

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 7th DAY OF OCTOBER 2026

BEFORE

THE HON'BLE MR. JUSTICE H. T. NARENDRA PRASAD

CIVIL MISCELLANEOUS PETITION NO. 772 OF 2025

BETWEEN:

RIEMEN SOLUTION PRIVATE LIMITED,
A COMPANY INCORPORATED UNDER THE
PROVISIONS OF COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT FLAT
NO.103, TOWER NO. CS-10,
SUPERTECH CAPETOWN, SECTOR-74,
NOIDA, GAUTAM BUDDHA NAGAR,
UTTAR PRADESH-201301

THROUGH ITS AUTHORIZED REPRESENTATIVES,
MR. DEEPAK GUPTA & MR. DEEPAK SINHA
(JOINTLY AND SEVERALLY).

... PETITIONER

(BY SRI KAPIL MALIK, ADVOCATE FOR
SRI MANJUNATH C, ADVOCATE)

AND

SWIGGY LIMITED,
A PUBLIC LIMITED COMPANY
INCORPORATED UNDER THE
COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT

NO.55, SY.NO.8-14, GROUND FLOOR,
I & J BLOCK,, EMBASSY TECH VILLAGE,
OUTER RING ROAD,
DEVARBISANAHALLI,
BENGALURU, KARNATAKA, INDIA 560103,
REPRESENTED BY ITS DIRECTOR.

... RESPONDENT

(BY SRI PRAMOD NAIR, SENIOR ADVOCATE FOR
SRI NIKHIL HEGDE, ADVOCATE)

THIS CIVIL MISCELLANEOUS PETITION IS FILED UNDER SECTION 11(6) OF THE ARBITRATION AND CONCILIATION ACT 1996, PRAYING THAT ADVOCATE ASHOK ANND (REG.D/1420/1995), OR ANY OTHER PERSON, AS THE SOLE ARBITRATOR SECTION 11(6) OF THE ACT FOR ADJUDICATION OF THE DISPUTES BETWEEN THE PARTIES ARISING OUT OF THE CALL CENTRE SERVICES AGREEMENT DATED: 09.12.2021, PRODUCED AS ANNEXURE-A.

THIS PETITION, HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 24.9.2026, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:

CORAM: HON'BLE MR. JUSTICE H.T. NARENDRA PRASAD

CAV ORDER

This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the Act"), seeking appointment of a sole Arbitrator for adjudication of the disputes that have arisen between the parties under the Call Centre Services Agreement dated 09.12.2021 ("the Agreement"), in particular under Clause 14(viii) thereof, produced at Annexure-A.

FACTS

2. The petitioner is a Private Limited Company registered under the Companies Act, 2013, and the respondent is a Public Limited Company within the meaning of the same Act. The parties entered into the Agreement on 09.12.2021. Disputes subsequently arose between them in relation to the Agreement.

3. The petitioner first addressed series of e-mail to the respondent. Being dissatisfied with the reply,

As there was no reply, the petitioner invoked the arbitration clause in the Agreement and issued a notice dated 02.09.2025 (Annexure-F) to the respondent under Section 21 of the Act. The respondent replied to the said notice, rejecting the proposal to refer the dispute to arbitration. Being aggrieved by the same, the petitioner has approached this Court under Section 11(6) of the Act seeking appointment of a Sole Arbitrator.

SUBMISSIONS

4. The learned counsel for the petitioner submits that the clause has all the essential attributes of an arbitration agreement. It expressly employs the words "arbitration", "sole arbitrator" and "award"; provides that the award shall be final and binding on the parties; incorporates the Arbitration and Conciliation Act, 1996; and fixes Bengaluru as the place of arbitration.

5. It is therefore submitted that the intention of the parties to arbitrate is manifest from a holistic reading of the clause, and that an unduly technical construction ought not to defeat that intention.

