2025 INSC 693

**REPORTABLE**

**IN THE SUPREME COURT OF INDIA**
**CIVIL APPELLATE JURISDICTION**

**Civil Appeal No. ____/2025**
**(Arising out of SLP (C) No. 16913/2017)**

South Delhi Municipal Corporation of Delhi ...Appellant

versus

SMS Limited ...Respondent

**WITH**

**Civil Appeal No. ____/2025**
**(Arising out of SLP (C) No. 21437/2022)**

M/s DSC Limited ...Appellant

versus

Municipal Corporation of Delhi ...Respondent

**WITH**

**Civil Appeal No. ____/2025**
**(Arising out of SLP (C) No. 17510/2023)**

Municipal Corporation of Delhi ...Appellant

versus

M/s Consolidated Construction Consortium Limited ...Respondent

**J U D G E M E N T**

**SURYA KANT, J.**

Leave granted.

**2.** The captioned appeals challenge the judgments dated 09.03.2017, 29.07.2022, and 02.11.2022 all delivered by the High Court of Delhi (**High Court**), in three separate proceedings pertaining to multiple Concession Agreements executed between the Municipal Corporation(s) of Delhi and certain private contractors for the development of parking and commercial complexes. At the heart of each dissension is the interpretation of the dispute resolution clauses contained therein—specifically, whether they constitute an arbitration clause, thus making the disputes arbitrable. This alleged ambiguity has led to protracted litigation before multiple fora.

**3.** To further contextualise, the private contractors assert that these dispute resolution clauses necessarily mandate arbitration; whereas the Municipal Corporations contend that they be construed as those prescribing mediation.

**A.** ***FACTS***

**4.** We deem it necessary, at this juncture, to delve into the facts giving rise to this controversy. While the factual matrices differ in detail, they converge on a common interpretative dissonance concerning the dispute resolution clauses. Consequently, although the distinct

contextual backgrounds of these three legal proceedings may not be directly determinative of the ultimate adjudication, we have nonetheless set them out briefly, *in seriatim*, for clarity and completeness.

**5. South Delhi Municipal Corporation v. SMS Limited [SLP (C) No. 16913/2017] (SMS Ltd. Case)**

**5.1.** The Municipal Corporation of Delhi (**MCD**) executed a Concession Agreement with the Respondent, SMS Ltd. on 24.04.2012, for the construction of a multi-storeyed parking facility at Defence Colony, New Delhi, on a Design, Build, Finance, Operate, and Transfer (**DBFOT**) basis. Subsequently, the MCD was trifurcated into the New Delhi Municipal Corporation (**NDMC**), the East Delhi Municipal Corporation (**EDMC**), and the South Delhi Municipal Corporation (**SDMC**) in 2012, with the subject-Concession Agreement falling under the jurisdiction of the SDMC.

**5.2.** Shortly thereafter, the SDMC executed a lease deed for the project site, transferring all rights and interests therein to SMS Ltd. Disputes quickly arose between the parties, with SMS Ltd. alleging that SDMC's failure to grant timely approvals for its architectural drawings resulted in it incurring substantial losses and additional expenditure.

**5.3.** During this time, while construction at the project site had commenced in earnest, the Defence Colony Welfare Association (**DCWA**) filed W.P. (C) No. 1076/2013 before the High Court, *inter alia* seeking the quashing of the subject-Concession Agreement and an injunction

restraining SMS Ltd. from proceeding with the construction. The DCWA alleged that SDMC did not own the very land on which it sought to construct, and that the planned project would only worsen the existing traffic in the area. The High Court by way of a *status quo* order dated 20.02.2013 halted further progress on the project. This impediment ultimately led SMS Ltd. to seek termination of the Concession Agreement.

**5.4.** SMS Ltd., by letter dated 15.01.2014, formally sought termination of the subject-Concession Agreement, along with a refund of its deposited amounts, reimbursement of incurred expenditure, and the return of its Bank Guarantee as stipulated in the Concession Agreement. Following a meeting with the SDMC Commissioner on 18.02.2014, an initial understanding was reached between the parties, regarding partial refunds. However, SMS Ltd. subsequently raised additional claims, seeking interest on the refunded amounts as well as compensation for loss of profits. Upon receiving no response to these demands, SMS Ltd. *vide* letter dated 07.12.2015, invoked Article 20 of the Concession Agreement calling upon SDMC to refer the disputes to 'mediation.' Notably, in the same letter, SMS Ltd. also acknowledged the absence of an 'express arbitration clause' in the Concession Agreement but nonetheless expressed its willingness to submit its claims before an arbitrator.

**5.5.** It is a matter of record that SMS Ltd. later modified its stance as to the arbitrability of the subsisting dispute, stating that its initial position

was based on erroneous legal advice. Its novel position was that Article 20 of the Concession Agreement indubitably constituted an arbitration clause. On this basis, SMS Ltd. made further representations, seeking additional refunds and the appointment of an arbitrator. In response, SDMC, by its letter dated 23.09.2016, rejected SMS Ltd.'s request for arbitration as untenable. SDMC maintained that the meeting on 18.02.2014 had been convened by the Commissioner in pursuance of the mandate laid down by Article 20, which they understood to be as a clause prescribing mediation. It added that since the two parties had already concluded a negotiation session chaired by the Commissioner, any further claims for interest or damages were strictly precluded.

