AR NO. 293 OF 2026

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR. SOUMEN SEN

TUESDAY, THE 3RD DAY OF NOVEMBER 2026 / 12TH KARTHIKA, 1948

AR NO. 293 OF 2026

PETITIONER/S:

V.K VARGHESE, AGED 77 YEARS
S/O DR. V K KURIAKOSE, VYSIAMPARAMBIL, VYTILLA P O, POONITHARA VILLAGE, KANAYANNOOR TALUK, ERNAKULAM, PIN - 682019

BY ADVS.
SHRI.SANTHOSH MATHEW (SR.)
SRI.ARUN THOMAS
SMT.VEENA RAVEENDRAN
SRI.ANIL SEBASTIAN PULICKEL
SHRI.SHINTO MATHEW ABRAHAM
SHRI.MATHEW NEVIN THOMAS
SMT.LEAH RACHEL NINAN
SHRI.KURIAN ANTONY MATHEW
SMT.APARNNA S.
SHRI.NOEL NINAN NINAN
SHRI.ADEEN NAZAR
SHRI.ROHAN MATHEW
SHRI.CHERIYIL SANIL JOHN
SHRI.KARTHIK RAJAGOPAL

RESPONDENT/S:

1 ANTA BUILDERS AND DEVELOPERS PVT LTD
VANDANATHIL HOUSE, MANGATTOOR, KOLENCHERY P.O,

ERNAKULAM , COCHIN, KERALA, INDIA REPRESENTED BY ITS MANAGING DIRECTOR, PIN - 682311

2 MIDHUN KURUVILA KURIEN
S/O V. K. KURUVILA VANDANATHIL (KANNIKARA PUTHENPURAYIL) HOUSE, MANGATTOOR KARA, KOLENCHERY POST, AIKKARANAD NORTH VILLAGE, KUNNATHUNADU TALUK, ERNAKULAM, KERALA, PIN - 682311

3 ALLY KURUVILLA
VANDANATHIL (KANNIKARA PUTHENPURAYIL) HOUSE, MANGATTOOR KARA, KOLENCHERY POST, AIKKARANAD NORTH VILLAGE, KUNNATHUNADU TALUK, ERNAKULAM, KERALA, PIN - 682311

4 VANDANATHIL KURIAN KURUVILLA
VANDANATHIL (KANNIKARA PUTHENPURAYIL) HOUSE, MANGATTOOR KARA, KOLENCHERY POST, AIKKARANAD NORTH VILLAGE, KUNNATHUNADU TALUK, ERNAKULAM, KERALA, PIN - 682311

5 ABRAHAM KURUVILLA
VANDANATHIL (KANNIKARA PUTHENPURAYIL) HOUSE, MANGATTOOR KARA, KOLENCHERY POST, AIKKARANAD NORTH VILLAGE, KUNNATHUNADU TALUK, ERNAKULAM, KERALA, PIN - 682311

BY ADVS.
SRI.VISHAK.K.JOHNSON
SMT.MARILIN ROMEO
SMT.PARVATHY S.

THIS ARBITRATION REQUEST HAVING COME UP FOR ADMISSION ON 03.11.2026, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O R D E R

Dated this the 3rd day of November 2026

2. This is an application for appointment of an arbitrator.

The dispute arises out of an agreement dated 20th August 2016. The petitioner contends that the respondents have failed to fulfil their obligations under the Joint Venture Agreement (JVA), thereby causing loss and damage to the petitioner. Accordingly, the petitioner invoked the dispute resolution mechanism provided under Clause 12 of the said agreement. The petitioner had issued notice under Section 21 of the Arbitration and Conciliation Act, 1996, (in short, '1996 Act') dated 20th January 2026 through registered post and email invoking clause of the said agreement and nominated a Senior Advocate as the petitioner's preferred arbitrator and called upon the respondents to nominate their arbitrator within 30 days of receipt of the said notice. The respondents

in spite of service of such notice did not reply and nor did they nominate an arbitrator within 30 days. As such they did not concur to the constitution of the Tribunal in terms of Clause 12.2. Consequently the agreed appointment procedure has failed and the petitioner has now become entitled to invoke the jurisdiction under Section 11(6) of the 1996 Act.

3. Mr Santosh Mathew, the learned senior counsel appearing on behalf of the petitioner has submitted that there cannot be any dispute that Clause 12 is the arbitration clause. The parties have not disputed the execution of the said agreement. In view of the fact that the contractual appointment procedure has failed after the respondents' omission to act on the notice invoking arbitration, it is just and proper to appoint an arbitrator in exercise of power under Section 11(6) of the 1996 Act.

