Shabnoor

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN IT'S COMMERCIAL DIVISION

COMM ARBITRATION APPLICATION NO.377 OF 2025

Qwik Supply Chain Private Limited
having its registered office at
3rd Floor, Court House, Lokmanya Tilak Marg,
Dhobi Talao, Mumbai 400002,
Maharashtra ... **Applicant**

Vs.

CRPL Infra Private Limited
having its registered office at,
121 Chittaranjan Avenue,
Kolkata – 700073.
And also having address at
A8 and A9, Sudharas Food Park – Poly Park,
Dhulagarh, Howrah – 711302. ...**Respondent**

Mr. Ankit Lohia a/w Mr. Kshitij Madekar, Mr. Gaurav Thakur & Ms. Aditi Kambli i/b A. S. Dayal & Associates, for the Applicant.

Ms. Krupa R. Parekh i/b Mr. Ankit Agarwalla, for the Respondent.

CORAM	**: AMIT BORKAR, J.**
RESERVED ON	**: AUGUST 21, 2026.**
PRONOUNCED ON	**: AUGUST 25, 2026.**

JUDGMENT:

1. The present Application has been filed by the Applicant under Section 11 of the Arbitration and Conciliation Act, 1996, seeking appointment of an Arbitrator in terms of Clause 19 of the Agreement dated 27 April 2021.

2. On 27 April 2021, the Applicant and the Respondent entered into a Cold Storage Facility Service Agreement, hereinafter referred to as "the Agreement". Under the Agreement, the Applicant had handed over certain storage facilities to the Respondent. The Agreement contains an arbitration clause in Clause 19. The relevant part of the said clause reads as follows:

> "In case of any dispute or difference between Parties in relation to this Agreement Parties shall make reasonable endeavors to resolve such dispute or difference amicably. If such dispute or difference ("Dispute") is not resolved amicably by Parties within thirty (30) days of such Dispute arising, or within any further period as may be agreed to by Parties, then either Party may refer such Dispute to arbitration by sending a notice of arbitration to the other Party, informing the other Party of its intention to settle the Dispute by arbitration ("Request for Arbitration")."

3. The Agreement further provides that the arbitration shall be conducted at Mumbai under the provisions of the Arbitration and Conciliation Act, 1996, or any statutory amendment or re-enactment thereof which may be in force from time to time. The relevant clause reads as follows:

> "Arbitration shall be conducted in Mumbai under the rules of the Arbitration and Conciliation Act, 1996, or any statutory amendment or re-enactment thereof for the time being in

force."

4. Clause 19 further provides that the arbitration shall ordinarily be conducted by three Arbitrators. The party seeking arbitration is required to nominate its Arbitrator in the Request for Arbitration. The other party is required to nominate its Arbitrator within thirty days from the receipt of such Request for Arbitration. If the other party does not nominate an Arbitrator within the prescribed period, or within such further period as may be mutually agreed, the Arbitrator nominated by the party seeking arbitration shall decide the dispute as the sole Arbitrator. If both parties nominate their respective Arbitrators, the two nominated Arbitrators are required to appoint the third Arbitrator within thirty days from the date on which the other party communicates the nomination of its Arbitrator. If they fail or are unable to appoint the third Arbitrator within the said period, such appointment is required to be made in accordance with the Arbitration and Conciliation Act, 1996. The relevant part reads as follows:

> "The arbitration shall be conducted by three (3) arbitrators. The Party requesting for arbitration shall nominate its arbitrator in the Request for Arbitration and the Party to whom the Request for Arbitration is addressed ("Other Party") shall nominate its arbitrator within thirty (30) days of receipt of the Request for Arbitration. If such Other Party fails to nominate its arbitrator within such thirty (30) days period, or such other period as may be mutually agreed by Parties, the arbitrator named in the Request for Arbitration

> shall decide the dispute as the sole arbitrator. Otherwise, the two (2) arbitrators so nominated shall appoint the third arbitrator within thirty (30) days of the Other Party having notified the requesting Party of the nomination of its arbitrator. If the two (2) arbitrators fail or are unable to appoint the third arbitrator within such thirty (30) day period, then the appointment of the third arbitrator shall be made in accordance with the Arbitration and Conciliation Act, 1996."

5. The arbitration proceedings are required to be conducted in the English language. The arbitral award is required to be in writing and shall be final and binding upon the parties. The Arbitrators may award costs, including reasonable advocates' fees and disbursements. The relevant part reads as follows:

> "The arbitration proceedings shall be conducted in the English language. The arbitral award shall be in writing and shall be final and binding on the Parties. The award may include costs, including reasonable advocates' fees and disbursements."

6. The Agreement provides that each party shall bear its own costs and expenses in connection with the arbitration. Thereafter, on 20 April 2022, the parties entered into the First Amendment Agreement in respect of additional storage facilities under Schedule V relating to Price and Payments of the Agreement., on 14 November 2022, the parties entered into the Second Amendment Agreement in relation to the details of the service provider under Schedule V of the Agreement. Both these Amendment Agreements provide that all the terms and conditions of the main Agreement, except to the extent amended, shall remain unaffected and shall continue to remain in full force and effect until the expiry or earlier termination of the Agreement. They further provide that in case of any inconsistency between the Amendment Agreement and the main Agreement, the terms of the Amendment Agreement shall prevail. On 11 February 2023, the Respondent lodged a complaint with the Sankrail Police Station at Howrah concerning certain crates and pallets which were stated to be missing. According to the Applicant, the said crates and pallets belonged to the Applicant and/or its sister concerns.

