Reserved On : 05/12/2025
Pronounced On : 30/01/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 22 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No

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ADANI ENTERPRISES LIMITED
Versus
GUJARAT STATE ELECTRICITY CORPORATION LIMITED

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Appearance:
MR. JAIMIN R DAVE(7022) for the Petitioner(s) No. 1
MR DIPAK R DAVE(1232) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR.JUSTICE D.N.RAY**

CAV JUDGMENT

1. Heard Mr. Shalin Mehta, learned senior advocate for Mr. Jaimin R. Dave, learned advocate appearing for the Petitioner and Mr. Dipak R. Dave, learned advocate appearing for the Respondent.

2. Shorn of embellishments, the facts which lead to the present case are as follows:-

2.1 The Respondent (Gujarat State Electricity Corporation Limited) initiated an international competitive bidding process for selection of a Mine Developer and Operator for the development and operation of the Gare Pelma Sector–I Coal Block (Phase–I), Mand Raigarh Coalfields, District Raigarh, Chhattisgarh. In furtherance thereof, a Request for Qualification (RFQ) dated 22.01.2016 was issued, followed by a corrigendum dated 17.03.2016. The said bidding process contemplated subsequent stages culminating in execution of a Coal Mining Services Agreement (CMSA) for the said project.

2.2 In response to the RFQ, the petitioner and Sainik Mining and Allied Services Limited (SMASL) entered into a consortium agreement dated 29.03.2016 for the purpose of participating in the bid. The petitioner was designated as the lead member holding 74% share in the consortium. The consortium successfully qualified at the RFQ stage, whereupon the respondent issued a Request for Proposal (RFP) dated 23.02.2017 to the qualified bidders, including the consortium.

2.3 Pursuant to the RFP, the consortium submitted its price bid on 27.03.2017. Upon evaluation of the bids, the consortium was declared the successful bidder with a quoted mining fee of Rs.1295 per tonne of raw coal. Subsequently, during discussions with the respondent, the petitioner, on behalf of the consortium, communicated a further concession of Rs.25 per tonne by letter dated 22.10.2018.

2.4 Despite the consortium having emerged as the successful bidder, the Letter of Acceptance (LoA) was not issued for a considerable period. During this interval, the petitioner addressed several communications requesting issuance of the LoA and execution of the CMSA in terms of the RFP. Eventually, on 15.12.2018, the respondent issued a Conditional Letter of Acceptance permitting commencement of preliminary activities, subject to fulfilment of certain approvals to be obtained by the respondent. The said Conditional LoA was accepted by the petitioner on behalf of the consortium on 19.12.2018, along with a request to execute the CMSA by 31.12.2018.

2.5 It is averred that even after issuance of the Conditional LoA, the CMSA was not executed for more than four years. During this period, the respondent, by letter dated 09.09.2021, informed its decision to surrender the coal block to the Nominated Authority, Ministry of Coal. Thereafter, by communication dated 04.01.2023, the respondent intimated the consortium regarding its decision to scrap or cancel the tender process and the Conditional LoA.

2.6 It is the case of the petitioner that, in terms of the RFQ and the corrigendum, the petitioner had furnished a bank guarantee of Rs.37 crores and the consortium partner had furnished a bank guarantee of Rs.13 crores as earnest money deposit. The bid validity under the RFP was stipulated to be 180 days from the opening of the price bid. However, at the request of the respondent, the consortium extended the validity of the bid as well as the EMD bank guarantees for several years, including for a period after issuance of the Conditional LoA. Upon expiry of the claim period and in the absence of execution of the CMSA, the petitioner sought return of the EMD bank guarantees through various communications between August 2021 and March 2022.

2.7 It is the case of the petitioner that, the respondent, however, declined to return the EMD bank guarantees and, by its communication dated 11.03.2022, indicated its intent to invoke the same. Even after expiry of the claim period, the original bank guarantees were not returned despite repeated requests made in December 2022 and January 2023. It is further stated that after issuance of the Conditional LoA, the consortium commenced preparatory and project-related activities, incurring expenditure towards the connected activities, which were periodically brought to the notice of the respondent through written communications.