4. The learned Senior Counsel has also submitted that, prior to the application for appointment of an arbitrator,

an application under Section 9 of the 1996 Act was filed, and during the pendency of the said proceeding before the High Court, an attempt was made to settle the dispute amicably. However, mediation had failed on 11th March 2026 and the matter is presently pending before the High Court with regard to the interim relief claimed by the petitioner.

5. The said application is opposed by the respondents. The respondents in its counter affidavit has stated that Clause 12.2 of the Joint Venture Agreement is not an arbitration clause under Section 7 of the 1996 Act. An arbitration agreement requires an unequivocal, mandatory obligation to refer disputes to arbitration. A clause stipulating that a reference will occur only upon mutual consent, or if the parties so determine is merely an enabling and discretionary procedure, and not a binding arbitration agreement. Without fresh mutual consent at the time the dispute arises, Section 11 cannot be invoked. Moreover

Section 21 notice was issued on 20th January 2026, nearly 7 years after the stipulated completion date. Hence the said claim is expressly barred by limitation.

6. The learned counsel for the respondents, in support of the submission that Clause 12.2 of the Joint Venture Agreement cannot be considered to be an arbitration clause, has relied upon a decision of the Honorable Supreme Court in ***Jagdish Chander v. Ramesh Chander and Others***[1], wherein, in paragraph 9, it was held that clause 16 of the partnership deed with the wordings "the dispute shall be referred for arbitration if the parties so determine" was held to be not an arbitration agreement, but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. It is submitted that mutual consensus not being arrived at by the parties, arbitration clause 12.2 as invoked by the petitioner, cannot be

1 (2007) 5 SCC 719

considered to be an arbitration agreement.

7. In response to the said argument, Mr Santosh Mathew, the learned Senior Counsel has referred to the decisions of the Honorable Supreme Court in ***Tarun Dhameja & Another v. Sunil Dhameja and Another***[2] and ***Shubham Equipment Private Limited and Another v. Rothwell Water Company Limited and Others***[3], and submitted that in ***Tarun Dhameja*** (supra), the arbitration clause in the deed of partnership where it was stated that arbitration shall be optional and the arbitrator will be appointed by partners with their mutual consent, was held to be an arbitration clause. In Clause 9 of the Memorandum of Undersanding (MoU), it was *inter alia* stated that the parties shall endeavour to settle such disputes and differences amicably, failing which, the disputes and differences shall be settled in accordance with the provisions of the 1996 Act, was

2 2024INSC 973
3 2026 SCC Online SC 2089

held to be a valid arbitration agreement. In both the cases, the Hon'ble Supreme Court has emphasized that merely because the dispute resolution clause requires and contemplates an amicable settlement, failing which, it would not be a bar to refer to the parties to arbitration once the intention of the parties to have the dispute resolved through the mechanism of arbitration is clear and the procedure for such appointment in the agreement is clearly visible and discernible.

8. In order to appreciate the said argument, it is necessary to refer to Clause 12.2 of the Joint Venture Agreement, which admittedly contains an arbitration clause:

> "12.2. All disputes and differences arising between the parties hereto with regards to interpretation or effect this agreement or with regard to the rights and obligations of the parties hereto or under this agreement shall, upon mutual consent of parties, be referred to the arbitration under Indian Arbitration Act and Conciliation

> Act 1996 or any amendments or reenactments thereof and the venue of arbitration shall be at Cochin. The party raising the dispute shall serve a notice upon the other party advising that a dispute or difference has arisen and nominate in that notice its own arbitrator. The party receiving the notice, shall, within 30 days after receiving such notice, nominate its arbitrator by advising the party raising the dispute and name of the arbitrator appointed by the other party. The arbitrators so appointed shall nominate the third arbitrator. The award of the arbitrators, shall be final, conclusive and binding upon the parties thereto."
>
> (emphasis supplied)

9. The said clause can be divided into two parts. The first part contemplates a mutual consent of parties for a reference of the disputes to arbitration and the second part contemplates the procedure to be adopted for the appointment of an arbitrator by each of the parties. The second part is not independent of the first part, as from a plain reading of the said clause, it would be clear that for a reference to be made to arbitration, there shall be a mutual

consent for arbitration by the parties. In other words, once the parties have agreed to the dispute resolution by an arbitration on mutual consent, then, each of the parties will be required to nominate its arbitrator as laid down in the latter part of the said arbitration clause. Admittedly, there has been no mutual consensus between the parties to arbitration. In ***Jagadish Chander*** (supra), the Honorable Supreme Court considered Clause 16 of the partnership deed, which reads as follows:

> "16) If during the continuance of the partnership or at any time afterwards any dispute touching the partnership arises between the partners, the same shall be mutually decided by the partners or shall be referred for arbitration if the parties so determine."
>
> (emphasis supplied)

10. This clause and more particularly the word 'determine' was interpreted as an enabling provision for arbitration only if the parties mutually decide after due consideration as to whether the dispute should be referred to

arbitration or not. This is clear from paragraph 9 of the *Jagdish Chander* (supra), which reads as under:

> "9. Para 16 of the Partnership deed provides that if there is any dispute touching the partnership arising between the partners, the same shall be mutually decided by the parties or shall be referred to arbitration if the parties so determine. If the clause had merely said that in the event of disputes arising between the parties, they "shall be referred to arbitration", it would have been an arbitration agreement. But the use of the words "shall be referred for arbitration if the parties so determine" completely changes the complexion of the provision. The expression "determine" indicates that the parties are required to reach a decision by application of mind. Therefore, when clause 16 uses the words "the dispute shall be referred for arbitration if the parties so determine", it means that it is not an arbitration agreement but a provision which enables arbitration only if the parties mutually decide after due consideration as to whether the disputes should be referred to arbitration or not. In effect, the clause requires the consent of parties before the disputes can be referred to arbitration. The main attribute of an arbitration agreement, namely, consensus ad idem to refer the disputes to arbitration is missing in clause 16

relating to settlement of disputes. Therefore it is not an arbitration agreement, as defined under S.7 of the Act. In the absence of an arbitration agreement, the question of exercising power under S.11 of the Act to appoint an Arbitrator does not arise."

(emphasis supplied)

11. Similarly in ***Tarun Dhameja*** (supra), Clause 23 of the partnership deed is the arbitration clause which reads as under:

"23. Arbitration

That if at any time either during the continuance of the partnership or after the retirement of any partner, any dispute or difference shall arise between the partners or their respective heirs or any one claiming through or under them, the same shall be referred to arbitration. Arbitration shall be optional & the arbitrator will be appointed by partners with their mutual consent. In any case of dispute arise then the Jurisdiction of Indore Civil Court shall be applicable & acceptable by the partners."

(emphasis supplied)

12. It would be clear from the said clause that the partners have agreed to the resolution of their disputes and differences through the mechanism of arbitration. It was thereafter only, it was stated that arbitration shall be optional and the arbitrator will be appointed by partners with their mutual consent. The first limb of the said clause clearly reflects a clear intention of the parties to have their disputes decided by an arbitrator. The Honorable Supreme Court interpreted the said clause in the manner following:

> "The first portion of the arbitration clause is clear and states that, at any time during the continuance of the partnership or after the retirement of any partner, if any dispute or difference arises between the partners or their respective heirs or anyone claiming from them, the same shall be referred to arbitration. Therefore, the legal representatives or anyone claiming through a partner is entitled to invoke the arbitration clause. In the present case, the legal representative of the deceased partner, Yeshwant Boolani, invoked the arbitration clause.

> Reliance placed on the second portion of the arbitration clause, which states that if any dispute arises, the arbitration shall be optional and the Arbitrator will be appointed by the partners with their mutual consent, is not to be read in isolation but in the context of the earlier portion of the arbitration clause. This means that the arbitration clause can be invoked by an aggrieved party who wants to take recourse to arbitration. To this extent there is mutual agreement. Thereupon, the arbitrator can be appointed by mutual consent of all parties. This does not obliterate or write off the arbitration clause. In terms of the Arbitration and Conciliation Act, 1996, where parties cannot agree upon a common name as to who will act as an arbitrator, the court can appoint the arbitral tribunal. The arbitration clauses have to be read in a pragmatic manner. The intent of the parties while executing the arbitration clause in the Partnership Deed is clear.
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> (emphasis supplied)

13. The decision in ***Jagdish Chander*** (supra) was also considered and it was held that the said case is entirely different and the arbitration clause relied upon was differently worded. In ***Shubham Equipment Private Limited***

(supra), Clause 9 of the MoU reads as under:

> 8. Clause 9 of the said MoU provided for dispute resolution via arbitration, as follows:
>
> "9.0 DISPUTE RESOLUTION
>
> 9.1 In case of any dispute or difference arising between the parties as to the interpretation or effect of this Agreement and/or the rights and liabilities of the Parties, thereunder, and the Parties thereunder, the Parties shall endeavour to settle such disputes/differences amicably, failing which the dispute/difference shall be settled in accordance with the provisions of the Arbitration and Conciliation Act, 1996 of any statutory re-enactments or modification thereof. Sole arbitrator to be appointed with mutual consent of both the Parties. The seat and venue of Arbitration shall be Mumbai. The language of the Arbitration shall be English. The Award passed by the Arbitrator shall be final and binding upon the parties herein."

