Ashapura Mine-Chem Ltd vs Gujarat Mineral Devlopment ... on 16 April, 2015

Equivalent citations: 2015 AIR SCW 2853, 2015 (8) SCC 193, AIR 2015 SC (SUPP) 1153, (2015) 4 CIVLJ 857, (2015) 3 KCCR 287, (2015) 5 ALL WC 4679, (2015) 5 SCALE 379, (2015) 152 ALLINDCAS 102 (SC), (2016) 1 MPLJ 571, (2016) 2 MAH LJ 4, (2015) 3 ARBILR 138, (2015) 4 ALLMR 449 (SC), (2015) 3 CAL HN 54, (2015) 3 MAD LJ 838, (2015) 3 RECCIVR 614, (2016) 1 MAD LW 104

Bench: Shiva Kirti Singh, Fakkir Mohamed Ibrahim Kalifulla

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3702 OF 2015
(@ SLP (C) NO.1963 of 2014)

Ashapura Mine-Chem Ltd. ....Appellant

VERSUS

Gujarat Mineral Development Corporation ....Respondent

J U D G M E N T

Fakkir Mohamed Ibrahim Kalifulla, J.

Leave granted.

This appeal is directed against the judgment of the High Court of Judicature of Gujarat at Ahmedabad in Arbitration Petition No. 9/2013 dated 27.9.13/04.10.2013. By the impugned judgment, the learned Single Judge of the High Court dismissed the appellant's application filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to "Act").

Short facts which are required to be noted are that the appellant and the respondent entered into a Memorandum of Understanding (MoU) on 17.08.2007. Under the said MoU, the appellant proposed to constitute a joint venture along with Chinese Company, namely, "M/s Qing TongXia Aluminium Group Co. Ltd. Ningxia of China (hereinafter referred to as "QTX") as well as the respondent for setting up an alumina plant of appropriate capacity in the Kutch District of Gujarat.

The MoU also records that the Government of Gujarat agreed to encourage and support the proposed joint venture for setting up of the alumina plant. The respondent agreed to supply on priority basis, medium grade Bauxite to the proposed plant from its 10 existing and 18 expected Bauxite mining leases in the Kutch District.

The other relevant terms were that the appellant should arrange for the equity participation of the QTX in the proposed joint venture, that the respondent should invest in the equity of the joint venture to the extent determined by the Government of Gujarat but not exceeding 26% while the appellant and the QTX should hold 74% of the equity. The capacity of the proposed plant should be 1.00 million tonnes per annum which may be enhanced subsequently. On the part of the respondent, it should assist the joint venture in obtaining the required land for locating the project. Under Clauses 5, 6, 8, 10 and 11, the quantity of the medium grade Bauxite to be supplied by the respondent, the grade of the Bauxite, the specifications, the rate at which it was to be supplied, the time within which such supply should be effected were all set out which also included a long term agreement for the supply to be entered into.

MoU also stipulated certain other conditions by which the appellant was obligated upon to reimburse to the respondent, within 60 days of the signing of the MoU, an amount of Rs.3.94 crores being the direct expenses incurred by the respondent on its Alumina Project and related matter. It is not in dispute that within the stipulated time limit the appellant gave its cheque for the said sum but the respondent did not encash the same. It also provided for the appellant to pay the respondent a further sum of Rs.6.25 crores within 60 days of the execution of the MoU by way of signature bonus apart from providing a bank guarantee to the value of Rs.10 crores for the due observance for the joint venture by the appellant under the various terms and conditions of the MoU within 30 days of the signing of the MoU.

Clause 12 of the MoU specifically provided that the rights and privileges were not transferable for a period of five years and the appellant should not exit the project/joint venture for a period of five years after the commencement of commercial production.

