IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE PRADEEP MITTAL

ON THE 5th OF NOVEMBER, 2026

MISC. APPEAL No. 416 of 2012

CNR No.: MPHC010055012012

UNION OF INDIA AND ANR

Versus

R.K. GUPTA

Appearance:

Shri Rajesh Kumar Tiwari - Advocate for applicant.

Shri Deepak Kumaar Raghuwanshi - Advocate for respondent.

ORDER

This miscellaneous appeal under Order 43 Rule 1 of the Code of Civil Procedure, 1908 ("CPC") is directed against the order dated 12.08.2010 passed by the IVth Additional Judge to the Court of the 10th Additional Judge, Bhopal, in R.C.S. No. 7-B/2009. By that order the application filed by the respondent (defendant) under Section 8 of the Arbitration and Conciliation Act, 1996 ("the Act") was allowed, the parties were referred to arbitration under Clause 64 of the General Conditions of Contract ("GCC"), and the plaint was directed to be returned to the appellants (plaintiffs).

2. The appellants, the Union of India through the General Manager, West Central Railway, Jabalpur, and the Divisional Engineer (South), West Central Railway, Bhopal, filed R.C.S. No. 7-B/2009 for recovery of Rs. 3,98,438.83. As pleaded, the respondent's tender was accepted and contract agreement No. A/2002-2003/W/41 dated 20.12.2002 was executed for the work of tiling of platform surface at Timarani, District Harda. The respondent did not complete the

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 7:26:35 PM

work within the stipulated time. After a notice of 7 days dated 27.02.2003 and a further notice of 48 hours, the contract was terminated at the risk and cost of the respondent on 17.03.2003. The left-over work, valued at Rs. 14,71,499/-, was got executed through M/s Bhawani Construction, Bhopal, at an extra cost of Rs. 3,98,438.83, which the appellants seek to recover from the respondent. A registered notice dated 06.05.2008, served on 10.05.2008, was not replied to, and the suit was filed on 20.01.2009.

3. The respondent filed two applications. The first, under Order 7 Rule 11 CPC, pleaded that the suit was barred by limitation; the learned trial Court rejected it on the ground that under Article 112 of the Limitation Act, 1963 a suit by the Government may be filed within thirty years. That finding is not under challenge before this Court. The second application was under Section 8 of the Act, on the ground that Clauses 63 and 64 of the GCC, forming part of the agreement, contain an arbitration clause. The appellants replied that Clause 64(1) permits arbitration to be invoked only by the contractor and not by the Railways. The learned trial Court noted that the existence of the arbitral clause in the agreement was accepted by both parties, held that the parties were bound to approach the arbitrator first, allowed the application and directed return of the plaint.

4. The appellants first approached this Court by W.P. No. 17409/2010 under Article 227 of the Constitution of India. By order dated 16.12.2011 the petition was dismissed as withdrawn, with liberty to avail the remedy of appeal under Order 43 Rule 1(a) CPC. The present appeal was filed on 29.01.2012.

5. Learned counsel for the appellants, submits that Clause 64(1) of the GCC gives the right to demand arbitration only to the contractor and none to the Railways; that a demand for risk and cost cannot be termed a dispute under the contract; that the learned trial Court erred in treating Clause 64 as an arbitration

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 7:26:35 PM

clause applicable to the appellants' claim; and that the decisions relied upon by the trial Court were rendered in contracts where both parties had the right to seek appointment of an arbitrator. He prays that the impugned order be set aside. This Court has heard learned counsel for the parties and perused the record.

6. The first question is whether an appeal lies at all. Section 37(1) of the Act provides:

"37. Appealable orders.(1) Notwithstanding anything contained in any other law for the time being in force, an appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:- (a) refusing to refer the parties to arbitration under section 8; (b) granting or refusing to grant any measure under section 9; (c) setting aside or refusing to set aside an arbitral award under section 34."

The order impugned is one allowing an application under Section 8 and referring the parties to arbitration. It is not an order refusing to refer the parties and finds no place in Section 37(1). The position was no different when the order was passed in 2010. Section 37(1) then also allowed an appeal only from the orders enumerated in it, "and from no others", and its enumeration, which related to measures under Section 9 and to the setting aside of awards under Section 34, did not include even an order refusing reference, much less one allowing it. The Supreme Court has noted in Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715, , that:

"Thus, an order which refers parties to arbitration under Section 8, not being appealable under Section 37(1)(a), would not be appealable under Section 13(1) of the Commercial Courts Act. Similarly, an appeal rejecting a plea referred to in

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

sub-sections (2) and (3) of Section 16 of the Arbitration Act would equally not be appealable under Section 37(2)(a) and, therefore, under Section 13(1) of the Commercial Courts Act."