6. It is further contended that an arbitration clause need not be drafted in any particular form, and that the Court must ascertain the intention of the parties from the clause read as a whole and also contended that a pragmatic approach should be taken for interpretation of arbitration clause. The drafting of such a clause, in view of the intention demonstrated otherwise, cannot be taken advantage of by any party. Reliance is placed on **NAGREEKA INDCON PRODUCTS PVT. LTD. Vs. CARGOCARE LOGISTICS (INDIA) PVT. LTD. (2026 SCC Online SC 630)**, particularly paragraphs 5.1, 9.3 and 9.4.

7. The learned Senior Counsel for the respondent submits that the expression "if mutually agreed upon

by the parties” qualifies the very submission of the dispute to arbitration.

8. It is contended that the parties have not undertaken an unconditional obligation to arbitrate. Arbitration would arise only if, after the dispute has arisen and the period for mutual resolution has expired without success, both parties mutually agree to submit the dispute to arbitration.

9. According to the respondent, therefore, the clause is at best an agreement contemplating the possibility of a future arbitration agreement, and not a concluded arbitration agreement as contemplated by Section 7 of the Act. The respondent also relies on **NAGREEKA INDCON PRODUCTS PVT. LTD. (supra)** and **on JAGDISH CHANDER vs. RAMESH CHANDER [(2007) 5 SCC 719]**.

POINT FOR CONSIDERATION

10. In the light of the rival contentions, the following point arises for consideration:

"Whether the stipulation that the dispute shall, 'if mutually agreed upon by the parties', be submitted for arbitration constitutes a valid and binding arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996?"

ANALYSIS

11. Section 7 of the Act reads as under:

"7. Arbitration agreement.-

(1) In this Part, arbitration agreement means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication, including communication through electronic means, which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

12. Section 7(1) of the Act defines an arbitration agreement as an agreement by the parties "to submit to arbitration" all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship.

13. The foundation of an arbitration agreement is therefore *consensus ad idem*: a concluded agreement between the parties that disputes falling within its scope shall be submitted to arbitration.

14. It is well settled that no particular form of words is indispensable for constituting an arbitration agreement. Equally, the mere use of expressions such as "arbitration", "arbitrator" or "award" is not by itself sufficient. The contractual provision must disclose a present and binding intention of the parties to submit their disputes to arbitration, and not merely contemplate arbitration as a future possibility.

15. The question is substantially covered by the decision of the Apex Court in **JAGDISH CHANDER (supra)**. The relevant portion is extracted below:

"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi

[(1998) 3 SCC 573], Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418]. In State of Orissa v. Damodar Das [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:

(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is an arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the

possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clauses relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an

arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or

consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

16. The clause considered in **JAGDISH CHANDER (supra)** provided, in substance, that disputes touching the partnership would be mutually decided by the partners or would be referred to arbitration "if the parties so determine".

17. The Apex Court held that the words "if the parties so determine" completely altered the nature of the provision, as they required the parties to arrive at a further decision as to whether the dispute should be referred to arbitration.

18. The Court consequently held that where a contractual provision requires or contemplates fresh consent or consensus before a dispute can be referred to arbitration, it does not amount to an arbitration

agreement. It is merely an arrangement under which the parties may enter into an arbitration agreement in future.

19. The principle flowing from **JAGDISH CHANDER (supra)** is that the words employed by the parties must disclose a determination and obligation to go to arbitration, and not merely a possibility of doing so.

20. This principle was subsequently reiterated in **MAHANADI COALFIELDS LTD. v. IVRCL AMR JOINT VENTURE [(2022) 20 SCC 636]**.

21. The Apex Court, relying upon **JAGDISH CHANDER (supra)**, the Apex Court reiterated that the mere use of the word "arbitration" does not create an arbitration agreement if the contractual arrangement requires the parties to arrive at a further

agreement to proceed to arbitration after the dispute arises.

22. The existence of a concluded agreement to arbitrate is therefore indispensable before jurisdiction under Section 11 can be exercised.

23. More recently, in **BGM AND M-RPL-JMCT (JV v. EASTERN COALFIELDS LIMITED [2025 INSC 874]**, the Apex Court once again considered the principles laid down in **JAGDISH CHANDER (supra)** and **MAHANADI COALFIELDS (supra)**.

