

OCD-4

AP-COM/152/2025
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

ILEAD FOUNDATION
VS
STATE OF WEST BENGAL

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 5th March, 2025.

Appearance:

Mr. Chayan Gupta, Adv.
Mr. Rittick Chowdhury, Adv.
Mr. Dwip Raj Basu, Adv.
. . .for the petitioner.

Mr. Noelle Banerje, Adv.
Mr. Ritoban Sarkar, Adv.
Mr. Paritosh Sinha, AoR.
Mr. Arindam Mondal, Adv.
Ms. Swagata Ghosh, Adv,
. . .for the respondent.

The Court:

1.This is an application for appointment of a learned Arbitrator to adjudicate the disputes arising out of a Memorandum of Understanding (in short MoU) entered by and between the petitioner and the respondent for execution of a project floated by the Ministry of Rural Development, Government of India. The petitioner claims to be a registered project implementation agency. The MoU was executed on August 30, 2017. Clause 9.1, contains the arbitration clause. The petitioner raised a dispute with regard to non-payment of dues. It is submitted that, upon completion of the first phase, payment was made. When the petitioner claimed the payment for the second phase, the same was denied on the ground that the petitioner had failed to execute the project in terms of the MoU,

thereby committing breach of the MoU. To such denial, the petitioner filed its response. Challenging the refusal on the part of the respondent to make the payment, the petitioner approached the High Court under Article 226 of the Constitution of India. The writ petition was registered as WPA No.25102 of 2022. By a judgment dated November 17, 2023, the writ petition was dismissed as not maintainable. It was held that, the very nature of the allegations, the defences and counter allegations by the parties, required adjudication upon weighing materials and evidence. Scanning of evidence being entirely beyond the domain of the Writ Court, His Lordship refused to entertain the writ petition upon recording the nature of the dispute and the disputed questions of facts involved. His Lordship, however, held that nothing in the order would prevent the parties from approaching the appropriate arbitral tribunal or any other forum, if they were otherwise entitled to in law, for adjudication of the disputes between the parties. Upon dismissal of the writ petition, the petitioner invoked the arbitration clause, by a notice dated January 8, 2025. Despite receipt of the said notice, the respondent did not take any steps, and as such, this application has been filed for appointment of an Arbitrator.

2. Ms. Banerjee, learned advocate for the respondent, submits that Clause 9.1 is not an arbitration clause. The same is vague. The applicable law has not been mentioned. The seat and venue has not been mentioned. Thus, the mere use of the expression 'Arbitrator' would not make the said clause an arbitration agreement between the parties. Further reliance has been placed on a notification dated September 12, 2023, by which the project director PBSSD clarified that the use of the expression 'Arbitrator' would not cover the definition

of arbitrator, under the Arbitration and Conciliation Act, 1996 and the expression should be read as 'adjudicator'.

3. Clause 9 of the MoU is set out hereinbelow for convenience.

“9. Arbitration and Applicable Laws:-

9.1 The parties hereby agree that any dispute arising in connection with this MoU shall first be addressed mutually by the Parties. If the said Parties are unable to resolve the dispute mutually, the dispute shall be referred to the Vice- Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, who will act as arbitrator for this purpose and whose decision shall be final and binding on all parties.

9.2 In case an aggrieved party seeks judicial remedy, and where PBSSD is the First Deponent, the petition shall be filed in jurisdiction of Calcutta High Court.”

4. The Clause provides that disputes should be first attempted to be addressed mutually. If the parties were unable to resolve the disputes, the disputes shall be referred to the Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, who will act as an Arbitrator for the purpose and whose decision shall be binding. In my understanding of the above clause, the intention of the parties to refer disputes not settled mutually, to an Arbitrator, is available. It is a different matter altogether that the Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, was the named Arbitrator. It was a common practice that in the dispute resolution clause, the party/owner of the project, named the Arbitrator.