7. Learned counsel for the appellants relies on Order 43 Rule 1(a) CPC, which reads:

"1. Appeals from orders.- An appeal shall lie from the following orders under the provisions of Section 104, namely- (a) an order under Rule 10 of Order 7 returning a plaint to be presented to the proper court except where the procedure specified in Rule 10-A of Order 7 has been followed;"

The provision applies to an order under Rule 10 of Order 7, that is, an order returning a plaint for presentation to the proper Court. The impugned order is not of that kind. The learned trial Court did not hold that it lacked jurisdiction and direct presentation of the plaint to another Court, it acted under Section 8 of the Act on the ground that the matter is the subject of an arbitration agreement, and referred the parties to arbitration. The direction to return the plaint is only consequential to that reference and does not alter the character of the order. The Act is a special enactment and Section 37(1) is a closed list. The liberty granted on 16.12.2011 to "avail remedy of appeal" did not decide, and could not decide, that an appeal lies; it left the appellants to such remedy as the law provides, and a right of appeal, being the creature of statute, cannot be conferred by liberty or consent. The appeal, as framed, is therefore not maintainable.

8. However, since this Court itself granted liberty on 16.12.2011, and the matter has been fully argued, this Court considers it appropriate to examine the merits as well, so that the parties are left in no doubt. On merits also, the appeal fails.

9. Section 8(1) of the Act provides:

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

"(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

The mandate is that the judicial authority "shall" refer the parties; refusal is permissible only on a finding that prima facie no valid arbitration agreement exists. Here, the existence of the arbitration agreement in Clauses 63 and 64 of the GCC was accepted before the trial Court (para 14 of the impugned order), and even in the grounds of this appeal the appellants' case is not that no arbitration agreement exists but that it cannot be invoked by the Railways. The relevant clauses, as reproduced in the impugned order, read:

Clause 63: "All disputes and difference of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the Contractor to the Railway."

Clause 64(1): "In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the Contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 63 of these conditions, the Contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

demand in writing that such dispute or difference be referred to arbitration."

Clause 64(1)(ii): "The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item-wise. Only such disputes or difference(s) in respect of which the demand has been made, together with counterclaims or set-off, shall be referred to arbitration and other matters shall not be included in the reference."

10. The claim in the suit is for the extra cost incurred in getting the left-over work executed after termination of the contract. Prima facie, it arises out of or in connection with the contract, after its determination, and concerns "the respective rights and liabilities of the parties", which are the words of the clauses quoted above, Clause 64(1)(ii) itself speaks of counter claims and set-off of the Railway. The appellants' contentions, namely that only the contractor can make the demand under Clause 64(1), that a claim for risk and cost is not a "dispute", and that the claim of the Railways cannot be referred, are objections to the scope and applicability of the arbitration clause to the appellants' claim. They are not contentions that no arbitration agreement exists. The respondent, in whom Clause 64(1) vests the right to demand arbitration, has himself sought reference of the dispute to arbitration by his application under Section 8.

11. Legally, the arbitration clause is considered an independent agreement embedded within the main contract (known as the doctrine of severability). Even if the principal terminates or cancels the main contract, the arbitration clause survives for the purpose of resolving disputes that arose while it was active, including claims for damages. The principal's civil suit is for the recovery of damages due to an alleged breach. Because calculating, validating, and awarding damages requires interpreting the contract terms and assessing performance, it is

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

inherently a contractual dispute. If the contractor does not challenge the termination, it simply means the validity of the termination may not be a point of contention in the dispute. However, it does not mean the contractor agrees with the principal's financial calculations or the amount of damages being claimed.

The arbitrator will still need to determine:

1. Whether a breach actually occurred that justifies damages.

2. The exact quantum (amount) of financial loss or damage suffered by the principal.

3. Whether the claimed damages are reasonable, direct, or restricted by the contract's terms (such as liquidated damages clauses).

