REPORTABLE

2026 INSC 342

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). OF 2026

(Arising out of SLP (C) No. 36889 OF 2025)

MAHARASHTRA STATE ELECTRICITY DISTRIBUTION COMPANY LIMITED (MSEDCL) & ORS. **...APPELLANT(S)**

VERSUS

R Z MALPANI **...RESPONDENT**

J U D G M E N T

J.K. MAHESHWARI, J.

1. Leave granted.

2. The instant appeal is directed against the judgment dated 01.10.2025 of the Bombay High Court (hereinafter referred to as "**High Court**") in Arbitration Application (L) No. 1417 of 2025.

3. By the impugned order, the High Court disposed of the application filed by the Respondent under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**1996 Act**") and appointed a sole arbitrator to adjudicate upon the disputes and differences between the parties.

FACTS

4. The Appellant, Maharashtra State Electricity Distribution Company Limited (MSEDCL) is a State Government company, which is a fully-owned corporate entity owned by the Government of Maharashtra. It is an electricity distribution utility which distributes electricity throughout Maharashtra including a few suburbs of Mumbai. The Respondent is a partnership firm engaged in civil construction and other allied businesses.

5. The Appellant floated a Tender dated 11.08.2021 bearing Code EEC/BND/TECH/42/21-22 for 'Civil & Interior work – Providing / renovating 134 CFC Centres at various O&M Divisions of SEDCL throughout the State'. (hereinafter referred to as the "**Tender**") Total estimated cost of the tender was ₹17,41,37,020. The Tender document contained four different constituents, being (i) Instructions to Tenderers & Qualifying Criteria (ii) General Specifications (iii) Technical Specifications (iv) Special Conditions of Contract. (collectively referred to as "**Tender documents**") The Tender documents also contained an agreement pro-forma. The timeline for the tender process as per the Tender documents was as follows:

Particulars	**Date / Time**
Bid Start Date	15.07.2011, 13:00
Bid End Date	06.08.2021, 11:30
Techno-commercial Bid opening	18.08.2021, 15:00
Price Bid opening on	Will be declared later
Winner Selection Date	18.08.2021, 15:30

6. The Respondent participated in the tender process and submitted a bank guarantee of ₹17,45,100 valid up to 06.03.2022. Respondent then submitted its bid/quotation against the said Tender with a validity of 120 days on 03.09.2021. Upon opening of the techno-commercial and price bids, the Appellant, *vide* letter bearing No. CEC/CCO/Tech/350 dated 16.11.2022 (hereinafter referred to as "**LOI**") accepted the bid of the Respondent and entrusted the work under the said tender process to the Respondent for a value of ₹17,76,19,699.

7. On 29.11.2022, the Respondent furnished a further bank guarantee to the tune of ₹44,40,500 as security deposit valid up to 27.05.2023. The Appellant wrote to the Respondent on 13.12.2022 requesting that bank guarantee be furnished on stamp paper of ₹500 value instead of ₹100 and sent a reminder in that respect on 31.12.2022. The Respondent submitted revised

bank guarantee on stamp paper with value of ₹500 on 31.01.2023.

8. On 02.02.2023, the Holding Company of the Appellant wrote to the Executive Engineer of the Appellant seeking correction in the forwarding letter of the bank guarantees. Pursuant thereto, the Respondent sent a corrected forwarding letter with the bank guarantees on 06.02.2023.

9. Thereafter, the Respondent sent various letters and representations to the Appellant seeking issuance of a Work Order in terms of the LOI, but no Work Order was issued by the Appellant. On 08.08.2023, the Respondent submitted revised / renewed bank guarantees as security deposit.

10. Despite repeated requests being made by the Respondent, the Work Order was not issued by the Appellant and ultimately, on 05.08.2024, the Respondent terminated the contract, citing Appellant's failure to hand over the sites for the work to begin. Thereafter, on 30.08.2024, the Respondent issued a notice under Clause 23 of the Special Conditions of Contract in the Tender documents, seeking reference of the disputes to arbitration and seeking compensation to the tune of ₹4,89,85,500.

11. On 27.09.2024, the Appellant formally cancelled the Tender and EMD, Security Deposit submitted by the Respondent was duly refunded on 24.10.2024. It is pertinent that the cancellation itself was not challenged by the Respondent availing public law remedies and instead, the Respondent chose to pursue its remedy by means of arbitration under the Tender documents.

12. On 01.10.2024, the Respondent again invoked the arbitration agreement contained in Clause 23 of the Special Conditions of Contract in the Tender documents. On 04.11.2024, the Appellant replied to the Respondent's arbitration notice and specifically stated therein that Tender documents along with LOI are not sufficient to form a valid contract or arbitration agreement. On 06.11.2024 and 03.12.2024, the Appellant informed the Respondent that since the EMD and Security Deposit has been refunded, no claims or dues are pending.

13. At this stage, the Respondent filed an application under Section 11 of the 1996 Act before the High Court being Arbitration Application No. 1417 of 2025, seeking appointment of an arbitrator. Notice was issued by the High Court on 21.01.2025 and service was complete, but on 26.06.2025 and 17.07.2025,

the Appellant did not appear before the High Court. The High Court *vide* the impugned *ex-parte* order on 01.10.2025 appointed one Mr. Drupad Patil, Advocate as the Sole Arbitrator to adjudicate the disputes between the parties.