7. On the same day, namely 11 February 2023, an FIR bearing No. 122 of 2023 came to be registered with Sankrail Police Station, Howrah, on the basis of the complaint lodged by the Respondent. Thereafter, by an email dated 28 February 2023, the Respondent acknowledged that there was a shortage of the materials and stated that the shortage had occurred due to theft. The Respondent expressed its willingness to compensate the losses which were not covered, by making payment from its monthly service bills, subject to a limit of 50% of the monthly billing. On 18 May 2023, Reliance Retail Limited, which is stated to be a sister concern of the Applicant, addressed a letter to Sankrail Police Station requesting that it be made a party to the FIR. Thereafter, on 27 April 2024, the Advocates for the Applicant addressed a letter to the Respondent calling upon it to pay an amount of Rs.76,67,613/- towards the alleged loss of the crates and pallets. Thereafter, on 24

June 2024, the Applicant, through its Advocates, issued a notice invoking arbitration under Clause 19 of the Agreement and nominated its Arbitrator. By an Advocate's letter dated 29 July 2024, the Respondent informed the Applicant that it was not agreeable to the appointment of an Arbitrator in the manner proposed by the Applicant. The Respondent stated that, being registered as an MSME, it intended to refer the disputes to the MSME Facilitation Council. Thereafter, on 26 August 2024, the Respondent, through its Advocates, issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996, invoking arbitration. On 4 September 2024, the Applicant, through its Advocate's letter, informed the Respondent that it was not agreeable to the appointment of the Arbitrator nominated by the Respondent. In these circumstances, the Applicant filed the present Application under Section 11 of the Arbitration and Conciliation Act, 1996, on 4 July 2025.

8. Mr. Lohia, learned Advocate appearing for the Applicant, submitted that the mere use of the word “may” in the arbitration clause does not mean that there is no agreement for arbitration. According to him, the clause has to be read as a whole to understand what the parties intended. While deciding whether a particular clause amounts to an arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996, the Court has to see the real intention of the parties from the entire clause. The decision cannot depend only upon one word or one expression used separately from the rest of the clause. According to the learned Advocate for the Applicant, a plain reading of Clause 19 of the Agreement clearly shows that the parties intended to refer their disputes to arbitration. He submitted that Clause 19 does not merely state that disputes “may” be referred to arbitration. The clause contains a complete procedure for resolving disputes through arbitration. It first requires the parties to make an effort to resolve the dispute amicably within thirty days. If the dispute is not resolved, it provides for issuance of a Request for Arbitration. It further provides for constitution of an Arbitral Tribunal of three Arbitrators, the manner and time within which the parties are required to nominate their Arbitrators, and the consequence if either party fails to do so. The clause provides that arbitration shall be conducted at Mumbai and that the arbitral award shall be final and binding and may include costs. According to him, such detailed provisions clearly show the intention of the parties to resolve their disputes through arbitration.

9. Mr. Lohia submitted that the use of the word “may” in Clause 19.1, namely, “either Party may refer such Dispute to arbitration”, does not take away the effect of the arbitration agreement. According to him, the word “may” only gives either party the option to start the agreed arbitration process after the period for amicable settlement has expired. It does not mean that, after a dispute arises, the parties must again give their mutual consent before arbitration can take place. According to him, the method of resolving the dispute through arbitration had been agreed between the parties. The learned Advocate for the Applicant further submitted that the Respondent had shown its intention to refer the dispute to arbitration. He invited attention to the letter dated 26

August 2024, by which the Respondent invoked arbitration under the Arbitration and Conciliation Act, 1996. According to him, this conduct clearly shows that both parties understood that the disputes arising from the Agreement could be referred to arbitration.

10. In support of these submissions, the learned Advocate for the Applicant relied upon the judgments in *Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55*, particularly paragraph 37; *Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719*, particularly paragraph 8; *M/s. JVS Foods Pvt. Ltd. v. M.P. State Agro Industries Development Corporation Ltd., Arbitration Case No. 90 of 2024 decided by the Madhya Pradesh High Court*, particularly paragraph 18; and *Shabhnam Praveen v. Axis E Corp Solutions Pvt. Ltd., 2025 SCC OnLine Del 10627*, particularly the arbitration clause reproduced in paragraph 3 and the findings in paragraph 7.

11. The learned Advocate for the Applicant submitted that the judgments relied upon by the Respondent in *BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd., 2025 LiveLaw (SC) 731*, and *Alchemist Hospitals Ltd. v. ICT Health Technology Services India Pvt. Ltd., 2025 LiveLaw (SC) 1070*, are distinguishable on facts. According to him, those decisions do not assist the Respondent. He submitted that in *BGM* and *M-RPL-JMCT (JV)*, the Supreme Court found that the clause only enabled the parties to refer the dispute to arbitration and required a further agreement between them before arbitration could commence. According to him, the position is different in the present case because Clause 19 provides a complete arbitration procedure. So far as Alchemist Hospitals is concerned, he submitted that although the relevant clause was titled “Arbitration”, its contents showed that the parties were required to have discussions between their respective Chairmen. According to him, that clause did not contain a complete arbitration agreement like the one contained in Clause 19 of the present Agreement. The learned Advocate for the Applicant, therefore, submitted that the mere use of the word “may” in a clause which otherwise provides a complete arbitration procedure cannot defeat the intention of the parties to resolve their disputes through arbitration. He further submitted that the word “shall” has been used at several places in Clause 19. According to him, when the entire clause is read together, it clearly shows that the parties intended arbitration to be the agreed method for resolution of their disputes.