24. The Apex Court reiterated that a clause providing that disputes may be referred to arbitration, or that they shall be referred to arbitration if the parties subsequently agree, does not constitute an arbitration agreement within the meaning of Section 7.

25. The decisive consideration remains whether the parties have already undertaken a binding obligation to arbitrate or whether a further consensus is required after the dispute has arisen.

26. In this regard, the Apex Court in the case of **NAGREEKA INDCON PRODUCTS PVT. LTD.** (**supra**) has held as follows:

"9. The sum and substance of the appellant's case is that clause 25 reproduced (supra) constitutes a binding arbitration clause. In furtherance of this position reliance has been placed on various judgments of this court and also of the High Court. Let us examine them.

9.1. In BGM and M-RPL-JMCT(JV) v. Eastern Coalfields Ltd. [2025 SCC OnLine SC 1471] , it has been observed that section, heading or a marginal note, can be relied on to clear any doubt or ambiguity. In that case, interpretation was regarding a mandatory arbitration clause but, the dispute was as to upon whom the said arbitration clause applies. Having regard to the heading of the section, it was held that the

arbitration clause would apply only to disputes between public sector enterprises and Government departments and would not apply to any dispute involving a private party. In the present case, there is no such distinction or dispute. The heading uses only one word arbitration but as opposed to the case referred to (supra), the modal here is "can", indicating a choice available to the parties.

9.2. In Babanrao Rajaram Pund v. Samarth Builders and Developers [(2022) 9 SCC 691; (2023) 1 SCC (Civ) 481; 2022 SCC OnLine SC 1165] which has been relied upon by the appellant to submit that a pragmatic approach should be taken, observes that when an arbitration agreement, apart from using the word "arbitration" or "arbitrators" spells out its clear intention by the use of the word "shall", its mandatory nature is clear. It has been also observed that deficiency of words and agreement which otherwise fortifies the intention cannot delegitimize the arbitration clause. As is obvious, the intention of the parties is anything but clear in the present case. This latter aspect will be elucidated with

more clarity in the succeeding paragraphs of this judgment.

9.3. In Visa International Ltd. v. Continental Resources (USA) Ltd. [(2009) 2 SCC 55; (2009) 1 SCC (Civ) 379; 2008 SCC OnLine SC 1802] the dispute resolution clause provided that any disputes arising between the parties, if any, shall be settled in accordance with the provisions of the Arbitration and Conciliation Act; and did not specifically state as to whether the chosen method would be arbitration or conciliation. While holding that a binding arbitration clause did exist, the court held that one or two words being absent is not the deciding factor and in fact, it is the whole clause providing for the settlement of disputes that are to be seen together to gather the intention of the parties. There can be no qualms with this position. Reading the arbitration clause in this case, it can in no way be said that the intent of the parties is clear. This is on two counts, one the use of the word "can" and second, providing for the incomplete procedure regarding appointment of arbitrators if at all.

9.4. *In Enercon (India) Ltd. v. Enercon GmbH [(2014) 5 SCC 1; (2014) 3 SCC (Civ) 59; 2014 SCC OnLine SC 129]* the question involved amongst others, not relevant to the present dispute, was regarding an arbitration clause being rendered unworkable on account of the fact that it did not provide for the manner in which the third arbitrator was to be appointed. It only provided that each party to the arbitration would appoint one arbitrator of their choice. This court observed that the intent to appoint an arbitrator cannot be frustrated on account of the fact that the clause is unworkable. There was no dispute as to arbitration being the chosen mechanism to resolve conflict. In the facts and circumstances, it was read into the clause that the two arbitrators so appointed by each party would then appoint the third arbitrator. In doing so, it was observed that the approach taken to construe an arbitration clause should not be pedantic but pragmatic. The crucial distinction with the present facts is that the intent to arbitrate was clear. It is not the case before us as one party says that the arbitration clause is binding and the other does not even

consider the clause to be an arbitration clause to begin with.