FINDINGS OF THE HIGH COURT

14. The High Court found that the offer made by the Respondent in response to the Tender was accepted by the LOI dated 16.11.2022 which resulted in a duly concluded contract. Existence of arbitration agreement can be discerned from correspondence between the parties and the scope of enquiry in Section 11 proceedings is limited to examining the existence of a valid arbitration agreement. It was observed by the High Court that Appellant in their reply to the arbitration notice has not denied the existence of an arbitration agreement, hence directed appointment of an arbitrator.

ARGUMENTS ADVANCED

15. Mr. Vikas Singh, learned senior counsel for the Appellants has vehemently argued that there exists no concluded contract between the parties, much less an arbitration agreement under the meaning of Section 7 of the 1996 Act, and as such, the High

Court has erred in directing appointment of an arbitrator. He submitted the impugned order is patently erroneous in recording that the Appellant had not disputed the existence of an arbitration agreement in their reply to the notice under Section 21 of the 1996 Act. Drawing our attention to the letter dated 04.11.2024 of the Appellant, it is stated that a specific plea was taken about non-existence of arbitration agreement at the very first instance by the Appellant. He further submitted that in the absence of a concluded contract between the parties, there can be no question of existence of an arbitration agreement complying with Section 7 of the 1996 Act. In reference to the Tender documents with the LOI, it is submitted that looking to the material does not evince a concluded contract since the LOI itself is contingent in nature, it provides that a detailed Work Order and formal agreement was to follow and as such it is a precursor to a contract and not the contract itself. He has placed reliance on the recent judgement of this Court in ***State of Himachal Pradesh and Anr. v. OASYS Cybernatics Pvt. Ltd.***[1] and the judgement of ***South Eastern Coalfields Limited and Ors. v. S. Kumar's Associates AKM (JV)***[2] in support of this argument.

1 2025 SCC OnLine SC 2536.
2 (2021) 9 SCC 166.

16. The Appellant has argued that, assuming *arguendo*, even if the LOI is construed to be a contract creating legal relationship, mere reference in the LOI to the terms of the Tender documents would not have the effect of importing the arbitration clause as contained therein. Further, learned senior counsel has drawn our attention to the judgement of this Court in ***NBCC (India) Ltd. v. Zillion Infraprojects Pvt. Ltd.***[3] to submit that mere reference to another document containing an arbitration clause is not sufficient unless the arbitration clause is specifically incorporated in the subsequent document. He has submitted, therefore, that the instant appeal deserves to be allowed and the impugned order passed by the High Court warrants interference by this Court.

17. Appearing for the Respondents, learned counsel Mr. Abhijit A. Desai has argued with equal force that the instant appeal warrants dismissal since an order appointing an arbitrator is final and non-appealable as per Section 11(7) of the 1996 Act. He submits that this Court in a special leave petition arising out of such appointment, must exercise caution while interfering against appointment of an arbitrator and the tribunal has the jurisdiction to decide on its jurisdiction under Section 16 of the

3 (2024) 7 SCC 174.

1996 Act in light of the principle of *Kompetenz-Kompetenz*. He has submitted that the instant case is a feeble attempt at delaying arbitration proceedings by the Appellant who has chosen not to appear before the High Court despite adequate service of notice. He has further argued that the existence of an arbitration agreement is clear from a conjoint reading of: (i) Clause 23 of the Special Conditions of the Tender documents; (ii) Respondent's bid dated 03.09.2021; (iii) LOI dated 16.11.2022 accepting the Respondent's bid. It is submitted that furnishing and repeated renewal of bank guarantees by the Appellant, exchange of correspondence regarding renewal of bank guarantees would further show that there was a concluded contract between the parties.

18. Since an arbitration agreement can be formed by exchange of communication under Section 7(4)(b) of the 1996 Act, a formally executed commercial contract is not necessary and tender conditions containing an arbitration clause, once accepted and acted upon, form a valid arbitration agreement under Section 7 of the 1996 Act. Learned counsel has placed reliance on the judgement of this Court in ***Office for Alternative Architecture***

v. Ircon Infrastructure and Services Ltd.[4] to argue that the scope of scrutiny by the Court in an application under Section 11 of the 1996 Act is circumscribed by sub-section (6A) thereto and as such, unnecessary judicial interference in arbitration proceedings is not warranted. Since the question relates to formation of the contract, it must be left to the arbitrator to decide in an application under Section 16 of the 1996 Act as held by this Court in ***Maharshi Dayanand University v. Anand Coop. L/C Society Ltd.***[5] Much emphasis has been laid on the judgement of this Court in ***UNISSI (India) (P) Ltd. v. Post Graduate Institute of Medical Education and Research***[6] to argue that where the tender conditions contain an arbitration clause and the tender has been acted upon by the parties, it cannot be said that there existed no concluded contract and consequently, no arbitration agreement. Lastly, it has been submitted that cancellation of the tender itself does not extinguish the arbitration agreement between the parties and the said cancellation is a subject matter of arbitration. As such, he has urged that the instant appeal warrants dismissal.