2.8 The RFP provided for a dispute resolution mechanism requiring attempts at amicable settlement prior to arbitration. In accordance therewith, a notice for amicable resolution was issued on 21.06.2023. A meeting held on 05.08.2023 failed to resolve the disputes, as recorded by the petitioner on 10.08.2023. Consequently, the petitioner invoked arbitration by notice dated 01.09.2023 and proposed appointment of a sole arbitrator (Justice R. S. Chauhan, Retd.), which was not accepted by the respondent.

3. In these circumstances, the petitioner preferred the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“**the Act, 1996**”) on 11.01.2024, with the following prayers :-

> *“A. Appoint a Sole Arbitrator for adjudication of disputes/claims between the Consortium and the Respondent arising under, or out of, or in relation to the RFP document dated 23.02.2017.*

> *B. Pass any such orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."*

3.1 By judgment and order dated 05.07.2024 a Coordinate Bench of this Court rejected the said petition, prompting the petitioner to approach the Hon'ble Apex Court by way of a Special Leave Petition. By order dated 28.10.2025, the Hon'ble Apex Court remitted the matter to this Court for fresh consideration. The material portion of the order dated 28.10.2025 is reproduced hereinbelow for ready reference:

> *"3. After hearing learned counsels for the parties and in view of the evolving jurisprudence, we are guided by recent judgment of this Court in the case of* ***SBI General Insurance Company Limited vs. Krish Spinning*** *whereby this Court, particularly in paragraph 118 therein, held that tests like "eye of the needle" and "ex facie meritless" are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.*
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> *4. We find merit in the said contention. The substantive issues raised in the present SLP requires examination of the Request for Proposal (RFP) document and the Letter of Award (LOA), which form the contractual foundation of the parties' relationship, in light of the principles enunciated in* ***Krish Spinning Mills*** *(supra). In view of the foregoing, and without expressing any opinion on the merits of the case, we deem it appropriate to set aside the impugned order and the matter is hereby remitted to the High Court with a direction to decide it afresh.*
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> *3. (Sic 5.) Accordingly, PUAA No. 22 of 2024 be restored to file of the High Court of Gujarat at Ahmedabad in its original number and be decided afresh. However, it is made clear that we have not expressed any opinion on the merits of the contentions of either side and leave it open for the High*

Court to appreciate the merit afresh. We request the High Court to decide the matter as expeditiously as possible, preferably in three months."

3.2 It is pursuant to the aforesaid order of the Hon'ble Apex Court that the parties are before me.

4. Mr. Shalin Mehta, learned senior advocate for Mr. Jaimin R. Dave, learned advocate appearing for the Petitioner has contended that a valid and binding arbitration agreement is embedded in Clause 3.5 of the Request for Proposal (RFP) document. It is submitted that the existence of the RFP document is undisputed, and it is equally not in dispute that the respondent accepted the offer submitted by the petitioner-consortium pursuant thereto. Upon such acceptance, a defined legal relationship came into existence between the parties, squarely falling within the ambit of Section 7(1) of the Act, 1996. In this backdrop, it is urged that the petitioner was justified in invoking arbitration in accordance with Clauses 3.4 and 3.5 of the RFP document.

4.1 It is further submitted that the respondent itself acted in furtherance of Clause 3.4 of the RFP by participating in the meeting convened for amicable settlement of disputes on 05.08.2023, without raising any objection or reservation as regards the applicability or existence of the dispute resolution mechanism. In view of such conduct, the respondent is stated to be estopped from subsequently contending that Clauses 3.4 and 3.5 of the RFP document never came into existence or are not binding. According to the petitioner, such a plea is an afterthought, as no such contention was raised by the respondent at any point of time prior to 09.11.2023. In support of the aforesaid submissions, reliance has been placed on the decision of the Hon'ble Apex Court in **Unissi (India) Pvt. Ltd. v. Post Graduate Institute of Medical Education and Research**, reported in **(2009) 1 SCC 107**, to contend that it is well-settled that an arbitration clause contained in a tender document is valid and enforceable.