14. It can be seen from the said decision that the parties did not dispute the existence of the arbitration agreements, namely, the JVA and MoU in respect whereof the disputes have arisen. The Honorable Supreme Court noticed

Section 11(6-A) of the 1996 Act and held as under:

> 19. Section 11(6-A) of the 1996 Act prescribes the principle of minimal judicial intervention by restricting the scope of inquiry to prima facie existence of the arbitration agreement. Once the prima facie existence of an arbitration agreement is adduced before the Referral Court, it ought to appoint an arbitrator and refer the parties to arbitration.
>
> 20. Admittedly, the existence of the agreements is not in dispute. What is contended is that the JVA and MoU spring from the mother agreement, namely License Agreement, and have no independent existence. As such, the dispute resolution clause, namely Clause 12.1 of the mother agreement, envisaging arbitration in Korea would override the dispute resolution clauses in the subsidiary agreements.
>
> (emphasis supplied)

15. In view of the fat that there was no dispute with regard to the existence of the arbitration agreements, the matter was referred to arbitrator. Moreover, having regard to the fact that the disputes and differences were not amicably

settled and the parties have clearly intended to have their disputes referred to arbitration, in case of failure to arrive at any amicable settlement, the dispute was referred to arbitration.

16. In this regard, reference can be made to a decision of the Honorable Supreme Court in ***Nagreeka Indcon Products Pvt. Ltd v. Cargocare Logistics (India) Pvt. Ltd***[4], wherein, Clause 25 of bill of lading which contains an arbitration clause, was held to be not an arbitration clause in view of the word "can" used in the said arbitration. For proper understanding the said clause is reproduced below:

> "25. Arbitration:
>
> The contract evaluated hereby or contained herein shall be governed by and construed according to Indian Laws. Any difference of opinion or dispute thereunder can be settled by arbitration in India or a place mutually agreed with each party appointing an arbitrator."

4 2026 INSC 384

17. In ***Nagreeka Indcon Products*** (supra), the Honorable Supreme Court considered amongst others, ***Jagdish Chander*** (supra) and ***Cox & Kings Ltd. v. SAP India (P) Ltd***,[5] and has held that the said clause is not an arbitration clause. In fact, the concurring opinion of the Honorable Justice P.S Narasimha in ***Cox & Kings Ltd*** (supra) that captures the essence of an arbitral proceedings - "The parties must mutually intend to refer their differences to arbitration as consent is the source of the Arbitral Tribunal's jurisdiction over them" has been reiterated and followed.

(emphasis supplied)

18. The Honorable Supreme Court thereafter in paragraph 6 has observed as follows:

> 6……In other words, Alternate Dispute Resolution mechanisms or more particularly, arbitration, which is relevant in this case, can only be the chosen method if both/all parties to the dispute can agree that it will be so. This freedom is not only in so far as choosing the

5 (2024) 4 SCC 1

medium, but it also encompasses choice of forum, applicable law and to some extent even procedural norms. This enables parties to have their dispute decided by keeping in view their own structures and realities.

19. On the scope of the interpretation of the contractual terms, in paragraph 11, it has been observed as follows:

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 Foundry20; Provash Chandra Dalui v. Biswanath Banerjee**] 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.

20. The Honorable Supreme Court considered as to whether Clause 25 actually constitutes an arbitration clause and in deciding it has relied upon, the observation of the Honorable Justice Sujatha Manohar in ***K.K. Modi v. K.N. Modi***[6] that spells out the requirement 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,

6 1998 (3) SCC 573

(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."

21. The observation of Justice Raveendran in ***Jagdish Chander*** (supra) was also reiterated and followed in paragraphs 12 and 13 and it was held as under:

12.....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."

22. Even for the court to arrive at a *prima faci* determination of the existence of the arbitration clause at the stage of considering the application for appointment of an arbitrator, the court cannot disregard the words and expressions used in the dispute resolution clause, as *sine*

qua non for invoking jurisdiction under Section 11 of the 1996 Act would be the existence of an arbitration clause.

In view of the fact that there is no arbitration agreement between the parties which can be enforced at this stage, the application fails and the same is dismissed. However, there shall be no order as to costs.

Sd/-

SOUMEN SEN

CHIEF JUSTICE

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