4 2025 SCC OnLine SC 1098.
5 (2007) 5 SCC 295.
6 (2009) 1 SCC 107.

ANALYSIS

19. After hearing learned counsel for the parties and having gone through the documents on record, the short question which falls for our consideration in the instant appeal is *whether, on a prima facie view, there exists an arbitration agreement between the parties and as such, whether the reference to arbitration under Section 11 by the High Court warrants interference by this Court?*

20. The law on appointment of an arbitrator under Section 11 of the 1996 Act has undergone windfall change in the recent years, especially after the insertion of sub-section 6A therein w.e.f. 23.10.2015 which confines the Court's jurisdiction to the examination of existence of an arbitration agreement. Initially, this Court in ***Vidya Drolia & Ors. v. Durga Trading Corporation***,[7] had developed what came to be known as the 'ex-facie' test, holding in clear terms that while scope of judicial review and interference by Courts at the Section 11 stage is extremely limited, the Courts may interfere where it is 'manifestly

7 (2021) 2 SCC 1.

and ex-facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable'. The 'eye of the needle' test was propounded by the judgement of this Court in ***NTPC Ltd. v. SPML Infra Ltd.***[8] to hold that limited scrutiny at the pre-arbitral stage by the referral court through the 'eye of the needle' must be done in order to protect the parties from being forced to arbitrate a matter which is demonstrably non-arbitrable. Subsequently, however, a co-ordinate bench of this Court in ***SBI General Insurance Co. Ltd. v. Krish Spg.***,[9] relying on the seven-judge bench decision in ***Interplay Between Arbitration Agreements under Arbitration Act, 1996 & Stamp Act, 1899, In re,***[10] has held that the 'ex-facie meritless' and 'eye of the needle' tests cannot be said to be in conformity with the principles of modern arbitration and they would not apply after the decision of the seven-judge bench, since even though they endeavour to minimise judicial interference, yet require the Courts to enter into a factual examination of contested facts and evidence, however minimal. Relevant portion of the judgement in ***SBI General Insurance Co. Ltd.*** is quoted herein for reference:

8 (2023) 9 SCC 385.
9 (2024) 12 SCC 1.
10 (2024) 6 SCC 1.

> "*114. In view of the observations made by this Court in In Re : Interplay (supra), 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 (supra) and adopted in NTPC v. SPML (supra) 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 In Re : Interplay (supra).*
>
> ....
>
> *118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.*"

21. As such, the pronouncement of this Court in ***SBI General Insurance Co. Ltd.*** (Supra) lays down a clear and comprehensive explanation about the scope of examination at the stage of Section 11 proceedings: it is limited to finding a *prima facie* existence of arbitration agreement and nothing beyond it. Questions of 'accord and satisfaction', limitation, dishonesty and frivolity, arbitrability of the subject-matter are to be left to the adjudication by the arbitral tribunal under Section 16 of the 1996 Act which is a reflection of the doctrine of '*Kompetenz-Kompetenz*' or '*compétence de la compétence*'. It is therefore

incumbent upon us to only examine the *prima facie* existence of an arbitration agreement.

22. At the outset, it would be apposite to extract the arbitration agreement purportedly contained in Clause 23 of the Special Conditions of Contract in the Tender documents. It reads as thus:

> "***23. Arbitration Clause:***
>
> ***a. The matters to be determine by the Chief Engineer:***
>
> *All disputes and differences 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 C. E. and the C. E. shall [within 120 days) after receipt of the contractor's representation make and notify decisions of all matters referred to by the contractor in writing.*
>
> ***b. Demand for Arbitration:***
>
> *i) 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, the dispute or difference on any account or as to the withholding by M.S.E.D.C.LTD. of any certificate to which the contractor may claim to be entitled to or if the C. E. fails to make a decision (within 120 days), then and in any such case, the contractor (after 120 days) but within (180 days) of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference to be referred to arbitration.*
>
> *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 dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or*

set off, shall be referred to arbitration and other matters shall not be included in the reference.

a) The arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Company.

b) The claimant shall submit his claim stating the facts supporting the claims along with all relevant documents and the relief or remedy sought against each claim Within a period of 30 days from the date of appointment of the Arbitral Tribunal.

c) The Company shall submit its defense statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from the Tribunal thereafter unless otherwise extension has been granted by the Tribunal.

iii) No new claim shall be added during the proceedings by either party. However, a party may amend or supplement the original claim or defense thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

iv) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Company, that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Company shall be discharged and released of all liabilities under the contract in respect of these claims.

c. Obligation during pendency of Arbitration:

Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Company shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should be continued during arbitration proceedings.