9.5. In Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components [(2018) 9 SCC 774; (2018) 4 SCC (Civ) 574; 2018 SCC OnLine SC 1503] the opposing contentions of the parties were that when the clause for dispute settlement says arbitration or the court, which one would prevail. The court here held that an option was available to the parties and the one who invoked the dispute settlement process chose to go for arbitration, as such, with that being an option available to him, no-fault could be found with that choice. The word used in the clause was "should", which is consistent with the fact that an option had been provided to the parties. The facts of this case, as it appears to us, are in no way similar to the present case and as such the same would not be of any aid to the appellant.

9.6. In Vidya Drolia v. Durga Trading Corporation [(2021) 2 SCC 1; (2021) 1 SCC (Civ) 549; 2020 SCC OnLine SC 1018] the court observed that when there is a doubt, the matter be referred to arbitration. It has also

been observed that in matters of purely commercial nature, a liberal approach should be adopted as a one-stop dispute resolution process would be favourable. Once again, these observations are such that no question can be raised against them. The doubt referred to here arises in the construction of the arbitration clause when it is vaguely worded or the like. The question of construction, however, only arise when the parties are ad idem as to arbitration. Despite the dispute before us being purely of a commercial nature, it is the parties themselves that cannot agree on arbitration being the chosen medium. When that is the case, it is not for a court to compulsorily send such parties before the jurisdiction that they have not chosen.

10. The appellant's reliance on Panasonic India P. Ltd. v. Shah Aircon [2022 SCC OnLine Del 3288] is misplaced for the learned single judge therein observed that the word "can" featuring in the subject arbitration clause was not qua arbitration itself but was in reference to the ability resting with either party to invoke arbitration. Here, the situation is different.

11. *In light of the above discussion, it is also to be noted that principles of contractual interpretation are now well settled. The words chosen by the parties are the most reliable manifestation of the intent. The meaning of the words used in contract is not found in strict etymological propriety or popular usage of word(s) as in the subject, occasion or context in which they are used, within the contractual realm. The Latin maxim "Ex praecedentibus et consequentibus optima fit interpretatio" signifies this statement. (See : Union of India v. Raman Iron Foundry [(1974) 2 SCC 231; 1974 SCC OnLine SC 95] Provash Chandra Dalui v. Biswanath Banerjee [1989 Supp (1) SCC 487]. The written word is, therefore, the foundation of legal obligation. To disregard or to impute an obligation or meaning which was not intended would compromise party autonomy.*

12. *Having taken due note of the interpretation of the word 'can' as also well-established principles of contractual interpretation, we now move to consider whether Clause 25 actually constitutes an arbitration clause. Sujata Manohar J., in K.K.*

Modi (supra) spelt out the requirements of such a clause in the following terms:

"17. Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:

(1) The arbitration agreement must contemplate that the decision of the tribunal will be binding on the parties to the agreement.

(2) That the jurisdiction of the Tribunal to decide the rights of parties must derive either from the consent of the parties or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration.

(3) The agreement must contemplate that substantive rights of parties will be determined by the agreed Tribunal.

(4) That the Tribunal will determine the rights of the parties in an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides.

(5) That the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law and lastly,

(6) The agreement must contemplate that the Tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal."

These requirements have been repeatedly restated. [See: Encon Builders (I) (P) Ltd (supra) ; Alchemist Hospitals Ltd. v. ICT Health Technology Services India (P) Ltd.²²

*and M.P. Rajya Tilhan Utpadak Sahakari Sangh Maryadit v. Modi Transport Service*²³]. In *Jagdish Chander (supra)*, recently followed in *BGM and M-RPL-JMCT(JV) (supra)* the Court set out what constitutes an arbitration agreement. Raveendran J., writing for the Court, held that the words used in the agreement should disclose a determination and obligation to go for arbitration and not only provide for the possibility of going to arbitration. When the word provides only a possibility, the same does not constitute a valid arbitration agreement.