4.2 Reliance has been placed on the judgment of the High Court of Orissa in **M/s. Jhar Mining Infra Private Ltd. v. CMD, Managing Coalfields Ltd**., rendered in Arbitration Petition No. 24 of 2022 by the order dated 27.09.2022. It is contended that, having regard to the principles enunciated by the Hon'ble Apex Court in **Vidya Drolia v. Durga Trading Corporation**, reported in **(2021) 2 SCC 1**, the High Court of Orissa held that a dispute arising out of cancellation of a tender after issuance of a Letter of Intent, coupled with a request to resolve such dispute in terms of the arbitration clause contained in the tender document, is required to be referred to arbitration. It is further pointed out that the said decision of the High Court of Orissa has attained finality, the Special Leave Petition preferred thereagainst, being SLP (C) No. 22562 of 2022, having been dismissed by the Hon'ble Apex Court on 02.01.2023.

4.3 Placing reliance on the aforesaid line of authorities, it has been vehemently urged that the respondent cannot be permitted, at the stage of pre-referral proceedings under Section 11(6) of the Act, 1996, to raise an objection with respect to the existence of an arbitration agreement between the parties arising out of the issuance of the conditional LoA dated 15.12.2018. According to the petitioner, such an objection travels beyond the limited scope of scrutiny permissible at the Section 11 stage and is liable to be rejected.

4.4 Further reliance has been placed on the decision of the Hon'ble Supreme Court in **Bharat Sanchar Nigam Ltd. & Anr. v. Motorola India Pvt. Ltd.**, reported in **(2009) 2 SCC**

337, to contend that a unilateral act undertaken by one party, without adherence to the governing contractual framework, is impermissible in law. On the strength of the said decision, it has been urged that the unilateral decision of GSECL to surrender the coalmine is contrary to, and in breach of, the provisions of the Indian Contract Act, 1872, and therefore cannot be sustained.

5. On the contrary, Mr. Dipak R. Dave, learned advocate appearing for the respondent has submitted that, on a conjoint reading of the material on record, it is evident that no concluded contract ever came into existence between the parties. According to the respondent, all communications exchanged between the parties were at a pre-contractual stage, namely during the evaluation of the RFP/tender documents, as is apparent from the subject and tenor of such correspondence. It is urged that the petitioner was fully conscious of this position, as the communications themselves made it clear that the terms and conditions of the LoA were to be finalised only upon execution of the CMSA. Until such execution, neither party was to assume any liability, penalty or cost. It was further submitted that it was expressly agreed that, in the absence of consensus on revised milestones, the

conditional LoA would be rendered null and void without any liability or consequence for either party.

5.1 On this premise, Mr. Dipak R. Dave argued that no agreement, as contemplated under Sections 7 and 11 of the Act, 1996, came into existence. It is further submitted that the conditional LoA does not incorporate any arbitration agreement, either expressly or by necessary implication. Even otherwise, a plain reading of the RFP document, according to the respondent, would indicate that the arbitration clause contained therein is inapplicable to the present facts.

5.2 Further, it has also been urged that there is no dispute regarding the tender conditions as such, and in any event, any dispute emanating from the tender process is in the nature of a public dispute, involving elements of public interest, and therefore does not constitute a private dispute capable of resolution through arbitration. It is emphasized that no CMSA was executed, the tender was never finalised, the contractual terms were never crystallised, and no final LoA was issued. The RFP, it is submitted, is neither an offer nor an agreement, but merely a document inviting bids, reserving absolute discretion with the respondent to accept or reject any or all bids without assigning reasons. In the absence of a concluded contract, the respondent contends that the dispute is non-arbitrable, the formation of a binding agreement being a sine qua non, which is conspicuously absent in the present case. According to the respondent, all acts relied upon by the petitioner were merely preparatory and antecedent to contract formation and do not amount to acceptance of any tender.

5.3 Mr. Dave has invited the attention of this Court to the decisions of the Hon'ble Apex Court in **Dresser Rand S.A. v. Bindal Agro Chem Ltd.**, reported in **(2006) 1 SCC 751**; **PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust**, reported in **(2018) 10 SCC 525**; and **Bharat Sanchar Nigam Limited v. Telephone Cables Limited**, reported in **(2010) 5 SCC 213**. Relying on the aforesaid judgments, it has been contended that unless a LoA is issued and a formal agreement, namely the CMSA, is thereafter executed, a mere bid or tender document, even if it contains an arbitration clause, does not confer any enforceable rights upon the bidder in the realm of private law. It is submitted that, in such circumstances, any grievance of the bidder can only be ventilated by invoking public law remedies and not through arbitration.