In cases where the total value of all claims in question added together does not exceed Rs.1,00,00,000/- (Rs. One Crore) the Arbitrate Tribunal shall consist of a Sole Arbitrator who shall be either the C.E. of the Company or serving or retired officer of the Company/Government not below the grade of C.E. or equivalent nominated by the Chairman of the Company in that behalf. The Sole Arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by the Company.

i) In cases the value of the claim exceeds Rs. 1,00,00,000/- (Rs. One Crore) as above, the Arbitral Tribunal shall consist of panel of 3 serving or retired officers of M.S.E.D.C.LTD. /Govt not below the grade of C.E./CA.O. as the Arbitrators. For this purpose, the Company will send a panel of more than 3 names of arbitrators of one or more department of the Company/Govt. to the contractor who will be asked to suggest to the Chairman at least 2 names for appointment as contractor's nominee. The Chairman shall appoint at least one of them as the contractor's nominee and will also appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the presiding arbitrator from amongst the three [3) arbitrators so appointed. While nominating arbitrators, it will be necessary to ensure that one of them is or has worked in Accounts department.

ii) If one or more arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the Chairman fails to act without undue delay. The Chairman shall appoint new arbitrators to act in his/their place in the same manner in which the earlier arbitrator/s had been appointed. Such reconstituted Tribunal, may, as its discretion proceed with the reference from the stage at which it was left by the previous arbitrator(s).

iii) The Tribunal shall have powers to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal

shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay.

iv) While appointing arbitrator(s) as above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Company's servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings or the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

v) Arbitral award shall state item wise, the sum and reasons upon which it is based.

vi) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award and interpretation of specific point of award to tribunal within 30 days of receipt of the award.

vii) A party may apply to Tribunal within 30 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings, but omitted from the arbitral award.

viii) In case of the Tribunal, comprising of three members any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

ix) Where the arbitral award is for payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

x) The cost of the arbitration shall be borne equally by the respective parties. The cost shall inter-alia include fees of the arbitrators as per the rates fixed by the Company from

time to time. Provided that the fees payable per arbitrator for claims up to Rs. One Crore, shall not exceed Rs. 2000/- per sitting subject to a maximum of Rs. 25,000/- and the fees payable per arbitrator for claims over Rs. One Crore, shall not exceed Rs. 2000/- per sitting subject to a maximum of Rs. 50,000/-. Provided further that the arbitrators who are in service of Govt/M.S.E.D.C. LTD. shall draw fees at half of the rates mentioned above.

xi) Company shall maintain a list of arbitrators. The Chairman shall have full powers to delete or add the name of the arbitrators in the list or to make amendments to the said list as per his discretion.

xii) The arbitral proceedings should be completed and the award be finalized within one year ff om the date of appointment of arbitrators.

xiii) Subject to the provisions as aforesaid, Arbitration & Conciliation Act,1996 and the rules there under, and any statutory notification thereof shall apply to the arbitration proceedings under this clause."

23. The 'Instructions to Tenderers' contained in the Tender documents at Clause 23 provides that the successful tenderer will have to execute an agreement with the Company (Appellant) in the Company's standard proforma. It reads as thus:

"**23.0** *The successful tenderer will also have to execute an agreement with the Company in Company's standard proforma. The cost of stamp paper shall be borne by the contractor. (The value of Stamp paper for agreement is Rs. 500/- up to ten lakh Plus RS. 100 for every one lakh or part there of above Rs Ten Lacks)*"

24. Clause 42 of the 'Instructions to Tenderers' contained in the Tender documents provides that in case the work is cancelled

before starting the work for any reason after placement of work order, only E.M.D. / S.D. shall be refunded and no other claim in this respect shall be entertained. Clause 39 of the 'Instructions to Tenderers' in the Tender documents provides that the 'Instructions to Tenderers' shall form part of the contract.

25. The entire thrust of the argument of the Respondent is that the arbitration clause contained in Clause 23 of the Special Conditions of Contract in the Tender documents has been incorporated in the contract which has been concluded by the Appellant's LOI dated 16.11.2022. The LOI references the Tender documents and in the initial paragraphs, provides that the terms and conditions of the contract as per the reference documents shall be interpreted by reading together with them the terms of the LOI itself and in case of conflict, the terms of the LOI shall prevail. The said portion of the LOI is quoted herein for reference:

> "...
>
> *With reference to the above, on behalf of MSEDCL tender No. EEC/BND/TECH/T-42/2021-22 is invited for providing / renovating the CFC center at various O&M Division of MSEDCL throughout the State vide E-Tender Notice PR No. 295/2021 dt. 14.7.2021. In this regards the undersigned is pleased to inform you that your offer for the above work covered under the scope of Schedule-B of the said tender has been accepted and work covered under the scope of*

the contract is entrusted to you subject to the following terms and conditions.

Notwithstanding that reference are given above, the terms and conditions and specifications of contract shall be interpreted by reading together the terms and conditions, specifications and contents of this Letter of intent as below. In case of any deviations with the contents of this Letter of intent from corresponding conditions in the above said tender specifications or contents of the letter under reference as read and interpreted up to date, the contents of this Letter of intent shall prevail."

26. In the concluding portion of the LOI, it is stated that the LOI has been issued to the Respondent to start with preliminaries and to start the work on the issuance of the detailed work order. The said portion of the LOI is quoted herein for reference:

"…

This letter of intent is issued to enable you to start with preliminaries to start the work as soon as the detailed work order is issued.

..."