12. The learned Advocate for the Applicant further submitted that the arbitration clause contained in the main Agreement governs the disputes arising under the Amendment Agreements. According to him, the Agreement dated 27 April 2021 is the main or parent agreement between the Applicant and the Respondent and contains the arbitration agreement in Clause 19. He submitted that thereafter the parties executed the First Amendment Agreement dated 20 April 2022 in relation to additional storage facilities under Schedule V relating to Price and Payments., they executed the Second Amendment Agreement dated 14 November 2022 concerning the details of the service provider under Schedule V. According to the learned Advocate for the Applicant, the present case does not involve two separate and independent agreements where one agreement seeks to bring in an arbitration clause from another agreement merely by reference. He submitted that, therefore, the principles relating to "incorporation by reference" between two separate contracts, including those considered in *NBCC (India) Ltd. v. Zillion Infraprojects (P) Ltd., (2024) 7 SCC 174*, do not apply to the present case. According to him, the First and Second Amendment Agreements are only amendments to the original Agreement dated 27 April 2021. They make changes only in limited parts of the main Agreement. Both Amendment Agreements provide that they are to be read along with the main Agreement and shall form part of it. According to him, the main Agreement and the Amendment Agreements together constitute the complete agreement between the parties.

13. The learned Advocate for the Applicant submitted that, while considering the effect of the Amendment Agreements, the Court must examine the real intention of the parties from the documents as a whole. According to him, the clear intention was that all the provisions of the original Agreement, including Clause 19 containing the arbitration agreement, would continue to apply to the Agreement even after it was amended. In support of this submission, reliance was placed upon *Bengal Investment Ltd. v. Airborne Technologies Pvt. Ltd., 2016 SCC OnLine Cal 10496*, particularly paragraph 6, and *Om Swayambhu Siddhivinayak v. Harischandra Dinkar Gaikwad, 2025 SCC OnLine Bom 6046*, particularly paragraphs 19 to 21.

14. The learned Advocate for the Applicant further submitted that the fact that the Respondent is registered as an MSME does not take away the jurisdiction of this Court under Section 11 of the Arbitration and Conciliation Act, 1996. According to him, the Respondent contends that, because it is registered as a Micro, Small and Medium Enterprise, the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 override the Arbitration Act. The Respondent, therefore, contends that the parties must refer their dispute to the Micro and Small Enterprises Facilitation Council under Section 18 of the MSMED Act and that arbitration under Clause 19 of the Agreement and proceedings under Section 11 of the Arbitration Act cannot be pursued. The learned Advocate for the Applicant submitted that this contention is contrary to the settled legal position. According to him, the mere registration of the Respondent as an MSME does not take away the power of this Court to appoint an Arbitrator under Section 11 at the request of the Applicant, who is not registered as an MSME. He further submitted that Section 18(4) of the MSMED Act does not create a complete bar merely because one of the parties is registered as an MSME. According to him, unless a reference has been made to the Facilitation Council, Section 18(4) cannot be read as preventing the Court from exercising jurisdiction under Section 11 of the Arbitration Act. He submitted that such an interpretation would add a consequence which the Legislature has not expressly provided in the statute. In support of this submission, reliance was placed upon the decision of this Court in *M/s. Porwal Sales v. M/s. Flame Control Industries, 2019 SCC OnLine Bom*

1628, particularly paragraph 27.

15. The learned Advocate for the Applicant further submitted that the allegation that some third party committed theft does not make the dispute between the Applicant and the Respondent incapable of being decided through arbitration. According to him, the Respondent has contended that the dispute is non-arbitrable because it concerns allegations of theft. The learned Advocate submitted that this contention does not correctly describe the actual dispute between the parties. According to him, the dispute which the Applicant seeks to refer to arbitration is a civil dispute concerning recovery of damages or compensation for the loss of crates and pallets which were entrusted by the Applicant to the Respondent under the Agreement. This dispute, according to him, is different from the question whether any third party committed theft and whether such person is criminally liable. The latter question is the subject matter of the FIR. He submitted that the criminal allegations concerning the alleged theft may have to be dealt with in the criminal proceedings against the person who is alleged to have committed the offence. However, according to him, those allegations against a third party do not decide whether the civil dispute between the Applicant and the Respondent, who are parties to the Agreement, can be referred to arbitration. The learned Advocate further submitted that the same facts can give rise to both civil and criminal proceedings. According to him, merely because criminal proceedings have been initiated, or can be initiated, on the basis of the same facts, it does not follow that a dispute which is otherwise capable of being referred to arbitration becomes non-arbitrable.

16. He further submitted that, in any case, after the Arbitral Tribunal is constituted, the Tribunal can consider questions concerning its jurisdiction and the arbitrability of the dispute under Section 16 of the Arbitration Act. According to him, at the stage of an application under Section 11, the Court is required to make only a prima facie examination regarding the existence of an arbitration agreement. The Court should not conduct a detailed trial regarding arbitrability at this stage. In support of this submission, reliance was placed upon The *Managing Director, Bihar State Food and Civil Supply Corporation Ltd. and Anr. v. Sanjay Kumar, (2026) 4 SCC 649*; *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677*; and *Lata Yadav v. Shivakriti Agro (P) Ltd., 2025 SCC OnLine Del 4334*.