5.4 Placing specific reliance on the decision in **BSNL (Supra)**, it has further been urged that in the absence of a purchase order, no concluded contract or binding agreement comes into existence, and consequently, the general conditions of contract, including the arbitration clause, do not become operative. Reliance is placed upon the below-mentioned paragraph of **BSNL (Supra)** :-

> *"26. A contract is entered in pursuance of the bid, when a purchase order is placed by BSNL on a bidder [vide Clauses 1(f) and 28 of Section II instructions to bidders]. When a purchase order is not placed, there is no contract or agreement and if there is no contract or agreement, the terms of the general conditions including the arbitration clause do not come into existence. In other words there is no arbitration agreement at all. BSNL intended to have arbitrations only where it had entered into contracts and there were disputes relating to such contracts. It did not intend to have arbitrations in regard to tender stage disputes or pre-contract differences, at a stage when there was no privity of contract."*

6 In the earlier round, consequent upon this Court declining to grant relief in the application under Section 11(6) of the Act by way of judgment and order dated 05.07.2024, the petitioner had moved the Hon'ble Supreme Court by filing a Special Leave Petition being SLP (Civil) No.21767 of 2024.

Eventually by order dated 28.10.2025 the Hon'ble Supreme Court set aside the order dated 5.7.2024 passed by this Court and remitted the matter with a direction to decide it afresh. The material part of the direction contained in paragraph No.4 of the order dated 28.10.2025 is as under :-

> *"The substantive issues raised in the present SLP requires examination of the Request for Proposal (RFP) document and the Letter of Award (LOA), which form the contractual foundation of the parties' relationship, in light of the principles enunciated in* ***Krish Spinning Mills*** *(Supra)"*

7. In light of the above, I have been singularly tasked with examining the request for Proposal (RFP) and the Letter of Award (LoA) in light of the principles enunciated in **SBI General Insurance Company Ltd. Vs. Krish Spinning Mills** reported in **(2024) 12 SCC 1,** while keeping in mind that the RFP and LoA "form the contractual foundation of the parties' relationship". In other words, I have to adjudicate the present petition under Section 11(6) of the Act bearing in mind that the Hon'ble Apex Court has observed that the RFP and LoA form the contractual foundation between the parties and keeping the aforesaid factual matrix, I have to apply the principles enunciated in Krish Spinning (Supra) to such factual matrix. Further, the aforesaid exercise has to be done without any reference to any observations in the judgment dated 05.07.2024 passed by this Court in the earlier

round.

8. During the hearing, much of the submissions of the counsel on behalf of the either party was whether or not the RFP and LoA a constitute a binding contract between the parties. Mr. Dave, particularly strained to submit that there was no binding contract between the parties, whatsoever. However, upon re-reading the order dated 28.10.2025 passed by the Hon’ble Apex Court, I am clear that the Hon’ble Apex Court has categorically opined that I have to examine the RFP and the LoA in light of ***Krish Spinning Mills*** *(Supra)* because the RFP and the LoA “form the contractual foundation of the parties’ relationship”. Therefore, I would proceed to examine whether either the RFP or the LoA contain any arbitration clause. This would also imply that it would be, to my mind, wholly unnecessary to enter into the question as to whether there is any binding contract which subsists between the parties in terms of the RFP and LoA. It is simply not necessary to imagine dragons to slay.

8.1 Clauses 3.4 and 3.5 of the RFP document are quoted hereinbelow for ready reference:

> “3.4 *Dispute resolution*
>
> *Any dispute, difference or controversy of whatever nature howsoever arising under, or out of, or in relation to this Document shall, in the first instance, be attempted to be resolved amicably in accordance with the arbitration procedure set forth in Clause 3.5.*
>
> *3.5 Arbitration*
>
> *Any dispute, as provided in Clause 3.4.1, shall be finally decided by reference to arbitration to be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996, as amended and modified from time to time. The place of such arbitration shall be Vadodara, and the language of arbitration proceedings shall be English.”*

8.2 A bare perusal of the RFP document, particularly clauses 3.4 and 3.5 thereof, quoted hereinabove, would reveal that clause 3.5 is nothing but an arbitration clause, which the parties had consciously inserted in their contractual relationship so that if and when the necessity arises, they can refer to and rely upon the same. In **Krish Spinning Mills** (supra), the Hon’ble Apex Court held as under:-

> *“114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-*

arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re: Interplay (supra).

