2026 INSC 384

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO OF 2026
(@ Special Leave Petition (Civil) No.19026 of 2023)

NAGREEKA INDCON PRODUCTS PVT. LTD. …APPELLANT(S)

VERSUS

CARGOCARE LOGISTICS (INDIA) PVT. LTD. …RESPONDENT(S)

J U D G M E N T

SANJAY KAROL J.

Leave Granted.

2. The short but significant question arising in this appeal is, when the arbitration clause in the contract uses the word '*can*', does it necessitate the reference of all disputes to arbitration or is recourse to other dispute resolution mechanisms, including that of the Civil Court, open for the parties.

3. The facts of this case lie in a narrow compass. The appellant is a manufacturer of aluminium foil containers and kitchen rolls. In the course of business, it received a contract for purchase of corrugated boxes of aluminium foil from M/s. American Alupack Industries[1]. The eventual product was to be delivered to South Carolina, USA, and regarding such transport, the appellant contracted with the respondent for a total consideration of Rs.2,23,550/- which was inclusive of freight charges, ocean freight, ACD charges, container maintenance charges etc. The total consignment was of six containers, out of which four were delivered successfully prior to the dispute arising between the parties. When it came to the delivery of the fifth container, the dispute in question arose. Apparently, when the respondent delivered the fifth consignment to AAI, the latter failed to pay the requisite amount or, as per established practice, produced the original bill of lading at the time of delivery. Despite this the respondent handed over the goods to AAI on 21st October 2020 resulting into financial loss to the appellant as did not receive payment for supply of the goods to the tune of USD 28064.86. On 10th December 2020 the appellant raised this issue with the respondent, who asserted the factum of a differing past practice of handing over the goods without production of the original bill of lading and denied any liability.

[1] 'AAI'

It may be noted here that the bills of lading issued by the respondent contained as Clause 25, a dispute resolution mechanism captioned arbitration which reads as under:

> *"***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."

In view of the above dispute, by notice of invocation dated 10th March 2022 the appellant suggested the matter be referred to arbitration for a total amount of USD 13230.86. Apart from replying to the merits of the notice, the respondent also disputed the reference to arbitration suggesting that the clause reproduced *supra* is not a mandate but leaves open the option to the parties to take the matter to arbitration.

4. The appellant preferred Arbitration Application No.168 of 2022 before the High Court of Judicature at Bombay, seeking appointment of sole arbitrator, which was disposed of in terms of the impugned judgment dated 23rd February 2023 whereby the learned Single Judge held as follows:

> "…However, in the present case when it is manifestly and ex-facie certain that there is no agreement between the parties to mandatorily refer the disputes that have arisen between them for arbitration, I am unable to be persuade myself by the submission of the learned counsel for the Applicant that the

clause involved make arbitration as a compulsory choice for the parties for resolution of disputes.

18] In the wake of above discussion, since I am of the view that Arbitration clause, which had used the word 'can', do not make it imperative for the parties to be referred for arbitration and specifically when the Respondent has refused to be referred for arbitration, in the wake of the choice being available, in terms of the clause contained in the agreement. The Arbitration Application deserve to be dismissed, as it cannot be construed as amounting to 'Arbitration' as the mode of" resolving disputes, in absence of affirmation at the end of the opposing party.
Hence, Arbitration Application No.168 of 2022 is dismissed."

5. We have heard learned counsel for the parties.

5.1 The case set up by the appellant is that Section 7 of the Arbitration and Conciliation Act 1996[2] does not prescribe any form for an arbitration agreement. Apart from that, the intent of the parties to have arbitration be the chosen method of dispute resolution is evident from the bill containing a clause to that effect. The heading of the clause acquires importance in view of the judgment of this Court in ***Eastern Coalfields v. Sanjay Transport Agency and Another***[3], it has also been held in ***Babanrao Rajaram Pund v. M/s Samarth Builders And Developers***[4] ***and Enercon (India) Ltd. v. Enercon GmbH***[5] that a pragmatic

[2] A&C Act
[3] 2009 (7) SCC 345
[4] 2022 (9) SCC 691
[5] 2014 (5) SCC 1

approach should be taken to interpretation of arbitration clauses. The drafting of such a clause, in view of the intention demonstrated otherwise, cannot be taken advantage of by any party [See: ***Visa International Ltd. v. Continental Resources USA Limited***[6]]. In reference to ***Vidya Drolia v. Durga Trading Corporation***[7], it is submitted that at the stage of Section 11 application only the existence of the clause is to be looked into, in other words a *prima facie* view is to be taken. Reliance is also placed on the observation that when there is a doubt, Courts should lean towards referring the matter to arbitration. Further, by relying on a judgment of a Delhi High Court in ***Panasonic India (P) Ltd. v. Shah Aircon***[8], it is submitted that '*can*' does constitute a mandatory arbitration clause. Further, strength is drawn from appointment of an arbitrator by this Court in ***Zhejiang Bonly Elevator Guide Rail Manufacture Company Limited v. Jade Elevator Components***[9]**.** When the dispute resolution clause stated "*arbitration or the court*".