27. It is the admitted case of the parties that pursuant to the LOI and in terms of Clause 23 of the 'Instructions to Tenderers' of the Tender documents, neither any work order was issued to the Respondent nor any formal agreement was entered into between the parties on the proforma of the Appellant. It is therefore required to be examined as to whether any agreement to arbitrate

has formed at this stage in order to meet the requirement of Section 7 of the 1996 Act. The said section is relevant for this purpose and is therefore quoted below for reference:

> "***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 telecommunications including communication through electronic means which provide a record of the agreement; or*
>
> *(c) an exchange of statement 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.*"

28. Section 7(1) of the 1996 Act posits that there must be a defined 'legal relationship' between the parties and the agreement to arbitrate may be contractual or not. As such, conclusion of a contract might not be necessary for that purpose and what needs

to be seen is whether the parties were *ad idem* in their intention to refer a dispute to arbitration as evinced from their communication.[11] A distinction, however, is drawn when the arbitration agreement is contained in some document which is sought to be incorporated within another. Section 7(5) is attracted in such a situation and it refers to the incorporation of an arbitration agreement contained in some document into a 'contract' which has to be in writing. The use of the word 'contract' when dealing with incorporation of an arbitration agreement from some other document is intentional and consequential. Since in the present appeal the Respondent's case is that the LOI incorporates the arbitration agreement from the terms of the Tender documents, both the contractual nature of the LOI as well as the validity of incorporation becomes relevant for our examination.

29. In this context, at the very threshold it must be observed that the finding of the High Court that Appellant in its reply dated 04.11.2024 to the Respondent's arbitration notice '*did not question the formation of arbitration agreement on any ground other than the fact that the project did not proceed further*' is *prima*

11 ***Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.***, (2015) 13 SCC 477.

facie erroneous and stares at the face of the record, and is liable to be set aside. It has been contended in plain terms by the Appellant in its reply dated 04.11.2024 that there was no concluded contract between the parties and that the LOI cannot bind either party to a contract, it is merely indicative of a party's intention to enter into a contract. There is, therefore, no admission of any concluded contract, much less an arbitration agreement between the parties by the Appellant in its reply dated 04.11.2024. The Appellant has throughout maintained that there was no concluded contract between the parties and as such, no reference to arbitration can be made under Clause 23 of Special Conditions of Contract contained in the Tender documents merely because of a general reference to the Tender documents in the LOI.

30. A co-ordinate bench of this Court in ***OASYS Cybernatics*** (Supra) has exhaustively discussed the effect of a letter of intent pursuant to a tender, its legal character and the nature of rights flowing therefrom. Relevant paragraphs of the said judgement are quoted herein for reference:

> "***11.*** *The first issue that falls for our determination concerns the legal character of the LoI dated 02.09.2022*

and the nature of rights, if any, accrued to the Respondent-company thereunder.

12. *This question goes to the root of the matter, and is not one of mere semantics, i.e. ascertaining whether the issuance of the LoI created a concluded contract capable of enforcement, or whether it remained a conditional and inchoate expression of intent, leaving the Government free to reassess its position prior to formal acceptance. The answer defines the legal threshold for the Appellant-State's power to cancel and the Respondent-company's entitlement to protection.*

13. *The jurisprudence on the subject is neither nascent nor unsettled. A catena of decisions starting from Rajasthan Cooperative Dairy Federation Ltd. v. Maha Laxmi Mingrate Marketing Service (P) Ltd., through Dresser Rand S.A. v. Bindal Agro Chem Ltd., to Level 9 Biz Pvt. Ltd. v. HP Housing & Urban Development Authority, this Court has consistently held that an LoI is, in the ordinary course, a precursor to a contract and not the contract itself.*

14. *In Dresser Rand (supra), it was re-stated with clarity that "**a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract**." The same principle animated Rajasthan Cooperative Dairy Federation (supra), where this Court observed that until the offer is accepted unconditionally and the preconditions are satisfied, "**no binding legal relationship**" comes into existence. The rationale is thus simple but fundamental: the law of contract distinguishes between a promise to make a promise and a promise performed. The former is not legally binding until its contingencies are fulfilled.*

15. *These authorities collectively articulate a coherent doctrine: an LoI creates no vested right until it passes the threshold of final and unconditional acceptance. It is but a "promise in embryo," capable of maturing into a contract only upon the satisfaction of stipulated preconditions or upon the issue of an LoA. A bidder's expectation that such a contract will follow may be commercially genuine, but it*

is not a juridical entitlement. To hold otherwise would be to bind the State in contract before it has consciously chosen to be bound—a proposition foreign to both contract law and public administration.

16. *Turning then to the LoI before us, its conditionality is beyond doubt. As noticed heretofore in* ***para 5.7****, it required the Respondent-company to:*

(i) undertake compatibility testing of its proposed ePoS devices at NICSI, Hyderabad;

(ii) provide a live demonstration of the devices with NIC's application before the Directorate at Shimla;

(iii) execute a formal agreement only after successful completion of the aforesaid steps; and

(iv) furnish a detailed MRP and landing cost of the devices and their major components.