115. The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by "accord and satisfaction".

116. The question of "accord and satisfaction", being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.

117. By referring disputes to arbitration and appointing an arbitrator by exercise of the powers under Section 11, the referral court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the arbitral tribunal doesn't in any way mean that the referral court is diluting the sanctity of "accord and satisfaction" or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principal of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in arbitral proceedings is given full effect. Once the arbitral tribunal is constituted, it is always open for the defendant to raise the issue of "accord and satisfaction" before it, and only after such an objection is rejected by the arbitral tribunal, that the claims raised by the claimant can be adjudicated.

118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

119. Appointment of an arbitral tribunal at the stage of Section 11 petition also does not mean that the referral courts forego any scope of judicial review of the adjudication done by the arbitral tribunal. The Act, 1996 clearly vests the national courts with the power of subsequent review by which the award passed by an arbitrator may be subjected to challenge by any of the parties to the arbitration.

120. The principle of subsequent judicial review has been enshrined in the US doctrine of "Second Look". In a leading U.S. Supreme Court judgement of PacifiCare Health Systems, Inc. v. Book reported in 538, U.S. 401 (U.S. S. Ct. 2003), it was held that the question of non-arbitrability should be considered in the first instance by the arbitral tribunal. The Court observed that, "since we do not know how the arbitrator will construe the remedial limitations, the question ... whether they render the parties' agreements unenforceable is better left for initial arbitral consideration". This doctrine has also been affirmed by judgements of the U.S. lower courts in cases of Dillon v. BMO Harris Bank, NA reported in 856 F.3d 330, 333 (4th Cir. 2017) and Escobar v. Celebration Cruise Operator, Inc. reported in 805 F.3d 1279, 1288-89 (11th Cir. 2015) wherein it was reasoned that the issues of U.S. statutory law and arbitrability should be submitted first to arbitration, with the possibility of subsequent judicial review in recognition and enforcement proceedings.

121. In a case with similar facts but where an arbitration agreement is not in existence, the claimant would have the recourse to approach a civil court with its claims. Even in such proceedings before the civil court, it would be open to the defendant to put forward the defence of "accord and satisfaction" on the basis of the discharge voucher. Similarly, it would be open to the claimant to allege that the voucher had been obtained under fraud, coercion or undue influence. In such a scenario, the civil court would consider the evidence as to whether there was any fraud, undue influence or coercion. If the civil court finds that there was none, then it would reject the claims at the outset. However, if it finds that the allegations of fraud are true, then it would reject the discharge voucher and proceed to adjudicate the claims on merit.

122. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes *unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996.*

123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected.

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to "accord and satisfaction" and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going *through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.*

8.3 In **Ajay Madhusudan Patel & Ors. V/s. Jyotrindra S. Patel and Ors.**, reported in (**2025) 2 SCC 147** the Hon'ble Apex Court had gone on to hold as under:-

"76. The position of law that emerges from the aforesaid discussion can be summarized as follows;

76.1 SBP & Co. expanded the scope of the Court's power under Section 11 while empowering the referral courts to decide several preliminary issues. Boghara Polyfab went to the extent of identifying three categories of preliminary issues that may arise for consideration in an application under Section 11. Of these, in the first category which had to be mandatorily decided by the referral Court, the question whether there was an arbitration agreement and whether the party who has applied under Section 11 of the Act, 1996 is a party to such an agreement, was also included.

76.2 The insertion of Section 11(6A) through the 2015 Amendment to the Act, 1996 stipulated that the Courts under Section 11 shall confine their examination to the 'existence' of an arbitration agreement. It legislatively overruled the decisions in SBP & Co. and Boghara Polyfab by virtue of its non-obstante clause.

76.3 Duro Felguera, in clear terms, clarified the effect of the change brought in by Section 11(6A) and stated that all that the Courts need to see is whether an arbitration agreement exists - nothing more, nothing less.

76.4 Vidya Drolia endorsed the prima facie test in examining the existence and validity of an arbitration agreement both under Sections 8 and 11 respectively.