Having a named arbitrator does not make the clause invalid insofar as, the meeting of minds to refer a dispute to arbitration is concerned. It only results in failure of the mechanism provided by application of Section 12 (5) read with the Vth and VIIth schedules of the 1996 Act. It is a different question altogether that unilateral appointment of a named arbitrator by a party interested in the outcome of an arbitral proceeding, is no more permissible in law. The Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, who was named in the said clause to be an Arbitrator is incapable to function as such under the law, but the clause does lose its character of an arbitration agreement.

5. Reference is made to the decision of ***Perkins Eastman Architects DPC and Another vs. HSCC (India) Ltd.*** reported in ***2019 SCC OnLine SC 1517*** and ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in ***2024 SCC OnLine SC 3219***.

6. Ms. Banerjee's contention that the applicable law guiding the arbitration, the seat and other ingredients of an arbitration agreement should have been mentioned, for the clause to be treated as an arbitration clause, is not acceptable.

7. In the matter of ***Jagdish Chander vs Ramesh Chander & Ors*** reported in ***AIR 2007 SC 107, the Hon'ble Apex Court held as follows:-***

“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 vs. U.P. Small Industries Corporation Ltd.* [1999 (2) SCC 166] and *Bihar State Mineral Development Corporation 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 an willingness to be bound by the decision of such tribunal on such disputes, it is 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.”

8. In the matter of ***Solaris Chem Tech Industries Ltd Vs Assistant Executive Engineer Karnataka Urban Water Supply and Drainage Board & Anr.*** reported in **2023 INSC 916**, the Hon’ble Apex Court held as follows:-

“**18.** Sub-section (1) of Section 7 indicates that an arbitration agreement is an agreement by 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”. It is well settled that in determining whether there is an arbitration agreement, the terms of the contract between the parties must be read as a whole. The 1996 Act does not prescribe a certain form of an arbitration agreement. The use or the absence of the word ‘arbitration’ is not conclusive and the intention of the parties to resolve the disputes through arbitration should be clear from the terms of the clause. In *Jagdish Chander vs Ramesh Chander*, the Court

summarised the relevant factors for determining whether an agreement is an arbitration agreement within the meaning of S. 7 of the 1996 Act. The Court held:

“(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.” (emphasis added).”

9. The Hon'ble Apex Court has held that for an arbitration agreement to be a binding clause, neither the law nor the seat or venue has to be mentioned. As long as the clause indicated that the parties had agreed and there was a meeting of minds to refer any dispute to a private tribunal for adjudication of the disputes, the said clause would constitute an arbitration clause. In this particular case, the clause provides that the parties should first try to settle any disputes mutually and in case of failure of an amicable settlement, the dispute shall be referred to the Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, who will act as an Arbitrator for the purpose and whose decision shall be final and binding on all parties. Thus, the parties agreed to refer all disputes which remain unresolved, for adjudication by the Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, who would act as an Arbitrator and whose decision shall be final and binding upon them.

10. With regard to the notification issued on September 12, 2023 clarifying the interpretation of the expression 'Arbitrator' in Clause 9.1 of the MoU as adjudicator, this Court is of the view that the subsequent notification will not change the terms and conditions of the contract entered into between the parties for a period of three years, which ended on 2020. The notification cannot be applied retrospectively and unilaterally.

11. Under such Circumstances, this Court is of the view that an Arbitrator should be appointed by the Court as the mechanism has failed and the Vice Chairman, PBSSD & Principal Secretary, TET & SD Department, Government of West Bengal, being the named and chosen Arbitrator of the respondent who is also a party interested in the outcome of the arbitration proceeding cannot act as the Arbitrator being de jure unable to perform.

12. Under such circumstances, the Court appoints Mr. Sayantan Bose (9830775264), learned Advocate as the Arbitrator, to arbitrate the dispute. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

13. The learned Arbitrator shall fix his own remuneration as per the provisions of the Arbitration and Conciliation Act.

14. AP-COM/152/2025 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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