Under Clause 19, it was stipulated that the MoU was subject to approval of the Board of Directors of the appellant as well as the respondent, that the equity investment and decisions of the respondent should be subject to the concurrence of the Government of Gujarat, while the investment of the appellant should be subject to approval of its shareholders. It was specifically mentioned that both the appellant and the respondent should endeavour to obtain necessary approval within three months from the date of execution of the MoU. It was further specifically mentioned that on getting necessary approval by both sides, the MoU would be converted into an agreement between the appellant and the respondent. Clause 21 contained relevant stipulation to the effect that in case the concurrence of the Government of Gujarat was not forthcoming for equity participation in the project within six months of the signing of the MoU, the MoU would be construed as one relating to long term supply of medium grade Bauxite to the joint venture by the respondent from its Kutch mines.

The more important Clauses contained in MoU pertaining to arbitration are found in Clauses 26 and 27 which read as under:

> "26. In the event of difference disputes arising between the parties in respect of any matter arising out of and relating to this MoU, such dispute/difference shall, in the first instance, be resolved amicably by mutual consultation within 45 days of the reference of disputes by either party.
>
> 27. If amicable settlement is not reached between the parties then such unresolved dispute or difference of opinion concerning or arising from the MoU and its implementation, breach or termination whatsoever, including any difference or dispute as to the interpretation of any of the terms of the MoU, shall be referred to the arbitration or a sole arbitrator appointed to GMDC and AML. The Arbitrator shall give reasoned award. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996 (India) and conducted in the city of Ahmedabad. The language of Arbitration shall be English. The parties shall share the cost of Arbitration equally Arbitration clause to be acceptable to the Financing sources."

Subsequent to the signing of the above MoU, there was a Board Resolution of respondent dated 29.10.2007. The said Resolution stated that the Board resolved to accord its approval to the MoU executed on 17.08.2007 between the appellant and the respondent subject to the modifications noted in the said resolution. Subsequent to the said resolution which was communicated to the appellant, correspondence was exchanged between the appellant and the respondent and on some occasions with the Principal Secretary of the State of Gujarat between 17.12.2007 and 10.03.2010. There was a Board Resolution of the respondent dated 18.03.2010 which disclose that the Board decided to the effect that in the light of the new mineral policy announced by the State Government in November, 2009, major changes were made in respect of Bauxite also and, therefore, it was not inclined to extend the validity of the proposed MoU and also decided to invite fresh EOI in Bauxite for higher value addition in alumina. However, in a subsequent communication dated 26.07.2010, the respondent informed the appellant that to maintain parity necessary modification in the terms and conditions of the MoU dated 17.8.2007 as approved by the Board of the respondent were communicated to the State Government for approval which was awaited and that on receipt of such approval, a fresh MoU may have to be executed.

But subsequently, by communication dated 25.04.2011, the respondent tacitly informed the appellant that it decided to forthwith cancel the MoU dated 17.08.2007 in view of failure on the part of the appellant in complying with various terms and conditions of the MoU. The respondent, thus, threw the blame on the appellant for the proposed project not being able to be finalized.

In response to the said letter dated 25.04.2011, the appellant wrote a detailed reply on 11.07.2011 wherein the appellant expressed its desire to amicably resolve the dispute and requested the respondent to make an attempt for an amicable settlement as regards the issues and alleged breaches mentioned in the respondent's letter dated 25.04.2011. Subsequently, the appellant caused a legal notice dated 07.12.2012 to the respondent, wherein it was claimed that its attempt to

amicably resolve the dispute as provided under Clause 26 of the MoU failed and, therefore, it decided to invoke Clause 27 of the MoU to appoint an Arbitrator and suggested the name of a retired High Court Judge for appointment with the concurrence of the respondent or else the appellant's decision to invoke Section 11 of the Act.

On behalf of the respondent, a reply was addressed to the appellant on 04.01.2013 stating that there was no fault whatsoever on its side and, therefore, there was no question of any obligation to be fulfilled on its side and it also expressed its decision not to concur for the appointment of the Arbitrator.

It was in the above stated sequence of events i.e. from the date of MoU to the date of filing of the application, the appellant approached the High Court by filing an application under Section 11 of the Act and sought for appointment of an Arbitrator. By the impugned order, the High Court having rejected the appellant's application, the appellant has come forward with this appeal.