17. Ms. Parekh, learned Advocate appearing for the Respondent, submitted that the rights claimed by the Applicant arise only under the Addendum Agreement dated 21 April 2022. She invited my attention to Clause 2 of the Addendum Agreement and submitted that Schedule V of the main Agreement was amended by inserting the word “Kolkata” and by providing for additional space at the rate of Rs.29 per square foot per month. She further submitted that the Addendum Agreement provides that it shall be governed by the laws of India and that the Courts at Mumbai shall have exclusive jurisdiction. Inviting my attention to Clause 12 of the notice issued to the Applicant, Ms. Parekh submitted that the Applicant had been informed that the disputes between the parties were required to be resolved by a sole Arbitrator appointed pursuant to proceedings under the MSME Act. She further submitted that the persons who are alleged to have committed the theft have not been made parties either to the present Application or to the proposed arbitration proceedings. She submitted that the persons who owned the goods in question have not been joined as parties. According to her, for these reasons, the present Application is not maintainable.

18. In support of her submissions, the learned Advocate for the Respondent relied upon the judgments of the Supreme Court in *BGM and M-RPL-JMCT (JV); Alchemist Hospitals Limited ; Gujarat State Civil Supplies Corporation Limited*; and *NBCC (India) Limited.*

Reasons and Analysis:

19. I have considered the submissions made by Mr. Lohia, learned Advocate appearing for the Applicant, and Ms. Parekh, learned Advocate appearing for the Respondent. I have gone through the Agreement dated 27 April 2021, particularly Clause 19, the First and Second Amendment Agreements, correspondence exchanged between the parties, notices issued by both sides, and the judgments relied upon by them. I have considered the law held by the Supreme Court in *Jagdish Chander, Alchemist Hospitals Ltd. v. ICT Health Technology Services India Pvt. Ltd., BGM and M-RPL-JMCT (JV) v. Eastern Coalfields Ltd.*, and *Ajay Madhusudan Patel v. Jyotrindra S. Patel (2025) 2 SCC 147.* At this stage, question before this Court is of limited nature. The Court has to see whether there is an arbitration agreement between parties which can be acted upon under Section 11 of the Arbitration and Conciliation Act, 1996. This Court is not required at this stage to finally decide dispute regarding alleged missing crates and pallets.

20. The first objection raised by Respondent is that Clause 19 does not create any binding arbitration agreement because word “may” is used in that clause. I am unable to accept this submission in the manner in which it is made. Word “may” cannot be separated from rest of Clause 19. Entire clause has to be read together. Real question is whether parties had agreed that disputes between them would go to arbitration, or whether after dispute arose, they were still required to enter into some fresh agreement or give further consent. Clause 19.1 first provides that parties shall make reasonable efforts to settle dispute amicably. Thereafter, it says that if dispute is not resolved within thirty days, “either Party may refer such Dispute to arbitration by sending a notice of arbitration to the other Party”. In my view, this shows that at time of entering into main Agreement, parties had agreed upon arbitration. What remained was only that either party could invoke that agreed procedure when dispute arose. Thus, word “may” gives choice to either party to commence agreed arbitration process. It does not mean that after dispute arises, both parties have again to give fresh consent before arbitration can start.

21. In *Jagdish Chander*, Supreme Court held that where a clause only provides that parties may agree for arbitration in future, and some further consent or consensus is still required, there is no binding arbitration agreement. Supreme Court held that intention of parties has to be gathered by reading agreement as a whole. Therefore, test is not merely whether word “may” is found in clause. Real test is whether arbitration depends upon some further agreement between parties after dispute has arisen. In present case, Clause 19 does not leave arbitration dependent upon any future agreement. After providing for an attempt of amicable settlement, it lays down manner in which arbitration is to begin. It provides for Request for Arbitration. It provides for nomination of Arbitrators. It fixes period within which other party has to nominate its Arbitrator. It provides what will happen if such nomination is not made. Further procedure for appointment of third Arbitrator is provided. It further says what is to happen if two Arbitrators fail to appoint third Arbitrator. These provisions are not merely showing that parties may think about arbitration in future. They provide procedure which parties had agreed to follow. Remaining part of Clause 19 makes this position more clear. Clause 19.2 provides that arbitration shall be conducted in Mumbai under Arbitration and Conciliation Act, 1996. Clause 19.3 provides mechanism for constitution of Arbitral Tribunal. Clause 19.4 provides that proceedings shall be conducted in English and award shall be in writing and shall be “final and binding on the Parties”. Clause 19.5 deals with costs and expenses of arbitration. Therefore, Clause 19 does not merely use word “arbitration”. It provides complete procedure by which arbitration is to take place and states binding nature of award.

22. Present case is therefore different from facts considered by Supreme Court in *Alchemist Hospitals*. In that case, though clause was described as arbitration clause, its actual contents did not show concluded agreement requiring disputes to be referred to arbitration. Main provision contemplated discussions between senior management and Chairmen of parties. Clause, when read as a whole, did not show necessary binding intention to refer disputes to arbitration. Supreme Court therefore held that mere use of word “arbitration” was not sufficient. Principle laid down in *Alchemist Hospitals* is applicable. Court has to examine substance of clause and not merely its title or use of one particular word. However, when same principle is applied to Clause 19, result is different. Here, substance of clause shows a completed arrangement for arbitration.