17. *Each requirement was framed as a condition precedent; the LoI itself stated that a "****final award letter****" would issue only after the successful completion of these tasks. This language admits of no ambiguity. The tender architecture was sequential: testing, demonstration, acceptance, then execution. It was never contemplated that the LoI would operate as the contract itself.*

18. *The cumulative effect of the foregoing analysis is that the LoI was no more than a provisional communication signifying the Appellant-State's intent to enter into a formal arrangement upon fulfilment of certain technical and procedural conditions. The acceptance of tender and the consequential formation of a binding contract were contingent upon satisfaction of these prerequisites. The Respondent-company's reliance upon the LoI as a source of vested contractual rights is, therefore, wholly misplaced.*

19. *As a result, the* ***First Issue is answered in the negative****. We have no difficulty in holding that the LoI did not give rise to any binding or enforceable rights in favour of the Respondent-company.*"

31. It is settled law that a letter of intent does not, in and of itself, create a legal relationship or contractual obligations until

there is a clear, unambiguous final acceptance by the parties. It is an expression of one party's intent to enter into a contract with the other party in the forthcoming future. When the intent of the parties can be evinced from the letter of intent or the tender specifications and it is clear that the letter of intent is to be followed by a final award or a concluded agreement, it cannot be said that the letter of intent itself binds the parties to the terms of the tender. Contractual obligations cannot be foisted upon a party without a clear indication of its intent to enter into a binding concluded contract. Therefore, what needs to be distinguished is whether the intent of the parties is to make a 'promise' or a 'promise to make a promise'. We are mindful of the fact that a tender is essentially in the nature of an 'invitation to offer' and submission of a bid by the tenderer is an 'offer'. By means of a letter of intent, however, it must be examined by the Court whether the party extending the letter of intent is in *consensus ad idem* with the other party and intends to create a conclusive and binding agreement.

32. Further, in ***South Eastern Coalfields Ltd.*** (Supra), this Court held that the question as to whether a contract had been

concluded between the parties can be discerned by the notice inviting tender, the letter of intent and the conduct of parties. Relevant paragraph of the said judgement is quoted herein for reference:

> "*22. We would like to state the issue whether a concluded contract had been arrived at inter se the parties is in turn dependent on the terms and conditions of the NIT, the Lol and the conduct of the parties. The judicial views before us leave little doubt over the proposition that an Lol merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms. But then the intention to do so must be clear and unambiguous as it takes a deviation from how normally a letter of intent has to be understood. This Court did consider in Dresser Rand S.A. case that there are cases where a detailed contract is drawn up later on account of anxiety to start work on an urgent basis. In that case it was clearly stated that the contract will come into force upon receipt of letter by the supplier, and yet on a holistic analysis - it was held that the Lol could not be interpreted as a work order.*"

33. Applying the said principles of law to the facts of this case, we are in agreement with the argument of the Appellant that the LOI in the facts of the instant case was a promise to make a promise and not a promise itself and no agreement had concluded between the parties. The word 'contract' as defined in Clause 1(c) of the Special Conditions contained in the Tender

documents is '*the document forming Notice Inviting Tenders, Tender Form, General Conditions of Contract, Technical Specifications, priced schedule of items, contract agreement and drawings and any other document which may be included at the time of signing of contract agreement along with acceptance of the contract thereof together*'. This definition incorporates the tender framework under Clause 23 of the 'Instructions to Tenderers' of the Tender documents, which posits that an agreement will be entered into by the Appellant with the successful bidder.

34. The LOI provided that the work under the contract is entrusted to the Respondent subject to terms and conditions and as per clause 2 of the LOI, the time-limit to complete the entire work was six months from the date of handing over of the sites. Pertinently, the Appellant never handed over the sites to the Respondent. Clause 3 provided that security deposit to the tune of 5% of order value, being ₹88,81,000 must be deposited by means of demand draft or F.D.R. or B.G. of any nationalized bank within 10 days from the date of receipt of LOI. Alternatively, 50% of the security deposit, amounting to ₹44,40,500 shall be deposited in the said form and the balance amount of ₹44,40,500

may be deducted from the R.A. bill. Clause 7 of the LOI provides for the requirement to obtain insurance in specific form as mentioned therein. At the end of the LOI, it is mentioned that the LOI has been issued to enable the Respondent to start with the preliminaries so that work may be initiated as soon as the work order is issued. It contemplates a work order to be issued at a subsequent stage.

35. Neither the specifications of the Tender documents, nor the LOI provides that the LOI itself would result in a concluded contract. Rather, the Tender documents in Clause 23 of the 'Instructions to Tenderers' specifically provides for an agreement to be entered into between the Appellant and the successful tenderer and same is the import of Clause 1(c) defining the word 'contract'. The intent behind the LOI is explicitly clarified as merely to ensure that preliminaries are complied with so that the work may begin upon issuance of a work order. No such work order was issued pursuant to the LOI. On this count, it is stressed by the Respondent that it had submitted the requisite security deposit by means of bank guarantees and they were renewed from time to time. However, neither the LOI nor the

Tender documents contemplate that upon submission of bank guarantees, the contract would be said to be concluded, creating a binding legal relationship. Rather, they both contemplate the issuance of a work order and the signing of an agreement; mere completion of preliminaries cannot be said to be sufficient to form a binding legal relationship unless specified in the terms of the tender specifications. From a reading of the LOI, the clauses relating to submission of security deposit and insurance clearly show the tender framework, where after acceptance of the bid, work was entrusted to the Respondent subject to terms and conditions which were procedural in nature, contemplating that at a later stage, a final work order was to be issued and an agreement was to be entered into between the parties.