13. Turning to the words used in Clause 25, we find it to stipulate to the effect that if there is any dispute between the parties, they can settle the same by arbitration. In view of *Jagdish Chander (supra)* which holds as under:

"(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they

should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

The clause subject matter of dispute in this appeal indicates merely the future possibility of referring disputes to arbitration and as such, it cannot be said to be a binding arbitration agreement. In other words, the possibility of arbitration being used to settle disputes is open however, for the disputes to be settled by arbitration, further agreement between the parties would be required and needless to add, such an agreement can

only come into existence when both parties agree to the same. In that view of the matter, we are of the considered view that this appeal is bereft of merit. It is accordingly dismissed."

27. The clause considered in that case stated that any difference of opinion or dispute "can be settled by arbitration".

28. The Apex Court held that such language merely indicated the future possibility of referring the disputes to arbitration, i.e., for arbitration actually to take place, a further agreement between the parties was necessary.

29. The Court reiterated the principle in **JAGDISH CHANDER (supra)** that an arbitration clause must disclose a determination and obligation to go to arbitration, rather than merely provide the possibility of arbitration.

30. Significantly, the Supreme Court emphasized party autonomy and held that where the parties themselves have not agreed that arbitration would mandatorily be the chosen mode of dispute resolution, it is not open for the Court to compel them to submit to a jurisdiction which they have not chosen.

31. The Court further held that the written words employed by the contracting parties are the most reliable manifestation of their intention, and that an obligation which the parties did not undertake cannot be imputed to them in the guise of interpretation.

32. The relevant Clause of the Agreement herein reads thus:

"In the event of any dispute arising between the parties touching the meaning and construction of the covenants under this Agreement or any claim or controversy arising out of this Agreement, the parties shall be

mutually resolved and if the same is not resolved within 30 days from the date of receipt by one party of a written notice from the other party of the existence of the dispute, then the matter shall, if mutually agreed upon by the parties be submitted for arbitration in accordance with the Arbitration and Conciliation Act, 1996 before the sole arbitrator appointed mutually by the parties hereto. The award passed by the Arbitrator shall be final and binding upon the parties hereto. The construction and interpretation of this Agreement and any award passed in pursuance of the Arbitration proceedings shall be governed by the laws of India, without regard to its conflicts of law to give effectual discharge of the arbitral award. All arbitration proceedings shall be held at Bangalore, Karnataka, India in English language."

33. The Agreement further provides that disputes arising out of such arbitration shall be subject to the jurisdiction of the Courts at Bengaluru, India.

34. It is evident from the above clause that the parties first contemplated an attempt at mutual resolution of their disputes. If the dispute remained unresolved for thirty days after receipt of written notice, the next stage stipulated by the Agreement is that:

“the matter shall, if mutually agreed upon by the parties be submitted for arbitration...”

35. The legal effect of the words “if mutually agreed upon by the parties” assumes significance in determining whether the clause itself constitutes a presently binding arbitration agreement, or whether it merely contemplates the possibility of the parties entering into an agreement to arbitrate after a dispute has arisen.

36. Applying the above principles to the clause at hand, the words:

"the matter shall, if mutually agreed upon by the Parties be submitted for arbitration" cannot be ignored or rendered otiose.

37. Had the clause merely stated "the matter shall be submitted for arbitration", there could have been little difficulty in holding that a binding arbitration agreement existed.

38. However, the parties consciously inserted the qualifying expression "if mutually agreed upon by the Parties".

39. The qualification occurs between the words "shall" and "be submitted for arbitration". Therefore, grammatically as well as contextually, the requirement of mutual agreement attaches to the very submission of the dispute to arbitration.

40. In other words, the clause does not provide that "the dispute shall be submitted to arbitration and the Arbitrator shall be mutually appointed".

41. Had that been the formulation, the requirement of mutual consent could reasonably have been construed as relating only to the appointment procedure.

42. Instead, the present clause makes the submission itself conditional upon the words "if mutually agreed upon by the Parties".

43. The Court can neither delete these words from the Agreement, nor rewrite the bargain between the parties by converting a conditional reference to arbitration into an unconditional one.