We heard Mr. Dushyant Dave, learned senior counsel for the appellant and Mr. Vikas Singh, learned senior counsel for the respondent. Mr. Dushyant Dave after referring to the above course of events that has taken place between the appellant and the respondent from the date of MoU dated 17.8.2007 till the rejection of the Arbitration Application by the High Court, contended that since indisputably the respondent terminated the MoU, the conclusion of the High Court that the same was a still-born was wholly unjustified. The learned senior counsel submitted that even if the MoU for the proposed joint venture did not ultimately fructify into the creation of the joint venture, Clauses 26 and 27 of the MoU by virtue of the specific terms contained therein would operate as stand-alone agreement for arbitration and with reference to the said agreed terms, since there was a consensus ad idem between the parties, the High Court ought to have appointed the Arbitrator exercising its power under Section 11 of the Act, inasmuch as the respondent declined to express its consent for the named Arbitrator suggested by the appellant.

As against the above submission Mr. Vikas Singh, learned senior counsel appearing for the respondent vehemently submitted that the High Court was able to highlight that the parties had no consensus ad idem even with reference to the very MoU itself and in the circumstances, there was no scope for applying Clauses 26 and 27 for the appointment of Arbitrator as claimed by the appellant.

While Mr. Dushyant Dave, learned senior counsel placed reliance upon the decisions in Enercon (India) Limited & Ors. v. Enercon GMBH & Anr. - 2014 (5) SCC 1, Reva Electric Car Company Private Ltd. v. Green Mobil - 2012 (2) SCC 93 and Today Homes and Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust and Anr. - 2014 (5) SCC 68, Mr. Vikas Singh relied upon the decisions reported as SBP & Co. v. Patel Engineering Ltd. & Anr. - 2005 (8) SCC 618, National Insurance Company Ltd. v. Boghara Polyfab Pvt. Ltd. - 2009 (1) SCC 267 and Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors. - 2013 (1) SCC 641 in support of his submissions.

Having heard the submissions of the respective counsel, we find that the sum and substance of the submission of Mr. Dushyant Dave was that the arbitration Clause contained in Clause 27 of the MoU

was an independent arbitration agreement and, therefore, even if respondent chose to terminate the MoU dated 17.8.2007, the Arbitration agreement would continue to remain and consequently the parties are entitled to invoke the said Clause 27 and exercise their option for appointment of an Arbitrator and seek for concurrence of the other party. The learned senior counsel contended that since the respondent expressed its decision to terminate the MoU, the appellant after exhausting its attempt for an amicable settlement at bilateral level as between the appellant and the respondent by invoking Clause 26 had no other option but to invoke Clause 27 and opt for the appointment of a retired Judge Hon'ble Mr. Justice B.N. Mehta as an Arbitrator and sought for the concurrence of the respondent. The learned senior counsel submitted that when the respondent refused to concur with the appointment of the said learned Judge as an Arbitrator, the appellant was well justified in approaching the High Court under Section 11 for the appointment of an Arbitrator. The learned senior counsel, therefore, contended that the rejection of the said application filed under Section 11 of the Act by the impugned order is liable to be set aside and an Arbitrator has to be appointed.

According to Mr. Vikas Singh, learned senior counsel for the respondent inasmuch as the MoU itself was not a concluded contract, Clauses 26 and 27 of the said MoU do not survive and consequently there was no scope for appointment of an Arbitrator by invoking Clause 27 of the MoU.

To appreciate the respective contentions and having regard to the law on this issue been already settled in more than one decision, we are of the view that the statement of law so declared by this Court can be straightaway noted in order to render our decision in tune with the said proposition of law declared by this Court.