36. In the above conspectus of facts, from a holistic reading of the Tender documents, the LOI and other subsequent communication between the parties, the LOI does not evince the commercial intention of the Appellant to create a binding legal relationship, it informs the Respondent that the work was entrusted to them upon opening of bids and lays down preliminary conditions to be fulfilled in contemplation of a future

work order and agreement in order to ensure that prior to the work order being issued, everything is set in place and the work may begin at once upon such issuance. As such, it cannot be said that the LOI had the effect of creating a binding legal relationship between the parties.

37. In the instant case, the Appellant argues further that even assuming *arguendo* that the LOI itself can be considered a source of binding legal relationship between the parties, the LOI has made a general reference to the Tender documents and such a general reference cannot have the effect of 'incorporation' of the arbitration clause contained therein, in light of Section 7(5) of the 1996 Act. Section 7(5) provides that '*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.*'.

38. Reference in this respect has also been made to the judgement of this Court in ***NBCC (India) Ltd.*** (Supra). In the said judgement, this Court dealt with facts which are somewhat similar to the instant appeal; the arbitration clause was contained in the 'Request for Proposal' in the tender documents

and the contract was awarded to the Respondent therein by means of issuance of a letter of intent which made the terms and conditions of the said tender documents applicable to the letter of intent as well. This Court drew a distinction between 'reference' and 'incorporation' of an arbitration clause, and after discussing the decisions in ***M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd.***,[12] and ***Inox Wind Ltd. v. Thermocables Ltd.***,[13] found that the arbitration clause contained in some document may be incorporated in the contract between the parties only by a specific reference to the arbitration clause. The intent of the parties to incorporate the arbitration clause has to be explicitly clear and a mere general 'reference' to the tender conditions would not suffice. Relevant paragraphs of the said judgement are quoted herein for reference:

> "***16.*** *The issue is no more res integra. The provisions of sub-section (5) of Section 7 of the Arbitration Act have been considered by this Court in M.R. Engineers & Contractors [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] . After considering the relevant passages from Russell on Arbitration and various English judgments, this Court held thus : (SCC p. 707, para 24)*
>
> > *"24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus—*

12 (2009) 7 SCC 696.
13 (2018) 2 SCC 519.

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled;

> *(1) the contract should contain a clear reference to the documents containing arbitration clause,*
>
> *(2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,*
>
> *(3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.*

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by

reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

17. *It could thus be seen that this Court has held that when the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. It has been held that the arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause. It has further been held that where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.*

18. *This Court further held that where the contract provides that the standard form of terms and conditions of an independent trade or professional institution will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. It has been held that sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions. It has also been held that where the contract between the*

parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract, the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.

19. *A perusal of sub-section (5) of Section 7 of the Arbitration Act itself would reveal that it provides for a conscious acceptance of the arbitration clause from another document, by the parties, as a part of their contract, before such arbitration clause could be read as a part of the contract between the parties.*

20. *It is thus clear that a reference to the document in the contract should be such that shows the intention to incorporate the arbitration clause contained in the document into the contract.*

21. *The law laid down in M.R. Engineers & Contractors [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] has been followed by this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Elite Engg. & Construction (Hyd.) (P) Ltd. v. Techtrans Construction India (P) Ltd. [Elite Engg. & Construction (Hyd.) (P) Ltd. v. Techtrans Construction India (P) Ltd., (2018) 4 SCC 281 : (2018) 3 SCC (Civ) 60]*

22. *No doubt that this Court in Inox Wind Ltd. v. Thermocables Ltd. [Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519 : (2018) 2 SCC (Civ) 195] has distinguished the law laid down in M.R. Engineers & Contractors [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] . In the said case (i.e. Inox Wind [Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519 : (2018) 2 SCC (Civ) 195]), this Court has held that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. Though this Court in Inox Wind [Inox Wind Ltd. v. Thermocables Ltd., (2018) 2*

SCC 519 : (2018) 2 SCC (Civ) 195] agrees with the judgment in M.R. Engineers & Contractors [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] , it holds that general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause. In the said case (i.e. Inox Wind [Inox Wind Ltd. v. Thermocables Ltd., (2018) 2 SCC 519 : (2018) 2 SCC (Civ) 195]), this Court found that the purchase order was issued by the appellant therein in which it was categorically mentioned that the supply would be as per the terms mentioned therein and in the attached standard terms and conditions. The respondent therein by his letter had confirmed its acceptance. This Court found that the case before it was a case of a single contract and not two-contract case and, therefore, held that the arbitration clause as mentioned in the terms and conditions would be applicable.

***23.** The present case is a "two-contract" case and not a "single-contract" case.*

...