**5.6.** SMS Ltd. then approached the High Court by way of Arbitration Petition No. 793/2016 under Section 11(6)(a) read with Section 11(12)(b) of the Arbitration & Conciliation Act, 1996 (**Arbitration Act**) seeking appointment of an arbitrator. By way of the impugned judgment dated 09.03.2017, a learned Single Judge of the High Court overruled SDMC's objections, conclusively holding that Article 20 of the Concession Agreement constituted an arbitration clause and accordingly proposed the appointment of a sole arbitrator.

**5.7.** Aggrieved by the High Court's decision, SDMC has preferred the instant appeal, in which while issuing notice this Court *vide* an interim order dated 07.07.2017, had directed that *status quo* shall be maintained between the parties.

**6. <u>M/s DSC Limited v. Municipal Corporation of Delhi</u> [SLP (C) No. 21437/2022] (DSC Ltd. Case)**

**6.1.** Similar to the previous appeal, the dispute was borne out of the issuance of a Notice Inviting Tender (**NIT**) by the MCD on 02.01.2009 for the development of an integrated multilevel automatic car parking facility at M-Block, Greater Kailash I, New Delhi, on DBFOT basis.

**6.2.** M/s DSC Ltd. (**DSC Ltd.**) entered into a consortium with SIMMATEC Parking Technologies Ltd. under a Memorandum of Understanding (**MoU**), and jointly submitted a bid for the project. The MCD accepted their bid on 09.11.2010, culminating in the execution of the subject-Concession Agreement on 11.08.2011. In accordance with the terms of the said Agreement, DSC Ltd., as the lead member of the consortium, submitted a concession fee of INR 16,65,00,000 to the MCD.

**6.3.** However, as in the preceding appeal's factual matrix, differences arose between the parties. DSC Ltd. alleged that the MCD failed to fulfil its obligations under the Concession Agreement, particularly in respect of the condition requiring the delivery of an encumbrance-free project site and execution of the requisite lease deeds. It moreover stated that it could not begin its work in earnest until it was delivered the project site as stipulated under the subject-Concession Agreement. On the other hand, the MCD being faced with prolonged delays issued a termination notice on 13.06.2017 unilaterally closing the Concession Agreement. MCD retained INR 14,93,40,000, submitted by DSC Ltd. as the

performance guarantee, treating it as forfeited and refunded the concession fee without interest.

**6.4.** In contrast, DSC Ltd. maintained that the breaches leading to the impracticability of the project were attributable solely to the MCD and sought compensation amounting to approximately INR 406 crores, in addition to a full refund. It thus, much like SMS Ltd., invoked Article 20 of the Concession Agreement, construing it as an 'arbitration clause'. The MCD, however, reiterated that the subject-Concession Agreement was already closed, apart from categorically denying the existence of any arbitration clause in the same.

**6.5.** Aggrieved by the MCD's refusal to accede to the arbitral process, DSC Ltd. approached the High Court by filing Arbitration Petition No. 234/2018, seeking the appointment of an arbitrator. However, *vide* the impugned judgment dated 29.07.2022, a learned Single Judge of the High Court dismissed DSC Ltd.'s petition, holding that Article 20 of the Concession Agreement provided for mediation, not arbitration. Furthermore, the High Court declined to follow the Co-ordinate Bench's stance in SMS Ltd.'s case, noting that it had been effectively stayed by this Court (*vide* order dated 07.07.2017 noted hereinabove).

**6.6.** The aggrieved DSC Ltd. has preferred this appeal, wherein notice was issued by this Court *vide* order dated 07.12.2022.

**7. <u>Municipal Corporation of Delhi v. M/s Consolidated Construction Consortium Limited</u> [SLP (C) No. 17510/2023] (CCC Ltd. Case)**

**7.1.** As in the previous instances, here too the MCD awarded a Concession Agreement on 30.07.2010 to M/s Consolidated Construction Consortium Limited (**CCC Ltd.**) pursuant to a tender issued for the development of a multi-level automated parking-cum-commercial complex at South Extension Parts I & II, New Delhi.

**7.2.** Analogously, disputes arose between the parties herein, prompting CCC Ltd. to issue a legal notice to MCD on 01.07.2016, demanding payment of INR 41,88,50,435 as compensation/damages with interest, or the appointment of an arbitrator as an alternative. The MCD, however, categorically denied the existence of any arbitration clause in the Concession Agreement, specifically rejecting CCC Ltd.'s reliance on Article 20.

**7.3.** Consequently, CCC Ltd. approached the High Court by filing Arbitration Petition No. 319/2017 under the Arbitration Act. By its order dated 02.11.2022, a learned Single Judge of the High Court, while noting that an identical question of law was pending adjudication before this Court in the SMS Ltd. case, nonetheless construed Article 20 as an arbitration clause and directed that arbitration will proceed under the aegis of the Delhi International Arbitration Centre (**DIAC**).