12. The fact that the contractor has not explicitly challenged the termination itself does not change this requirement. A suit for the recovery of damages is a direct dispute arising out of the performance (or non-performance) of the contract, which falls squarely within the scope of standard arbitration clauses. If the principal himself for appointing authority for arbitrator therefor it is not necessary to mention a clause in agreement that he may apply for appointment of arbitrator himself therefor no force in argument that principal has no right to apply for appointment of arbitrator mean principal cannot opts the arbitration proceeding himself although the condition of arbitration apply equally to the both party if any dispute arose regarding the contract. An arbitration agreement naturally binds both parties. It is not legally necessary to explicitly state in the contract that a specific party (like the principal) has the right to apply for the appointment of an arbitrator. The right to refer a dispute to arbitration is inherent for both signatories.If the contract designates the principal (or a specific office, like a Managing Director) as the "Appointing Authority" who selects the arbitrator, this is merely a mechanism for how the arbitrator is chosen. It does not mean the

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

principal cannot also be the party who triggers the arbitration process. The argument that the principal "did not opt for arbitration" simply because the contract doesn't explicitly spell out their right to apply is weak and has no legal force. A party does not waive their right to seek arbitration just because they are also the designated authority responsible for appointing the panel or arbitrator.

13. Such objections are for the Arbitral Tribunal. Section 16(1) of the Act provides:

“(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”

In M/s GVV Constructions Private Limited v. Union of India & Others, 2026 INSC 976, decided on 08.09.2026, the Supreme Court, dealing with Clauses 63 and 64 of the Indian Railways General Conditions of Contract, held as follows in paragraphs 16, 18 and 20 (footnote numbers omitted):

“16. Another three-Judge Bench of this Court in Vidya Drolia and Others v. Durga Trading Corporation, harmonised the standard of review under Sections 8 and 11 of the Act and held that a court should decline reference only where it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid, or that the dispute is non-arbitrable; short of that, the governing maxim is “when in doubt, do refer.” This “eye of the needle” standard has since been applied consistently, in subsequent decisions by this Court in Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. (holding that limitation, being a mixed question of fact and law bound up with the Tribunal’s Section 16

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

jurisdiction, is ordinarily for the Arbitral Tribunal) and in In Re: Interplay Between Arbitration Agreements and the Indian Stamp Act, 1899 (holding by a seven-Judge Bench, that even insufficiency of stamping is a curable, evidentiary question for the Tribunal, and thus overruling N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.).”

“18. What emerges from the foregoing survey is that, under the Act, the question whether a particular claim is covered by, or falls outside, an “excepted matters” clause of a works contract is a matter squarely within the competence of the Arbitral Tribunal under Section 16, and not a question for a court exercising even the wider, appointment-stage jurisdiction under Section 11, much less for a court exercising the discretionary jurisdiction of judicial review under Article 226 of the Constitution, whose very engagement with the merits of the dispute, in the present case, was declined on the ground that it involved complicated questions of fact.”

“20. Whether the dispute regarding termination is, in whole or in part, an “excepted matter” outside the Arbitrator’s jurisdiction, and, if so, what remedy survives to the appellant in that behalf, are questions that Section 16 of the Act commits to the Arbitrator in the first instance. It was not open to the Division Bench, in the exercise of its writ appellate jurisdiction, to prescribe in advance the manner of, or to place constraints upon, that adjudication. For yet another reason, the Division Bench ought not to have made such an observation as the issue of arbitrability of termination of agreement was not an issue before it. Accordingly, the issue is answered.”

14. Applying the above to the present case, it cannot be said that it is manifestly and ex facie certain that the arbitration agreement is non-existent or

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 4:26:35 PM

invalid, or that the claim of the appellants is non-arbitrable. At the most, whether the claim of the Railways for risk and cost can be taken to arbitration under Clause 64, whether the timelines in Clause 64(1) stand in the way, and whether any part of it falls under the "excepted matters" of Clause 63, are questions which are at best arguable, and in such a situation the governing rule is "when in doubt, do refer". The learned trial Court was therefore bound by Section 8(1) to refer the parties. The contention that the decisions relied upon in the impugned order arose in contracts where both parties could seek appointment of an arbitrator does not help the appellants, because the order stands justified on the mandate of Section 8(1) itself, read with the law laid down above. No jurisdictional or legal error is shown in the impugned order.

15. It is clarified that the observations made in this judgment are prima facie and are confined to the question of reference under Section 8 of the Act. They shall not bind the Arbitral Tribunal, before which both parties are free to raise all their contentions in accordance with law, including those relating to the scope of Clauses 63 and 64 of the GCC, and the competence of the Tribunal under Section 16 of the Act.

16. In the result, the miscellaneous appeal fails and is dismissed. The order dated 12.08.2010 passed in R.C.S. No. 7-B/2009 is affirmed. There shall be no order as to costs. Pending applications, if any, stand disposed of.

(PRADEEP MITTAL)
JUDGE

Praveen

Signature Not Verified
Signed by: PRAVEEN
Signing time:
11/6/2026 7:26:35 PM