purchase orders are annexed to the application at page 22 on-wards (Exhibit A-1 to Exhibit A-13). A perusal of the purchase orders in no manner indicates that there is an arbitration agreement between the parties. However, it appears that in executing the purchase orders the applicant issued tax invoices and in the tax invoices, which are the printed forms, in a column "Terms & conditions" the following clause was incorporated:-
>
> 1) All or any disputes or differences that may arise between the parties hereto shall be referred to the arbitration of a sole arbitrator to be appointed by CONCRETE ADDITIVES & CHEMICALS PVT. LTD. The arbitration proceedings shall be governed by the provisions of the Arbitration & Conciliation Act, 1996. The venue of the arbitration shall be at Mumbai.
>
> 3. It is on the basis of the tax invoices, the applicant is before the Court to contend that there is an arbitration agreement between the parties. Such a contention as urged on behalf of the applicant cannot be accepted as issuance of tax invoice is certainly required to be held to be an unilateral act on the part of the applicant. **The contract between the parties is actually born under the purchase order. The purchase orders do not contain or make any reference to an arbitration agreement between the parties.**
>
> 4. To accept the applicant's case that there is an arbitration agreement between the parties in my opinion, would be in the teeth of Section 7 of the Act which provides as to what would constitute an arbitration agreement. In the present context, it can be clearly held that there is no conscious agreement between the parties to refer the disputes for

adjudication in arbitration. **Merely because the tax invoices which are in response to the purchase orders provide for an arbitration, certainly such invoices do not bring about an arbitration agreement as contemplated under Section 7 of the Act.**

5. Mr. Menon's contention that the tax invoices have been accepted by the respondent and therefore it is required to be presumed that there is an arbitration agreement between the parties also cannot be accepted. The acceptance of the tax invoices is required to be held to be relevant accepting the delivery of the goods and the payment to be made under the invoices. Certainly it cannot be accepted that the unilateral invoices brought about an arbitration agreement between the parties as section 7 would provide.

6. In the above circumstances, in my opinion, there is no arbitration agreement between the parties. The petition is wholly without any merit. It is accordingly rejected. No costs.

(emphasis added)

27) The judgment of this Court in ***Concrete Additives and Chemicals*** was challenged before the Apex Court in Civil Appeal No. 7858 of 2023 and the Apex Court has set aside the order passed by this Court. The order of the Apex Court dated 28 November 2023 reads thus:

Office report records that notice has been served to the sole respondent in the year 2022. No one has put in appearance.

Leave granted.

Heard the learned counsel appearing for the appellant. By the impugned judgment, the High Court has rejected the application made by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator on the ground that the Arbitration Agreement was not in existence.

We have perused the invoices annexed as Annexure P2 to IA No.34944 of 2022 filed for production of additional documents. In the invoices, terms and conditions have been incorporated. **The invoices were issued by the appellant and acknowledgments of receipt of the invoices by the respondent also appear thereunder.** Clause (1) of the terms and conditions printed on the invoices reads thus:

"(1). All or any disputes or differences that may arise between the parties hereto shall be referred to the arbitration of a sole

> arbitrator to be appointed by CONCRETE ADDITIVES & CHEMICALS PVT. LTD. The arbitration proceedings shall be governed by the provisions of the Arbitration & Conciliation Act, 1996. The venue of the arbitration shall be at Mumbai."
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> **Hence, we do not agree with the High Court that there was no arbitration clause.** All issues canvassed by the respondent, while opposing the petition under Section 11 of the Arbitration Act can be always canvassed before the Arbitral Tribunal in accordance with law.
>
> Therefore, we allow the appeal. The impugned order is set aside and the Arbitration Application (L) No.23207 of 2021 is hereby allowed. The disposed of Arbitration Petition shall be listed before the roster Judge of the High Court taking up Section 11 petitions under the Arbitration Act only for the purposes of appointing an arbitrator.
>
> A copy of this order shall be immediately forwarded by the Registry to the Bombay High Court.
>
> *(emphasis added)*