In this context, we find, the reliance placed upon by Mr. Dushyant Dave, learned senior counsel for the appellant on the decisions in Reva Electrical Car Company Private Ltd. (supra), Today Homes and Infrastructure Pvt. Ltd. (supra) and Enercon (India) Limited (supra) fully support the stand of the appellant. The decision in Reva Electrical Car Company Private Ltd. (supra) was a case which arose under Section 11 of the Act. A question was raised on behalf of the respondent in the said case to the effect that with the termination of the MoU itself, the Arbitration Clause would cease to exist. Dealing with the said question, the learned Judge has held as under in paragraphs 54 and 55:

> "54. Under Section 16(1), the legislature makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, the arbitration clause which formed part of the contract, has to be treated as an agreement independent of the other terms of the contract. To ensure that there is no misunderstanding, Section 16(1)(b) further provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. Section 16(1)(a) presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b), it continues to be enforceable notwithstanding a declaration of the contract being null and void. In view of the provisions contained in Section 16(1) of the Arbitration and Conciliation Act, 1996, it would not be possible to accept the submission of Ms Ahmadi that with the termination of the MoU on 31-12-2007, the

arbitration clause would also cease to exist.

> 55. As noticed earlier, the disputes that have arisen between the parties clearly relate to the subject-matter of the relationship between the parties which came into existence through the MoU. Clearly, therefore, the disputes raised by the petitioner need to be referred to arbitration. Under the arbitration clause, a reference was to be made that the disputes were to be referred to a single arbitrator. Since the parties have failed to appoint an arbitrator under the agreed procedure, it is necessary for this Court to appoint the arbitrator."

(Emphasis added) In Today Homes and Infrastructure Pvt. Ltd. (supra), this Court approved the statement of law stated by the learned Judge of this Court in Reva Electrical Car Company Private Ltd. (supra). Paragraph 14 can be usefully referred to which reads as under:

> "14. The same reasoning was adopted by a member of this Bench (S.S. Nijjar, J.), while deciding Reva Electric Car Co. (P) Ltd. v. Green Mobil, wherein the provisions of Section 16(1) in the backdrop of the doctrine of kompetenz kompetenz were considered and it was inter alia held that under Section 16(1), the legislature makes it clear that while considering any objection with regard to the existence or validity of the arbitration agreement, the arbitration clause, which formed part of the contract, had to be treated as an agreement independent of the other terms of the contract. Reference was made in the said judgment to the provisions of Section 16(1)(b) of the 1996 Act, which provides that even if the Arbitral Tribunal concludes that the contract is null and void, it should not result, as a matter of law, in an automatic invalidation of the arbitration clause. It was also held that Section 16(1)(a) of the 1996 Act presumes the existence of a valid arbitration clause and mandates the same to be treated as an agreement independent of the other terms of the contract. By virtue of Section 16(1)(b) of the 1996 Act, the arbitration clause continues to be enforceable, notwithstanding a declaration that the contract was null and void."

(Emphasis added) Again this very question came up for consideration in Enercon (India) Limited (supra) to which one of us (F.M.I Kalifulla, J.) was a party. In the said decision, the nature of transaction between the parties was more or less identical to the facts of this case. The contention raised on behalf of the appellant in that case was that there can be no arbitration agreement in the absence of a concluded contract, that, therefore, there was no question of an arbitration agreement coming into existence and, therefore, there was no scope for referring the dispute for arbitration.

As against the above submissions, it was contended on behalf of the respondent in the said decision that even if the existence of the main contract is under dispute, the Court is concerned only with the arbitration agreement, i.e. the arbitration clause and that when once such a Clause is very much present, that would by itself result in the matter being referable for arbitration. In fact, in the said case, the Clause relating to arbitration was found in Clause No.18.1 which provided for an attempt to resolve the dispute, controversy or difference through mutual consultation and if it is not resolved through mutual consultation within 30 days after commencement of discussion, then the parties

may refer the dispute, controversy or difference for resolution to an Arbitral Tribunal.