23. Reliance placed by Respondent on *BGM and M-RPL-JMCT (JV)* does not assist Respondent on facts of present case. Distinction recognised in decisions is between a clause which merely permits parties to consider or discuss arbitration in future and a clause where arbitration mechanism is agreed and either party is given right to invoke it. In present case, no further consent is required after expiry of period provided for amicable settlement. Either party can issue Request for Arbitration and procedure thereafter is fixed under Clause 19. There is one more circumstance which supports this understanding. On 26 August 2024, Respondent issued notice under Section 21 of Arbitration and Conciliation Act, 1996, invoking arbitration. Respondent may have taken a different stand concerning MSMED Act or proper forum. However, its own conduct at relevant time is material for understanding how Clause 19 was understood by parties.

Respondent did not proceed on basis that there was no arbitration agreement. On contrary, it invoked arbitration. I therefore find, prima facie, that Clause 19, when read as a whole, shows necessary intention of both parties to submit disputes arising from Agreement to arbitration. Use of word "may" in Clause 19.1 does not make arbitration agreement optional in sense that fresh consent is required. Nor does it make agreement invalid. It only gives either party right to commence agreed arbitration process.

24. Next objection concerns Amendment Agreements. Ms. Parekh submitted that rights claimed by Applicant arise from Addendum Agreement dated 21 April 2022 and that Clause 2 thereof amended Schedule V by inserting word "Kolkata" and providing for additional storage space at Rs.29 per square foot per month. She relied upon provision that Addendum would be governed by laws of India and Courts at Mumbai would have exclusive jurisdiction. I do not find that this submission creates any difficulty at stage of Section 11. Agreement dated 27 April 2021 is principal agreement between parties and it contains Clause 19. Subsequent documents, on material placed before Court, are amendments relating to certain parts of existing contractual arrangement. They are not shown to be independent agreements which replaced main Agreement. First Amendment Agreement dated 20 April 2022 concerned additional storage facilities under Schedule V. Second Amendment Agreement dated 14 November 2022 concerned certain service provider details under same Schedule. Amendments were thus limited in nature. Main Agreement was not terminated or substituted by a new contract. It is therefore not a case where one separate contract having no arbitration clause is attempting to borrow arbitration clause from another contract. Main Agreement and Amendment Agreements form part of contractual arrangement between parties. When only certain provisions were amended, remaining provisions of main Agreement continued unless changed. Clause 19 was neither deleted nor replaced. There is no provision in Amendment Agreements saying that disputes relating to amended matters must be resolved through a forum different from one agreed under Clause 19. Reference to exclusive jurisdiction of Courts at Mumbai does not destroy arbitration agreement. Such jurisdiction can operate in matters for which Court retains jurisdiction under Arbitration and Conciliation Act, 1996. I therefore do not accept submission that Clause 19 stopped operating merely because parties executed amendment documents relating to Schedule V. Arbitration agreement continued unless there was clear agreement between parties to remove or replace it. No such agreement is shown.

25. Next objection concerns Respondent's status as MSME. Respondent submitted that MSMED Act is a special legislation and dispute must be referred to Micro and Small Enterprises Facilitation Council under Section 18. Applicant relied upon *Porwal Sales* and submitted that mere registration of Respondent as MSME does not create absolute bar to proceeding under Section 11 of Arbitration and Conciliation Act, 1996. Decision in *Porwal Sales* has to be considered along with later decisions of Supreme Court dealing with effect of MSMED Act. Supreme Court has held that MSMED Act is a special legislation and where statutory mechanism under Section 18 is properly attracted and invoked, it can override an independent arbitration agreement between parties. Position cannot be understood to mean that registration as MSME removes every arbitration agreement contained in contract. Statutory conditions and factual position have to be considered. In present case, Respondent, in its Advocate's letter dated 29 July 2024, stated that it wished to refer dispute to MSME Facilitation Council. However, on 26 August 2024, Respondent issued notice under Section 21 of Arbitration and Conciliation Act, 1996, invoking arbitration. Material placed before Court does not show that before filing of present application, reference under Section 18(1) had been made to Facilitation Council in respect of present dispute. This factual position is material. A statement that party intends to approach Facilitation Council is different from actual reference under Section 18(1). Statutory process cannot be treated as having commenced merely because one party expressed intention to invoke such remedy. There is another aspect. Claim raised by Applicant is not, from face of record, a simple claim for recovery of payment due to Respondent for goods supplied or services rendered. Applicant claims compensation of Rs.76,67,613/- for alleged loss of crates and pallets which, according to Applicant, were entrusted to Respondent during contractual arrangement. Whether such claim falls within statutory field contemplated by Sections 17 and 18 of MSMED Act cannot be decided only because Respondent holds MSME registration. At this stage, it is unnecessary to finally decide whether MSMED Act may or may not apply to any part of dispute. Such final determination is not required for deciding present application. What can be said from material before Court is that Respondent's MSME registration alone is not sufficient to show that this Court is barred from considering present application under Section 11.