***29.** As already discussed hereinabove, when there is a reference in the second contract to the terms and conditions of the first contract, the arbitration clause would not ipso facto be applicable to the second contract unless there is a specific mention/reference thereto.*

***30.** We are of the considered view that the present case is not a case of "incorporation" but a case of "reference". As such, a general reference would not have the effect of incorporating the arbitration clause. In any case, Clause 7.0 of the LoI, which is also a part of the agreement, makes it amply clear that the redressal of the dispute between NBCC and the respondent has to be only through civil courts having jurisdiction of Delhi alone."*

39. Although this Court in ***NBCC (India) Ltd.*** (Supra) was dealing with a factual situation which was quite similar to the

instant case, the reasons why the Court interfered with the appointment of an arbitrator in the said case were twofold. Apart from the fact that a general reference in the letter of intent to an arbitration clause contained in the tender documents was found to not be sufficient for its incorporation, the second reason was that the letter of intent in that case had a separate dispute resolution clause which limited redressal of disputes to civil courts having jurisdiction of Delhi alone. Even then, the law laid down in respect of incorporation of arbitration clauses contained in tender documents by means of reference in the letter of intent is squarely applicable to the facts of the instant case. The LOI in the instant case makes a reference to the Tender documents contained in the following terms:

> "*Notwithstanding that reference are given above, the terms and conditions and specifications of contract shall be interpreted by reading together the terms and conditions, specifications and contents of this Letter of intent as below. In case of any deviations with the contents of this Letter of intent from corresponding conditions in the above said tender specifications or contents of the letter under reference as read and interpreted up to date, the contents of this Letter of intent shall prevail.*"

In our view, this is a case of 'reference' and not 'incorporation'. There is no mention of any arbitration or dispute resolution

clause in the LOI itself, neither does it purport specific incorporation thereof from the tender documents. As such, the arbitration clause contained in the Tender documents could not be said to have been incorporated in the LOI to evince the existence of an arbitration agreement between the parties on its conjoint reading with the Tender documents.

40. The judgements of this Court in ***NBCC (India) Ltd.*** (Supra) as well as ***M.R. Engineers & Contractors (P) Ltd.*** (Supra) were recently discussed and distinguished on facts by a co-ordinate bench of this Court in ***Glencore International AG v. Shree Ganesh Metals***[14]. In the facts of that case, there was no incorporation of the arbitration agreement, but rather the contract containing the arbitration agreement was never signed by the parties, but it was acted upon and the communication between the parties evinced the creation of a binding legal relationship between them. In such context, the Court placed reliance on the judgement in ***Govind Rubber Ltd.*** (Supra) and held that non-signing of the contract containing the arbitration agreement cannot invalidate the arbitration agreement which is in writing and the parties seem to be *ad idem* in respect of the

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agreement by communication about the contract. The judgement in ***Glencore International AG*** (Supra) is not applicable to the facts of this case since it distinguishes the judgement in ***NBCC (India) Ltd.*** (Supra) where the factual scenario was quite similar to the facts of the instant appeal.

41. Similar is the case of the judgement in ***UNISSI (India) (P) Ltd.*** (Supra) relied upon by the Appellant where the tender documents contained an arbitration clause and the tender offer of the Appellant therein was accepted and the Appellant therein acted upon the said acceptance and made supply of oxymeters required under the tender even though no formal contract was signed between the parties. In such context, the Court held that the arbitration agreement contained in the tender was applicable and dispute between the parties ought to be referred to an arbitrator. In the facts of the present case, the terms of the tender itself have never been worked upon by the Respondent. The Work Order was never issued by the Appellant and the sites were never handed over by the Appellant. The Respondent has submitted bank guarantees pursuant to the LOI, which at best is a preliminary requirement as a precursor to the Work Order being

issued. As discussed above, the LOI in the instant case was indicative of a preliminary document in course of the contract and was not intended to be an end-all-be-all contract between the parties, it did not create contractual obligations or legal relationship between them.

42. It goes without saying that the scope of inquiry at the stage of Section 11 is extremely limited and only pertains to an examination about *prima facie* existence of an arbitration agreement. Judicial non-interference in the arbitration process is the sacrosanct principle which guides alternative dispute resolution and Courts must be highly circumspect in interfering at the referral stage, especially since there is no appeal available in the 1996 Act against an order under Section 11. The Arbitral Tribunal, in exercise of its jurisdiction under Section 16 must be left to decide on its jurisdiction. The Courts should follow the principle of 'When in doubt, do refer' and lean towards referring matters to arbitration when the arbitration agreement is *prima facie* existent. However, it is only in the rarest of rare cases where even on a *prima facie* view, without going into disputed facts between the parties, there appears to be no existence of

arbitration agreement between the parties, the Court can reject the application for appointment of an arbitrator and reference of the parties to arbitration. The instant case appears to be a fit case where, as discussed, even without going into the disputed facts and merely on a *prima facie* view of the matter, there is no existence of arbitration agreement and therefore, the decision of the High Court to appoint an arbitrator requires interference.

43. As an upshot of the above discussion, the instant appeal deserves to be allowed and the order impugned passed by the High Court stands set aside. The Respondent is given the liberty to pursue other alternative remedies in accordance with law, if any, available to it. All interim application(s) shall be treated to be disposed of.

.....J.
(J.K. MAHESHWARI)

.....J.
(ATUL S. CHANDURKAR)

NEW DELHI;
APRIL 09, 2026.