Dealing with the said Clause and the arguments raised on behalf of the respective parties, the law has been laid down as under in paragraphs 82 and 83 which are to the following effect:

> "82. Further, the arbitration agreement contained in Clauses 18.1 to 18.3 of IPLA is very widely worded and would include all the disputes, controversies or differences concerning the legal relationship between the parties. It would include the disputes arising in respect of the IPLA with regard to its validity, interpretation, construction, performance, enforcement or its alleged breach. Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the Indian Arbitration Act, 1996. In view of the aforesaid, it is not possible for us to accept the submission of Mr Nariman that the arbitration agreement will perish as the IPLA has not been finalised. This is also because the arbitration clause (agreement) is independent of the underlying contract i.e. the IPLA containing the arbitration clause. Section 16 provides that the arbitration [pic]clause forming part of a contract shall be treated as an agreement independent of such a contract.
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> 83. The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the national courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties."

(Emphasis added) Mr. Vikas Singh, learned senior counsel for the respondent by referring to the Seven Judge Bench decision of this Court in Patel Engineering Ltd. (supra) sought to contend that the reliance placed upon the said decision by this Court in Today Homes and Infrastructure Pvt. Ltd. (supra) with particular reference to the position stated in paragraph 13 of the said judgment was not appropriate.

We are not inclined to entertain the said submission, as we find that we are not concerned with the said issue as to whether what was held in paragraph 13 of Today Homes and Infrastructure Pvt. Ltd. (supra) judgment was correct or not when it makes reference to the Seven Judge Bench decision in

Patel Engineering Ltd.(supra). We are only concerned with the question whether an Arbitration Clause contained in the MoU is a stand alone agreement or not. For that purpose, what has been stated in Today Homes and Infrastructure Pvt. Ltd. (supra) in paragraph 14 is only relevant and we find the legal position stated therein in tune with the ratio decidendi laid down consistently by this Court in very many decisions. The reliance was also placed upon the decision in National Insurance Company Ltd. (supra). Paragraphs 19, 20 and 21 were referred to in the said judgment. Paragraph 19 can be usefully referred, which reads as under:

> "19. In SBP & Co. v. Patel Engg. Ltd., a seven-Judge Bench of this Court considered the scope of Section 11 of the Act and held that the scheme of Section 11 of the Act required the Chief Justice or his designate to decide whether there is an arbitration agreement in terms of Section 7 of the Act before exercising his power under Section 11(6) of the Act and its implications. It was of the view that sub-sections (4), (5) and (6) of Section 11 of the new Act, combined the power vested in the court under Sections 8 and 20 of the old Act (the Arbitration Act, 1940). This Court held: (SCC pp. 660-61 & 663, paras 39 & 47) "39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense, whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal. *** [pic]47. (iv) The Chief Justice or the Designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators."

Having gone through the said paragraphs, we do not find any position in law contrary to what has been stated in Today Homes and Infrastructure Pvt. Ltd. (supra), Reva Electrical Car Company Private Ltd. (supra) and Enercon (India) Limited (supra).

Similarly, the reliance placed upon in Chloro Controls India Pvt. Ltd. (supra) also does not in any manner dislodge the legal position relating to the stand alone Arbitration Clause in a substantive transaction recorded in writing. Therefore, we do not find any useful purpose by referring to the said decision as well.

Having thus ascertained the legal position regarding the stand alone agreement relating to arbitration with particular reference to arbitration agreement in a legal transaction between the parties, when we refer to Clause 27 of the MoU, we wish to find out whether the said Clause satisfies the principles set down and applicable to a stand alone Arbitration Agreement. When we refer to Clause 27, we find that in the event of failure of an amicable settlement at the bilateral level relating to a dispute or difference arising between the appellant and the respondent to be reached as contained in Clause 26 of the MoU, then such unresolved dispute or difference concerning or arising from the MoU, its implementation breach or termination whatsoever including any difference or dispute as to the interpretation of any of the terms of the MoU is referable to the sole Arbitrator appointed by the appellant and the respondent. Therefore, irrespective of the question or as to the fact whether the MoU fructified into a full-fledged agreement, having regard to the non-fulfilment of any of the conditions or failure of compliance of any requirement by either of the parties stipulated in the other Clauses of MoU, specific agreement has been entered into by the appellant and the respondent under Clause 27 to refer such controversies as between the parties to the sole arbitrator by consensus. Therefore, when consensus was not reached as between the parties for making the reference, eventually it will be open for either of the parties to invoke Section 11 of the Act and seek for reference of the dispute for arbitration.