26. The submission based on the judgment of the Supreme Court in *Mahakali Foods (P) Ltd.* needs to be considered with care. The said judgment does hold that Chapter V of the MSMED Act, 2006 has overriding effect over the provisions of the Arbitration and Conciliation Act, 1996. However, the principle stated therein has to be applied by looking at the facts of the present case and the nature of dispute which is before this Court. In paragraph 52.1, the Supreme Court held that “Chapter V of the MSMED Act, 2006 would override the provisions of the Arbitration Act, 1996.” Thus, where dispute is of such nature which comes under Chapter V of the MSMED Act and the statutory mechanism under Section 18 is available and properly invoked, existence of an independent arbitration agreement may not prevent an eligible supplier from making a reference under Section 18. Paragraph 52.2 makes this position more clear. The Supreme Court held that “No party to a dispute with regard to any amount due under Section 17 of the MSMED Act, 2006 would be precluded from making a reference to the Micro and Small Enterprises Facilitation Council, though an independent arbitration agreement exists between the parties.” Therefore, mere existence of Clause 19 cannot stop a supplier, who is otherwise entitled to take benefit of the MSMED Act, from making a reference before the Facilitation Council in respect of an amount due under Section 17. However, this principle does not mean that every dispute where one party has MSME registration must be treated as a dispute under Section 17 and must, for that reason alone, go outside the agreed arbitration mechanism. The Supreme Court has used specific words, namely, "a dispute with regard to any amount due under Section 17". Therefore, before the overriding effect of Chapter V is applied to a particular dispute, there must at least be some material to show that the dispute is of a nature falling within the statutory field of Section 17 and that the party claiming such benefit is entitled to invoke the MSMED Act as a "supplier". This position is clear from paragraph 52.6 of Mahakali Foods. The Supreme Court has held:

> "A party who was not the "supplier" as per the definition contained in Section 2(n) of the MSMED Act, 2006 on the date of entering into contract cannot seek any benefit as the "supplier" under the MSMED Act, 2006. If any registration is obtained subsequently the same would have an effect prospectively and would apply to the supply of goods and rendering services subsequent to the registration."

27. Thus, only having MSME registration is not the only question. It is required to be seen whether the party was a "supplier" within the meaning of Section 2(n) at the relevant time and whether the goods were supplied or services were rendered after such registration. Benefit under Chapter V cannot be claimed only because a party has, or subsequently obtained, MSME registration. The factual requirements stated in paragraph 52.6 are required to be satisfied. Further, paragraph 52.2 of Mahakali

Foods says that an eligible party would not be precluded from "making a reference" to the Micro and Small Enterprises Facilitation Council. In the present case, the material placed before this Court shows that the Respondent, in its Advocate's letter dated 29 July 2024, stated that it wished to refer the dispute to the MSME Facilitation Council. However, merely expressing an intention to make a reference cannot, by, be treated as an actual reference made under Section 18(1). On the contrary, after issuing the said communication, the Respondent issued a notice dated 26 August 2024 under Section 21 of the Arbitration and Conciliation Act, 1996 and invoked arbitration. Therefore, from the material before this Court, it is not shown that the Respondent had made a reference under Section 18(1) to the Facilitation Council in respect of the present dispute before the present proceedings were filed. In my view, this distinction has some importance. *Mahakali Foods* does not say that a mere possibility of a party making a reference under Section 18, or merely saying that it intends to approach the Facilitation Council, puts an end to an otherwise existing arbitration agreement. Paragraph 52.2 protects the right of an eligible supplier to make a reference concerning an amount due under Section 17 despite the existence of an independent arbitration agreement. Whether such statutory remedy is available in a particular case, however, depends upon the statutory requirements and the facts of that dispute. The present dispute, at least from the case made by the Applicant, is not a simple claim made by the Respondent for recovery of an amount due towards goods supplied or services rendered. The Applicant is claiming compensation of Rs.76,67,613/- for alleged loss of crates and pallets which, according to the Applicant, were entrusted to the Respondent during the subsistence of the contractual arrangement. The Respondent may have its own claims or defences. However, whether the Applicant's claim, or any counterclaim which the Respondent may make, falls within the field covered by Sections 17 and 18 of the MSMED Act requires consideration of the nature of the transaction and the respective claims. Such question cannot be finally decided at the Section 11 stage only on the basis that the Respondent is registered as an MSME. More particularly, paragraph 52.5 of *Mahakali Foods* recognises that the Facilitation Council, when acting as an Arbitral Tribunal under Section 18(3), would be competent to rule on its own jurisdiction and other issues in view of Section 16 of the Arbitration and Conciliation Act, 1996. Therefore, even *Mahakali Foods* holds that questions concerning jurisdiction and applicability of the statutory mechanism may require examination by the Tribunal having jurisdiction to consider such matters. At the present stage, this Court is mainly concerned with existence of an arbitration agreement. On the material available, Clause 19 constitutes an arbitration agreement. There is no material to show that a reference under Section 18(1), concerning the present dispute, had been made to the Facilitation Council so as to show that the statutory proceedings were set in motion before this Court was approached. I am therefore unable to accept the broad submission that *Mahakali Foods,* only because the Respondent is registered as an MSME, completely bars this Court from entertaining the present application under Section 11. The judgment gives overriding effect to Chapter V of the MSMED Act where the statutory conditions are satisfied and a dispute concerning an amount due under Section 17 is properly brought before the statutory mechanism. However, these conditions cannot be presumed only from the existence of MSME registration. It is important that paragraph 52.6 requires examination of the status of the party as a "supplier" on the date of entering into the contract and, where registration is obtained subsequently, the benefit is prospective and applies to the supply of goods and rendering of services subsequent to such registration. Whether the Respondent satisfies these requirements in relation to the transactions involved in the present dispute is not finally required to be decided by this Court at the present stage. Therefore, applicability of the MSMED Act, entitlement of the Respondent to invoke Chapter V, whether the Respondent was a "supplier" within the meaning of Section 2(n) at the relevant time, effect of its registration, whether the present dispute concerns an amount due under Section 17, and all other connected questions are kept open. These questions may be considered by the appropriate forum or the learned Arbitral Tribunal, as may be permissible in law. Consequently, *Mahakali Foods* does not assist the Respondent to the extent of showing, at this stage and on the material available, that Clause 19 has ceased to exist or that the arbitration agreement cannot be acted upon. At the same time, appointment of an Arbitrator should not be understood as a final decision that the provisions of the MSMED Act are not applicable. That issue remains open and shall be decided in accordance with law by the forum which is competent to decide the same.