28) Thus, the Apex Court has not agreed with the view taken by this Court that the Purchase Order constitutes the primary contract and that mere presence of arbitration clause in the Invoices does not constitute arbitration agreement under Section 7 of the Arbitration Act. The Order of the Apex Court in ***Concrete Additives and Chemicals*** also is an authority on the issue that once the invoices containing arbitration clause are acknowledged, there would be arbitration agreement between the parties. On account of the Order of the Apex Court in ***Concrete Additives and Chemicals,*** the issue is now well settled that even if the Purchaser Order is silent in respect of the arbitration clause, but the Tax Invoices contain arbitration clause and if the Invoices are acknowledged, there would be arbitration agreement between the parties.

29) Reliance by Ms. Helaskar on judgment of this Court in ***TCI Infrastructure Limited*** (supra) is inapposite. In that judgment, the issue

was about absence of arbitration clause in purchase order but presence of arbitration clause in a 'proposal' forwarded on behalf of the Respondent therein which was unilaterally signed only by the Respondent. In the facts of that case, this Court held that mere forwarding of proposal containing arbitration clause did not constitute arbitration agreement between the parties.

30) The conspectus of the above discussion is that there is arbitration agreement between the parties. The case involves a situation where arbitration clauses were reflected in (i) the emails providing quotations, (ii) Delivery Challans, and (iii) Tax Invoices. The Purchase Orders were issued in pursuance of the quotations provided by the Applicant. The Delivery Challans and Tax Invoices are acknowledged without raising any protest about arbitration clause. More importantly, many of the invoices are paid for. In such situation, mere absence of arbitration clause in Purchase Orders cannot be a reason for inferring that parties did not intend to resolve disputes through arbitration. By acknowledging the Delivery Challans and Tax Invoices and by making payments against the invoices containing arbitration clause the Respondent has agreed for resolution of disputes through the mechanism of arbitration. The intention of parties to arbitrate can thus easily be gathered in the facts of the present case. Even otherwise, the order passed by the Supreme Court setting aside the judgment of this Court in the ***Concrete Additives and Chemicals*** leaves no manner of doubt that absence of arbitration clause in Purchase Order does not nullify the arbitration clause printed in the Delivery Challans and Tax Invoices.

31) In the present case, the arbitration clause was invoked vide notice dated 12 January 2023 providing time of 30 days to the Respondent to concur in the name suggested by the Applicant. Thus, as held by the Apex Court in ***M/s Arif Azim Co. Ltd. V/s. M/s Aptech Ltd.***[10], the period of limitation of 3 years prescribed under Article 137 of the Limitation Act, 1963 would commence from 11 February 2023. The present application appears to have been filed within a period of 3 years from the date of accrual of cause of action. The Application is thus within limitation. Whether the claims sought to be raised by the Applicant are within limitation or not will have to be decided by the Arbitral Tribunal.

32) Since there is arbitration agreement between the parties, it would be just and proper to constitute Arbitral Tribunal comprising of a sole arbitrator.

33) I accordingly proceed to pass the following order:

(A) Mr. Suyash Gadre, an Advocate of this Court is hereby appointed as Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of the Tax Invoices referred to above. The contact details of the Arbitrator are as under:

Office Address :- 122, Mittal Tower, C Wing Nariman Point Mumbai- 400021
Email ID :- lawofficesuyash@gmail.com

Mo. No. :- 9930212794

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(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Petitioner within a period of one week from the date of upload of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal alongwith 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 2 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 by him, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc.

(E) The sole Arbitrator shall be entitled to the fees prescribed under the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal proportion and shall be subject to the final Award that may be passed by the Tribunal

34) All issues on merits are expressly kept open to be agitated before the Arbitral Tribunal appointed as above.

35) With the above directions, the Application is **allowed** and disposed of.

[SANDEEP V. MARNE, J.]