However, it was clarified that in cases of debatable and disputable facts and reasonably good arguable case, etc. the Court may refer the parties to arbitration since the arbitral tribunal has the authority to decide disputes including the question of jurisdiction. It was further stated that jurisdictional issues concerning whether certain parties are bound by a particular arbitration under the group-company doctrine etc. in a multi-party arbitration raise complicated questions of fact which are best left to the tribunal to decide.

76.5 In In Re: Interplay (supra) the position taken in Vidya Drolia (supra) was clarified to state that the scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996 and the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Therefore, substantive objections pertaining to existence and validity on the basis of evidence must be left to the arbitral tribunal since it can "rule" on its own jurisdiction.

76.6 Krish Spinning cautioned that the Courts delving into the domain of the arbitral tribunal at the Section 11 stage run the risk of leaving the claimant remediless if the Section 11 application is rejected. Further, it was stated that a detailed examination by the courts at the Section 11 stage would be counterproductive to the objective of expeditious disposal of Section 11 application and simplification of pleadings at that stage.

76.7 Cox and Kings specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings. While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the arbitral tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal and can be decided under its jurisdiction under Section 16."

9. Further in an almost identical situation, the Orissa High Court in ***Jhar Mining (supra)*** has held that disputes arising out of cancellation of a tender after issuance of letter of intent is arbitrable. The relevant paragraphs of ***Jhar Mining (supra)*** are as under:-

> *"18. While therefore, there may not be a concluded formal contract, it would not be entirely correct for MCL to contend that there is no contractual relationship whatsoever between the parties. The reference in Clause 4(A).37 to the disputes arising during the course of execution "has to be understood as disputes arising even prior to the actual execution of the contract, since clause 1.3.2.5 envisages obligations of the parties at a stage even prior to the formal execution of the contract.*
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> *19. Moreover, Clause 4(A)37 and Clause 4(A).37A have to be read in continuation and the failure of the 'successful bidder', [which is in this case would include the preferred bidder and 'lowest bidder' which is the Petitioner] and MCL to resolve the dispute by the in-house mechanism, which would entitle either party to invoke the arbitration clause. It would also therefore not be correct for the MCL to contend that there is no arbitration agreement in terms of Section 7 of the Act.*
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> *20. In* ***South Eastern Coalfields Ltd. v. S. Kumar's Associates AKM (JV)*** *(supra), on the facts of that case, the Supreme Court noted that the bidder had failed to comply with the pre-conditions specified in the NIT and in the LoI and, therefore, a work order was not issued nor a contract was executed. In those circumstances, it was observed as under:*
>
> > *"22. We would like to state the issue whether a concluded contract had been arrived at inter se the parties is in turn dependent on the terms and conditions of the NIT, the LoI and the conduct of the parties. The judicial views before us leave little doubt over the proposition that an LoI merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the*

> *parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation from how normally a letter of intent has to be understood. This Court did consider in Dresser Rand S.A. case that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by the supplier, and yet on a holistic analysis - it was held that the Lol could not be interpreted as a work order."*

21. This was the purport of the decision in ***Dresser Rand S.A. v. Bindal Agro Chem Ltd*** *(supra) which has been referred to in the aforementioned decision in South Eastern Coalfields Ltd. v. S. Kumar's Associates (supra).*

22. Again, in Bharat Sanchar Nigam Limited v. Telephone Cables Ltd.(supra), on the facts of that case it was noted that unless a purchase order was placed, the GCT of the contract did not become part of the contract and the conditions in Section 3 of the GCT which included the arbitration agreement "would not at all come into existence or operation". In the present case, in view of the discussion hereinbefore, it cannot prima facie be said that the stage for invoking Clause 4.37(A) has not arisen at all.

23. Turning to the decision in ***Emcure Pharmaceuticals Ltd****. (supra) on facts, it was found that unless the purchase order was issued, the bidder did not become a 'successful bidder and, therefore, the arbitration clause would not apply. On the facts of that case, Opposite Party No.4 and not the Petitioner there was admittedly, the 'successful bidder'. Consequently, the Court is of the view that the aforementioned decisions relied upon by MCL do not assist its case.*

24. On the other hand, in ***Pravin Electrical Private Limited(supra)****, after referring to the decision of the Supreme Court in* ***Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1****, it was held by the Supreme Court that at that stage the Court was only expected to exercise "the power of prima facie judicial review". The observations in* ***Vidya Drolia (supra)*** *were that "a reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration* *agreement.*"