28. I now turn to objection concerning allegation of theft. Respondent submitted that persons who allegedly committed theft have not been made parties to present application or proposed arbitration. It was submitted that persons who owned goods have not been joined. In my view, this submission mixes criminal allegation with contractual dispute between Applicant and Respondent. FIR concerns allegation that certain materials went missing and offence of theft may have been committed. Proposed arbitration concerns a different question. It concerns whether Respondent, under contractual arrangement between parties, has any civil or contractual liability for alleged loss of crates and pallets. Same facts may give rise to criminal proceedings as well as civil or contractual proceedings. Existence of FIR does not make contractual dispute non-arbitrable. Person who may be found responsible for committing theft is not required to be party to contractual claim between parties who entered into Agreement. Applicant is not seeking from Arbitral Tribunal any finding that a particular person committed theft or is criminally liable. It seeks determination of its civil claim against its contractual counter party. These are two different questions. Same reasoning, at present stage, applies to objection that owners of goods have not been joined. Whether Applicant is entitled to maintain claim in its own name, whether it has suffered alleged loss, whether some other person is necessary party, and what evidence is required to establish ownership or liability are matters concerning adjudication of claim. These questions do not, on present material, show that Clause 19 does not exist or cannot operate.

29. Scope of examination under Section 11 is relevant. In *Ajay Madhusudan Patel*, Supreme Court summarised development of law relating to Section 11. In paragraph 76.3, while referring to *Duro Felguera*, Supreme Court observed that all that Court needs to see is whether arbitration agreement exists, “nothing more, nothing less”. In paragraph 76.5, while dealing with Interplay, In re, Supreme Court held that substantive objections concerning existence and validity which require examination of evidence are to be left to Arbitral Tribunal, which has power to “rule” on its own jurisdiction under Section 16. Same caution appears in paragraph 76.6 of *Ajay Madhusudan Patel*, while referring to *Krish Spg.* Supreme Court cautioned against Court going deeply into matters which properly belong to Arbitral Tribunal at Section 11 stage. Detailed inquiry may defeat object of expeditious disposal of application under Section 11. This does not mean that Court has to appoint an Arbitrator whenever word “arbitration” appears somewhere in a document. *Alchemist Hospitals* makes it clear that there must be real intention to refer disputes to arbitration. However, once such intention is found from agreement read as a whole, Court is not expected to conduct detailed trial regarding every objection which may arise between parties.

30. In present case, there is much more than bare reference to arbitration. Clause 19 provides for amicable settlement. It provides for Request for Arbitration. It provides for constitution of Arbitral Tribunal. It fixes period for nomination of Arbitrators and provides consequence in case of failure. It provides for appointment of third

Arbitrator. It states that arbitration shall be conducted in Mumbai under Arbitration and Conciliation Act, 1996. It further provides that award shall be in writing and "shall be final and binding on the Parties". Such clause, when read as a whole, cannot be understood as merely expressing desire that parties may think about arbitration at some future stage. Conduct of both parties supports this conclusion. Applicant invoked Clause 19 by notice dated 24 June 2024 and nominated an Arbitrator. Respondent did not state that there was no arbitration agreement. It initially stated that it wished to pursue remedy before MSME Facilitation Council. Thereafter, on 26 August 2024, Respondent issued notice under Section 21 invoking arbitration. On 4 September 2024, Applicant objected to Arbitrator nominated by Respondent. This sequence shows that both parties treated arbitration as a mechanism available under their contractual relationship, though they differed regarding manner in which dispute should proceed. I am conscious that correspondence cannot create arbitration agreement where contract contains no such agreement. However, that is not position here. Clause 19 provides arbitration mechanism. Correspondence is considered only as additional circumstance showing how parties understood that clause.

31. At this stage, it is necessary to consider procedure agreed between parties for constitution of Arbitral Tribunal. Clause 19.3 provides:

> "The arbitration shall be conducted by three (3) arbitrators. The Party requesting for arbitration shall nominate its arbitrator in the Request for Arbitration and the Party to

whom the Request for Arbitration is addressed /'Other Party" shall nominate its arbitrator within thirty (30) days of receipt of the Request for Arbitration, If such Other Party fails to nominate its arbitrator within such thirty (30) days period, or such other period as may be mutually agreed to by Parties, the arbitrator named in the Request for Arbitration shall decide the dispute as the sole arbitrator.

Otherwise, the two (2) arbitrators so nominated shall appoint the third arbitrator within thirty days of the Other Party having notified the requesting Party of the nomination of its arbitrator. if the two (2) arbitrators fail or are unable to appoint the third arbitrator within such thirty (30) day period, then the appointment of the third arbitrator shall be made in accordance with the Arbitration and Conciliation Act, 1996."

32. Clause 19.3 therefore contemplates two possible situations. Normal procedure is that each party nominates one Arbitrator. Two Arbitrators so nominated are thereafter required to appoint third Arbitrator. However, clause expressly provides consequence where party receiving Request for Arbitration fails to nominate its Arbitrator within thirty days. In that situation, parties agreed that "the arbitrator named in the Request for Arbitration shall decide the dispute as the sole arbitrator." Thus, though normal composition of Tribunal under Clause 19.3 is of three Arbitrators, Agreement provides that if other party fails to nominate its Arbitrator within stipulated period, Arbitrator nominated by party issuing Request for Arbitration shall act as Sole Arbitrator.