5. 2 *Per contra, inter alia* the respondents submitted that clause 25 of Bill of lading does not constitute a valid

[6] 2009 (2) SCC 55
[7] 2021 (2) SCC 1
[8] 2022 SCCOnline Del 3288
[9] 2018 (9) SCC 774

arbitration clause as it does not convey definitive agreement between the parties to that end. With reference to ***K.K. Modi v. K.N. Modi***[10] and ***Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd.***[11] it is submitted that the necessary elements of a valid arbitration clause has been set out in these judgments and the same are not met in the present case. Further, relying on ***BGM and M-RPL-JMCT(JV) v. Eastern Coalfields Ltd***[12] and ***Jagdish Chander v. Ramesh Chander***[13] it is argued that words such as '*can*' do not constitute a binding arbitration agreement**.** Further ground of attack on part of the respondent is that Clause 25 provided for each party appointing one arbitrator but does not contemplate the two arbitrators so appointed, collectively appointing the third, presiding arbitrator and this position is in derogation of Section 10 of the A&C Act.

5.3 In the light of the afore-stated submissions, we now proceed to consider the question formulated in paragraph 2.

6. As commercial transactions grow to involve more and more moving parts, naturally resulting in heightened complexity,

[10] 1998 (3) SCC 573
[11] 2003 (7) SCC 418
[12] 2025 SCCOnline SC 1471
[13] 2007 (5) SCC 719

time has become a prized commodity and possession. To that end, Alternate Dispute Resolution mechanisms, have deservedly become the preferred medium, overcoming the otherwise common factors of delay, cost and also its openness to public, which can have detrimental effect on the commercial value of the dispute. It has become a preferred medium while keeping its most essential factor at the forefront, that is, party autonomy, or its inherently voluntary characteristic. The concurring opinion of P.S. Narasimha, J., in ***Cox & Kings Ltd. v. SAP India (P) Ltd.***[14], succinctly captures the *sine qua non* for 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*." 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 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.

7. Since the judgment impugned before us was an application for appointment of arbitrator, it is apposite to refer to the duty cast upon the Court in deciding such an application.

[14] (2024) 4 SCC 1

The main dispute before us swings on the interpretation of the word '*can*'. As ordinarily understood, it means capacity, capability or factual possibility. The Oxford Learner's Dictionary discusses the word '*can*' as a word that is "*used to say that it is possible for someone or something to do something, or for something to happen*"[15]. Similarly, Merriam Webstar says '*can*' is a word that is "*used to indicate possibility*"[16]. Lastly, we may refer to the Britannica Dictionary, it defines the word as follows: "*to be able to (do something)*"; "*to know how to (do something)*"; "*to have the power or skill to (do something)*"[17]. Having understood the meaning of the word, it may be observed that its use in judicial interpretative context is limited. Most often the words '*may*' or '*shall*' are used. Normally, the former denotes discretion but not compulsion to act, but then it is all contextual. Put differently, the authority is permitted to do something but is not required to. If it is the requirement that is to be denoted, '*shall*' is the most appropriate word which signals a mandate or obligation.

7.1 In ***SBI General Insurance Co. Ltd. v. Krish Spg.***[18]**,** a bench of three judges held as under:

"114. The use of the term "examination" under Section 11(6-

[15] https://www.oxfordlearnersdictionaries.com/american_englist/can1
[16] https://www.merriam-webstar.com/dictionary/can
[17] https://www.britannica.com/dictionary/can
[18] (2024) 12 SCC 1

A) as distinguished from the use of the term "rule" under Section 16 implies that the scope of enquiry under Section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the Arbitral Tribunal to "rule" under Section 16. The prima facie view on existence of the arbitration agreement taken by the Referral Court does not bind either the Arbitral Tribunal or the Court enforcing the arbitral award.

…

117. In view of the observations made by this Court in *Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re* [*Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re*, (2024) 6 SCC 1 : 2023 INSC 1066] , it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] and adopted in *NTPC Ltd.* v. *SPML Infra Ltd.* [*NTPC Ltd.* v. *SPML Infra Ltd.*, (2023) 9 SCC 385 : (2023) 4 SCC (Civ) 342] that the jurisdiction of the Referral Court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re* [*Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re*, (2024) 6 SCC 1 : 2023 INSC 1066] .

…

127. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the Arbitral Tribunal is constituted by the Referral Court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in

> matters pertaining to Section 11. Seen thus, if the Referral Courts go into the details of issues pertaining to "accord and satisfaction" and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings."

7.2 In ***Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd.***[19]**,** the Court held:

> **"21.** Before we conclude, we must clarify that the limited jurisdiction of the referral courts under Section 11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time consuming and costly arbitration process. This is possible in instances, including but not limited to, where the claimant canvasses the adjudication of non-existent and mala fide claims through arbitration."

8. Since the discussion made in the impugned judgment pertained only to whether Clause 25 did or did not constitute a binding arbitration agreement between the parties, it can be observed that the learned Single Judge kept to the jurisdictional confines as mandated by the A&C Act. Next, we consider the rival contentions of the parties.

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 ***Eastern Coalfields*** (*supra*), it has been observed

[19] (2025) 2 SCC 192

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*** *(supra)* 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 judgement.

9.3 In ***Visa International*** (*supra*) the dispute resolution clause provided that any disputes arising between the parties, if any, shall be settled in accordance with the provisions of the A&C 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)*** (*supra*) 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 3rd 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*** (*supra*) 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*** (*supra*) 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.*** (*supra*) 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***[20]; ***Provash Chandra Dalui v. Biswanath Banerjee***[21]] 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,

[20] (1974) 2 SCC 231
[21] 1989 Supp (1) SCC 487

> (*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

[22] 2025 SCC OnLine SC 2354
[23] (2022) 14 SCC 345

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.

Pending application(s) if any stands disposed of.

…….J.
(SANJAY KAROL)

…….J.
(NONGMEIKAPAM KOTISWAR SINGH)

New Delhi;
17th April 2026