25. The decisions of ***Delhi High Court in Mahindra Susten Pvt. Ltd. v. NHPC Ltd.*** *(supra)and* ***Wadia Techno-Engineering Services Ltd****. (supra) are also to the same effect.*

26. The Court is therefore, satisfied, on a prima facie judicial review in the sense in which the expression is used in ***Vidya Drolia*** *(supra) by the Supreme Court, that the Petitioner does have an arguable case as regards the existence of an arbitration agreement between the parties and the conditions for its invocation of have prima facie been fulfilled. Nevertheless, in terms of the law explained in the above decisions, it would be still open for the MCL to apply to the Sole Arbitrator under Section 16 of the Act to invite a ruling on the existence of a valid arbitration agreement in terms of the aforementioned clauses referred to hereinbefore. If such an application is filed, it will be decided independent of the observations in this judgment."*

9.1 In my view, the aforesaid decision of the Orissa High Court is a decision on the lines of the jurisprudence subsequently laid down in ***Krish Spinning (supra)***. There was a time when arbitration proceedings were sought to be justified as being enabled by way of an exception to Section 28 of the Indian Contract Act, 1872. However, decades later, exception 1 to Section 28 embodies the right to arbitrate. In the light of the progress in the jurisprudence as held in Krish Spinning (supra) and a catena of other recent judgments of the Hon'ble Apex Court, I have to adopt the mandated approach of examining whether there is an arbitration clause in the contractual documents between the parties and whether the invocation is within limitation. In the facts and circumstances of the case, it is clear that Sections 3.4 and 3.5 contain the alternate dispute resolution (ADR) clauses. It is an undisputed position that the parties have acted upon the said clauses by attempting to resolve the dispute amicably. It is only upon the failure to resolve the dispute amicably in terms of Clause 3.4 of RFP that the petitioner issued the notice invoking arbitration under clause 3.5 of the RFP on 01.09.2023 which was within a period of a little more than seven months from the scrapping of the tender and conditional LoA on 24.01.2023. Upon the respondent's refusal to adopt the arbitration process by letter dated 09.11.2023, the petitioner filed the present petition on 11.01.2024. Therefore, the invocation of Clause 3.5 is well within limitation.

10. I am therefore of the view that once a valid arbitration clause like Clause 3.5 of the RFP exists/is executed by the parties, then every dispute of whatever nature arising under, or out of, or in relation to the same shall be resolved by arbitration, though, the exact extent of arbitratbility of the disputes are to be gone into solely by the Tribunal in exercise of kompetenz-kompetenz. This is the only inescapable view

which I can possible form. Nothing more, nothing less. Accordingly, the present petition succeeds. The Arbitration Petition is allowed. I hereby appoint the Hon'ble Mr. Justice R.P.Dholaria, Former Judge, High Court of Gujarat, having address as: 19, Golden Lotus Bunglow, Auda Water Tank Lane, Science City Road, Sola, Ahmedabad – 380060 and having contact numbers 079-27710299 and 9099955084 and Email ID: justicerpdholaria@gmail.com as the sole Arbitrator to resolve the disputes between the parties in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules") and shall be subject to the provisions of the Arbitration and Conciliation Act, 1996, as amended and modified from time to time. The place of such arbitration shall be Vadodara, and the language of arbitration proceedings shall be English. Both Parties would be governed by the said Rules.

Registry to communicate this order to the sole Arbitrator forthwith by Speed Post.

Pending application/s, if any, stands consigned to records.

<u>Further order:-</u>

After pronouncement of the judgment and order, the request has been made by the Mr. Dipak Dave, learned advocate for Mr. S. D. Motirani, learned advocate appearing for the respondent no. 1 to stay the operation of this judgment and order for a period of six weeks.

However, considering this is a judgment and order under Section 11 (6) for appointment of an Arbitrator where the disputes have arisen somewhere in the year 2017, I find no reason to accede to the same. Therefore, the request is rejected.

(D.N.RAY,J)

VARSHA DESAI

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: VARSHABEN VAGHAJIBHAI DESAI(HC01393), PRIVATE SECRETARY, at High Court of Gujarat on 03/02/2026 18:28:30