33. Facts of present case now have to be examined in light of this agreed procedure. Applicant issued Request for Arbitration on 24 June 2024 and nominated its Arbitrator. Respondent, by its reply dated 29 July 2024, did not nominate an Arbitrator pursuant to that Request for Arbitration. Instead, it objected to Applicant's proposal and stated that it wished to pursue remedy under MSMED Act. Thereafter, Respondent issued an independent notice dated 26 August 2024 invoking arbitration and nominated another Arbitrator. Applicant, by its reply dated 4 September 2024, did not agree to Arbitrator so nominated by Respondent. Therefore, this is not normal case where, pursuant to one Request for Arbitration, both parties nominated their respective Arbitrators and two nominated Arbitrators thereafter failed to appoint third Arbitrator. Contractual procedure did not proceed in that manner. Question is whether subsequent independent notice issued by Respondent on 26 August 2024 can undo consequence which had followed from Applicant's Request for Arbitration dated 24 June 2024. In my view, answer has to be found from Clause 19.3. Clause states that Other Party shall nominate its Arbitrator "within thirty (30) days of receipt of the Request for Arbitration". If it fails to do so, agreed consequence is that "the arbitrator named in the Request for Arbitration shall decide the dispute as the sole arbitrator." Contractual procedure is therefore linked to Request for Arbitration received by Other Party. Once valid Request for Arbitration is issued and other party does not nominate its Arbitrator within stipulated period, clause provides what is to happen. In present case, Respondent did not nominate its

Arbitrator pursuant to Applicant's Request for Arbitration dated 24 June 2024. Its letter dated 29 July 2024 does not amount to nomination of Arbitrator under Clause 19.3. Respondent instead disputed proposed course and expressed intention to approach MSME Facilitation Council. Later notice dated 26 August 2024 was an independent invocation of arbitration. It was not nomination of Respondent's Arbitrator in response to Applicant's Request for Arbitration dated 24 June 2024 within procedure and period contemplated by Clause 19.3. Once period contemplated under Clause 19.3 expired without nomination by Respondent pursuant to Applicant's Request for Arbitration, consequence expressly agreed by parties became applicable. Clause provides that "the arbitrator named in the Request for Arbitration shall decide the dispute as the sole arbitrator." Respondent's later issuance of separate notice invoking arbitration cannot, prima facie, change consequence which had arisen under procedure agreed in Clause 19.3. If such course is accepted, clear time limit and consequence provided in clause would become uncertain. A party could avoid consequence of not responding to original Request for Arbitration by issuing separate and independent Request for Arbitration after stipulated period. Such interpretation would not give proper meaning to language agreed by parties. Clause 19.3 connects consequence with failure of "Other Party" to nominate its Arbitrator within thirty days of receipt of Request for Arbitration. Parties had therefore agreed that where Other Party does not nominate its Arbitrator within stipulated period, arbitration need not remain without a Tribunal. Arbitrator nominated in Request for Arbitration is to decide dispute as Sole Arbitrator.

34. I am therefore of view that appropriate course is to give effect to Clause 19.3 in manner agreed between parties and request for Arbitration dated 24 June 2024, it is necessary appoint Sole Arbitrator and adjudicate disputes and differences between parties. Appointment shall, however, be subject to requirements of Section 12 of Arbitration and Conciliation Act, 1996. Learned Arbitrator shall make necessary disclosure in accordance with Section 12 before entering upon reference. It is clarified that all questions relating to jurisdiction, arbitrability, applicability of MSMED Act, maintainability of claims, liability, quantum, ownership of goods, necessary parties and all other contentions available to parties are kept open for consideration by learned Sole Arbitrator in accordance with law.

35. In view of the above discussion, the following order is passed:

(i) The Arbitration Application is allowed.

(ii) Mr. Vikramjit Grewal, Advocate of this court, is appointed as the Sole Arbitrator to adjudicate the disputes and differences arising between the Applicant and the Respondent under and in connection with the Cold Storage Facility Service Agreement dated 27 April 2021, including the Amendment Agreements dated 20 April 2022 and 14 November 2022.

(iii) The learned Sole Arbitrator shall, before entering upon the reference, file the disclosure as required under Section

12(1) of the Arbitration and Conciliation Act, 1996, read with the Sixth Schedule thereto.

(iv) The learned Sole Arbitrator shall be at liberty to decide all questions regarding the jurisdiction of the Arbitral Tribunal, arbitrability of the claims and disputes, maintainability of the claims, the effect, if any, of the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, the entitlement of the parties, and all other objections and contentions, in accordance with law.

(v) It is clarified that the findings recorded in the present order are only for deciding the present Application under Section 11 of the Arbitration and Conciliation Act, 1996. The learned Sole Arbitrator shall decide the disputes independently and on their own merits, without being influenced by any prima facie observations made in this order.

(vi) The fees and expenses of the learned Sole Arbitrator shall be determined in accordance with the Fourth Schedule to the Arbitration and Conciliation Act, 1996, unless otherwise agreed by the parties and the learned Sole Arbitrator.

(vii) The venue and seat of the arbitration shall be at Mumbai, in terms of Clause 19 of the Agreement.

(viii) The arbitration proceedings shall be conducted in the English language in accordance with Clause 19.4 of the Agreement.

(ix) All rights and contentions of the parties on merits are expressly kept open.

(x) The Arbitration Application is accordingly disposed of. There shall be no order as to costs.

(AMIT BORKAR, J.)