

Order Referring Parties To Arbitration Cannot Be Recalled If Valid Arbitration Agreement Exists In Terms Of The Arbitration Act: Calcutta High Court

Authors: *Vasanth Rajasekaran and Harshvardhan Korada*

INTRODUCTION

The Calcutta High Court, in a recent judgment in ***Bankat Garodia v. Adityo Poddar***¹, addressed key procedural and substantive issues concerning arbitration law under the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**" / "**the Act**"). The case revolved around the recall of an order appointing an arbitrator under Section 11 of the Act. The judgment sheds light on the standards of *prima facie* satisfaction required for the appointment of arbitrators, the scope of recall applications, and the interpretation of arbitration clauses in commercial agreements. In this article, we navigate through the facts and findings of the High Court.

BACKGROUND

The petitioner, Bankat Garodia, sought to recall an order dated 30 August 2024, passed under Section 11 of the Act, appointing an arbitrator to resolve disputes arising out of an agreement with the respondent, Adityo Poddar. The agreement in question included two clauses relevant to the dispute:

1. Clause 21, titled "*Dispute Resolution and Arbitration*", which indicated that arbitration was the preferred mechanism for resolving disputes.
2. Clause 22, titled "*Jurisdiction*", which confined the jurisdiction to the courts of Kolkata.

The respondent, relying on these clauses, invoked arbitration under Section 11. However, the petitioner, through the recall application, raised several objections to the appointment of the arbitrator, arguing that the arbitration clause lacked validity.

The petitioner's objections were threefold:

1. The agreement did not contain a valid arbitration clause in terms of the provisions under the Act.
2. There was material suppression, as the respondent failed to disclose that the petitioner had replied to the notice under Section 21 of the Act.
3. The petitioner was unrepresented at the Section 11 hearing, leading to an *ex parte* decision.

KEY ISSUES

The case presented three primary issues for consideration:

¹ AP-COM/17/2023.

1. **Validity of the arbitration clause:** Does the arbitration clause under the agreement entered between the parties meet the requirements of an arbitration agreement prescribed under Section 7 of the Act?
2. **Procedural lapses in Section 11 proceedings:** Did the petitioner's absence and alleged suppression of material facts warrant a recall of the order?
3. **Distinction between recall and review applications:** Was the recall application the appropriate remedy in the present case?

HIGH COURT'S ANALYSIS

On Validity of the Arbitration Clause

The petitioner argued that the arbitration clause was not valid because it lacked the essential elements of an arbitration agreement as outlined in Section 7 of the Act. The court examined Clause 21, titled "*Dispute Resolution and Arbitration*", which specified arbitration as a mechanism for resolving disputes, subject to Kolkata jurisdiction.

The petitioner relied on precedents such as *Bihar State Mineral Development Corporation v. Encon Builders (I)(P) Ltd.*² and *Blue Star Limited v. Rahul Saraf*, which held that mere mention of the terms "*arbitration*" or "*arbitrator*" does not establish the existence of an arbitration agreement. Instead, the parties must clearly intend to submit disputes to arbitration.

The High Court found that Clause 21 clearly indicated the parties' intent to arbitrate disputes. Unlike the agreement in *Blue Star Limited*, where the clauses left arbitration as a discretionary option, Clause 21 in the present case unambiguously stipulated arbitration as the chosen dispute resolution mechanism. The use of the term "*arbitration*" in conjunction with "*dispute resolution*" left no doubt about the parties' intention.

The High Court emphasised that the threshold for *prima facie* satisfaction under Section 11 is not as stringent as determining the validity of an arbitration clause on merits. The Court's role is limited to identifying whether the clause contains the essential elements of an arbitration agreement, including:

- (i) A clear intention to arbitrate disputes.
- (ii) A reference to present or future differences between the parties.
- (iii) An agreement in writing to be bound by the arbitral process.

As per the High Court, Clause 21 satisfied these conditions. Accordingly, the High Court concluded that the Section 11 order was validly passed.

On Alleged Procedural Lapses

² (2003) 7 SCC 418.

³ 2023 SCC OnLine Cal 1406.

The petitioner contended that the respondent suppressed material facts by failing to disclose that the petitioner had replied to the Section 21 notice. According to the petitioner, this reply contested the invocation of arbitration, which should have influenced the Court's decision under Section 11 of the Act.

The High Court rejected this argument on two grounds:

Insignificance of the Reply: The High Court noted that even if the reply had been disclosed, it would not have altered the outcome of the Section 11 proceedings. The reply did not dispute the existence of the arbitration clause but merely denied the respondent's allegations on the merits.

No Fraud or Suppression: The High Court observed that non-disclosure of the reply did not amount to fraud or suppression of material facts. To vitiate an order, the suppression must directly impact the Court's decision-making process, which was not the case here.

Regarding the petitioner's absence during the Section 11 hearing, the High Court noted that the petitioner had been served with notice of the proceedings. The petitioner admitted to having knowledge of the hearing but claimed that its counsel could not attend due to illness. The High Court held that adequate opportunity had been provided to the petitioner, satisfying the principles of natural justice.

On Recall vs. Review Applications

The respondent argued that the recall application was not maintainable and that the petitioner should have filed a review application instead. The court clarified the distinction between recall and review. A recall application addresses procedural defects, such as lack of notice or fraud, that render an order fundamentally flawed. A review application involves re-examining the order on its merits, focusing on errors apparent on the face of the record.

The High Court cited *Asit Kumar Kar v. State of West Bengal*⁴ and *Budhia Swain v. Gopinath Deb*⁵ to outline the limited grounds for recall applications. While the petitioner attempted to frame the application as a recall on procedural grounds, the High Court found that it effectively sought a review of the Section 11 order, which was impermissible in law.

JUDGMENT OF THE HIGH COURT

The High Court dismissed the recall application, holding that:

1. The arbitration clause in Clause 21 of the agreement entered between the parties was valid and satisfied the requirements of Section 7 of the Act.
2. The petitioner's procedural objections, including alleged suppression and absence at the hearing, lacked merit.

⁴ (2009) 2 SCC 703.

⁵ 1999) 4 SCC 396.

3. The recall application was an inappropriate remedy, as the petitioner's grievances pertained to the merits of the Section 11 order, which could not be revisited in a recall application.

The High Court noted that if the petitioner wished to challenge the arbitrability of the dispute or the validity of the arbitration clause, it could do so before the arbitral tribunal under Section 16 of the Act.

COMMENTS

The judgment reinforces several principles critical to arbitration law:

1. ***Prima Facie* Satisfaction Under Section 11:** The High Court clarified that the threshold for *prima facie* satisfaction under Section 11 of the Act is relatively low. Courts need only ascertain the existence of an arbitration clause that meets the basic requirements of Section 7.
2. **Limits of Recall Applications:** The judgment delineates the boundaries between recall and review applications, ensuring that procedural remedies are not misused to challenge substantive decisions.

The Calcutta High Court's judgment in ***Bankat Garodia*** is a robust affirmation of the principles governing arbitration law in India. It strikes a balance between procedural fairness and the need to uphold the integrity of arbitration proceedings, reinforcing India's pro-arbitration stance.

Contact

For any query, help or assistance, please reach out at info@trinitychambers.in or visit us at www.trinitychambers.in.

Authors

	
Vasanth Rajasekaran Founder & Head vasanth@trinitychambers.in	Harshvardhan Korada Counsel harshvardhan@trinitychambers.in