44. The position therefore falls squarely within the principle laid down in **JAGDISH CHANDER (supra)** and subsequently reiterated in **MAHANADI**

COALFIELDS (supra) BGM AND M-RPL-JMCT (JV) (supra) and NAGREEKA INDCON PRODUCTS PVT. LTD. (supra).

45. It is true that the latter portion of the clause provides for:

(a) arbitration in accordance with the Arbitration and Conciliation Act, 1996;

(b) a sole Arbitrator;

(c) mutual appointment of such Arbitrator;

(d) the final and binding nature of the award;

(e) the applicability of Indian law;

(f) Bengaluru, Karnataka, India as the place of arbitration; and

(g) English as the language of the arbitral proceedings.

46. These stipulations undoubtedly demonstrate that the parties had contemplated the procedural

framework which would govern an arbitration if they subsequently agreed mutually to submit their dispute to arbitration.

47. However, these provisions cannot override the antecedent condition expressly imposed by the parties regarding the very submission of the dispute to arbitration.

48. There is a material distinction between agreeing presently and unconditionally to arbitrate, while leaving the appointment of the Arbitrator to future mutual consent; and agreeing that the dispute itself would be submitted to arbitration only if the parties mutually agree to do so in future.

49. The present Agreement falls within the second category.

50. The decision in **BABANRAO (supra)** does not alter the above conclusion.

51. In **BABANRAO (supra)**, the contractual provision manifested a clear intention that disputes were to be referred to arbitration. The controversy concerned whether certain deficiencies in drafting, including the absence of particular terminology regarding the binding nature of the decision, defeated the arbitration agreement.

52. The Apex Court held that Section 7 does not prescribe a particular form, and that a deficiency of words should not defeat a clause which otherwise manifests a clear intention to arbitrate.

53. The present case does not concern a mere deficiency or imperfect drafting. The clause contains an express substantive qualification making submission to arbitration dependent upon further mutual agreement.

54. Giving effect to those words is not adopting a pedantic construction. It is giving effect to the bargain actually recorded by the parties.

55. It is equally true that the jurisdiction of the referral Court under Section 11 is confined to a prima facie examination of the existence of an arbitration agreement, and that ordinarily disputed questions falling within the jurisdiction of the Arbitral Tribunal are ordinarily to be left open.

56. However, the limited nature of the enquiry under Section 11 does not dispense with the foundational requirement that an arbitration agreement must exist.

57. The distinction between deciding the merits of a dispute and determining whether the parties ever entered into an arbitration agreement must be maintained.

58. In the present case, no elaborate evidentiary enquiry is necessary. The issue emerges from the language of the contractual provision itself.

59. The recent decision in **NAGREEKA INDCON PRODUCTS PVT. LTD. (supra)** also makes it clear that the limited jurisdiction of a referral Court cannot be used to compel a party to undergo arbitration where the contractual clause does not disclose a binding agreement to arbitrate.

CONCLUSION

60. On a plain and holistic reading of the clause, this Court is of the considered view that the parties contemplated two distinct stages.

(i) First, disputes were to be mutually resolved within thirty days of receipt of written notice.

(ii) Secondly, upon failure of such resolution, arbitration could follow only "if mutually agreed upon by the Parties".

61. Thus, failure of the first stage did not automatically trigger arbitration. A further consensus between the parties was expressly contemplated as a condition precedent to the submission of the dispute to arbitration.

62. There being no material to establish such subsequent mutual agreement, the unilateral invocation of the clause by the petitioner cannot transform the conditional provision into a binding arbitration agreement.

63. The fact that the Agreement specifies the procedure, seat/place, language, governing law and binding nature of a possible arbitral award does not eliminate the express requirement of mutual agreement for submission of the dispute to arbitration.

64. Consequently, this Court holds that the clause in question does not constitute a presently binding arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996.

65. In the absence of an arbitration agreement, the jurisdiction of this Court under Section 11 of the Act cannot be invoked for the appointment of an Arbitrator.

66. The point formulated for consideration is accordingly answered in the NEGATIVE.

ORDER

The Civil Miscellaneous Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 is dismissed.

**Sd/-
(H.T. NARENDRA PRASAD)
JUDGE**

CM