In the case on hand, as we have noted earlier, after the signing of the MoU on 17.8.2007, the Board of Directors of the Respondent passed a Resolution on 29.10.2007 which expressed its approval to the MoU, subject, however, to modification of the conditions. Thereafter, correspondence exchanged between the parties from 17.12.2007 to 10.03.2010. There was a subsequent Board Resolution of the respondent on 18.03.2010 which stated that the Board took a decision that it was not inclined to extend the validity of proposed MoU due to change in the mineral policy of the State Government. However, on 26.07.2010, the respondent informed the appellant that to maintain parity, necessary modification in the terms and conditions of the MoU dated 17.8.2007 was communicated to the State Government for approval which was awaited and that on receipt of such approval, a fresh MoU can be executed. Thereafter, by communication dated 25.4.2011, the respondent categorically informed the appellant that it decided to forthwith cancel the MoU dated 17.8.2007 alleging fault on the side of the appellant with regard to failure to comply with the various terms and conditions of the MoU. Thus, from the above referred to sequence of events which occurred between 17.8.2007 and 25.4.2011, it is crystal clear that both parties were at variance with reference to the various terms and conditions contained in the MoU and consequently there was every right in either of the parties to seek for an amicable settlement in the first instance as specified in Clause 26 of the MoU.

We find from the materials on record that the appellant in its letter dated 11.07.2011 addressed to respondent expressed its desire to amicably resolve the dispute at the bilateral level. Since there was no response from the respondent, the appellant caused a legal notice on 07.12.2012 by invoking Clause 27 of the MoU for appointment of an Arbitrator and also suggested the name of a retired High Court Judge and sought for the concurrence of the respondent. In the legal notice, the appellant specifically intimated that in the event of the respondent failing to express its concurrence for the appointment of the named Arbitrator, it will have no other option but to move the High Court under Section 11 of the Act. The respondent having made it clear in its reply dated 04.01.2013 to the lawyer's notice stating that it was not inclined to agree for a reference, the appellant had no other option except to move the High Court by filing an application under Section 11 of the Act.

Having noted the above factors and inasmuch as we are convinced that Clause 27 is a valid arbitration agreement contained in the MoU dated 17.8.2007, the appellant was fully entitled to invoke the said agreement and seek for a reference to the Arbitrator.

In the light of our above conclusion, we hold that the learned Judge having failed to appreciate the legal position as regards the existence of an arbitration agreement in the MoU irrespective of the failure of the parties to reach a full-fledged agreement with respect to the various terms and conditions contained in the MoU for a joint venture, the said conclusion and judgment of the learned Judge is liable to be set aside and is accordingly set aside. Since the respondent has expressed its disinclination to agree to express its concurrence and thereby the parties failed to appoint an Arbitrator under the agreed procedure, it is necessary for this Court to appoint an Arbitrator. Therefore, while setting aside the judgment impugned in this appeal, we hereby appoint Hon'ble Ms. Justice Rekha Manharlal Doshit, resident of C-5, 402, Deo Sangam Flat, Guartgam Road, Near Gandhi Nagar, Gujarat, former Chief Justice of Patna High Court and former Judge of Gujarat High Court as the sole Arbitrator to adjudicate the disputes that have arisen between the parties on such terms and conditions as the sole Arbitrator deems fit and proper. Undoubtedly, the learned sole Arbitrator shall decide all the disputes arising between the parties under the MoU, without being influenced by any prima facie opinion expressed in this order with regard to the respective claims of the parties.

The Registry is directed to communicate this order to the sole Arbitrator to enable him to enter upon the reference and decide the matter as expeditiously as possible.

The appeal stands allowed with the above directions.

.....J. [Fakkir Mohamed Ibrahim Kalifulla]
.....J. [Shiva Kirti Singh] New Delhi;

April 16, 2015