**7.4.** The aggrieved MCD has preferred the instant appeal wherein notice was issued on 24.07.2023.

**8.** It, thus, becomes evident that the focal issue in all three cases before us is whether Article 20 of the respective Concession Agreements constitutes an 'arbitration clause' or merely prescribes 'mediation'. Given the commonality of the interpretative challenge, a uniform determination by this Court is necessary to ensure clarity and consistency in the underlying disputes.

**9.** Before we proceed further, it would be apposite to reproduce the dispute resolution clauses across all three appeals (contained in Article 20), whose interpretation forms the bone of contention in these appeals.

**9.1.** *Firstly*, the Concession Agreement in the SMS Ltd. Case provided the following dispute resolution clause:

> "***ARTICLE 20: DISPUTES***
> *In the event that any dispute, controversy or claim arises among the Parties in connection with or under this Agreement or the interpretation of any of its provisions or upon the occurrence of an event of Default any party shall refer the dispute, controversy or claim to the Commissioner, MCD.*
> ***Section 20.1 Mediation by Commissioner***
> *The Party that initially issue the notice of intention to refer the matter to the MCD and MCD in Consultation with Consultant will appoint a officer from within or outside MCD who will look into the written documents; (i) a description of dispute; ii) a statement of that party's position; and (iii) copies of relevant documentary evidence in support of such position.*
> ***Section 20.2 Performance during Dispute Resolution***
> *Pending the submission of a dispute, controversy or claim to the officer appointed by the MCD and thereafter until the final decision of the officer appointed by the MCD, as the case may be, the parties shall continue to perform all of their obligations under this Agreement, without prejudice to a final adjustment in accordance with such decision.*
> ***Section 20.3 Survival***
> *The provisions relating to indemnification contained in Section 15.2, intellectual property contained in Section 18, confidentiality contained in Section 19.1 and the dispute*

*resolution provisions contained in this Article 20 shall survive the termination of this Agreement.*"

**9.2.** *Secondly*, in the DSC Ltd. Case, Article 20 provides as follows:

"***ARTICLE 20: DISPUTES***
*In the event that any dispute, controversy or claim arises among the Parties in connection with or under this Agreement or the interpretation of any of its provisions or upon the occurrence of an event of Default any party shall refer the dispute, controversy or claim to the Commissioner, MCD.*
***Section 20.1 Mediation by Commissioner***
*The Party that initially issued the notice of intention to refer the matter to the MCD and MCD in Consultation with Consultant will appoint a officer who will look into the written documents; (i) a description of dispute; (ii) a statement of that party's position; and iii) copies of relevant documentary evidence in support of such position.*

*(a) Within 10 days of receipt of the above documents, the other parties shall submit; (i) a description of dispute; (ii) a statement of that party's position; and iii) copies of relevant documentary evidence in support of such position.*

*(b) The officer appointed by MCD may call for such further documentary evidence and/or interview such persons, as it may deem necessary in order to reach a decision.*

*(c) The officer appointed by MCD shall give notice to the parties of its decision within 20 days of receipt of the documents provided by the parties pursuant to subsection (b) and (c) above. The decision of the officer appointed by MCD shall be binding.*

*(d) The officer appointed by the MCD should give decision in writing. The decision of the MCD shall be final and binding on party…*"

**9.3.** *Lastly*, the CCC Ltd. Case lays down the following dispute resolution clause:

"***ARTICLE 20: DISPUTES***
*In the event that any dispute, controversy or claim arises among the Parties in connection with or under this Agreement or the interpretation of any of its provisions or upon the occurrence of an event of Default any party shall refer the dispute, controversy or claim to the Commissioner, MCD.*
***Section 20.1 Mediation by Commissioner***

*The Party that initially issued the notice of intention to refer the matter to the MCD and MCD in Consultation with Consultant will appoint a officer who will look into the written documents; (i) a description of dispute; (ii) a statement of that party's position; and iii) copies of relevant documentary evidence in support of such position.*

*(e) Within 10 days of receipt of the above documents, the other parties shall submit; (i) a description of dispute; (ii) a statement of that party's position; and iii) copies of relevant documentary evidence in support of such position.*

*(f) The officer appointed by MCD may call for such further documentary evidence and/or interview such persons, as it may deem necessary in order to reach a decision.*

*(g) The officer appointed by MCD shall give notice to the parties of its decision within 20 days of receipt of the documents provided by the parties pursuant to subsection (b) and (c) above. The decision of the officer appointed by MCD shall be binding.*

*(h) The officer appointed by the MCD should give decision in writing. The decision of the MCD shall be final and binding on party…"*

**B. *CONTENTIONS***

**10.** It is necessary for us at this juncture to delineate the contentions advanced by the rival parties. For the sake of clarity and coherence, we have categorized the submissions into two groups—(***i***) those made on behalf of SDMC/MCD, and (***ii***) those advanced by the private contractors (SMS Ltd., DSC Ltd., and CCC Ltd.). This classification reflects the evident similarities in their respective arguments, as well as the reliefs sought.

**11.** Mr. Sanjiv Sen, learned Senior Counsel appearing on behalf of SDMC/MCD, sought to assail the High Court's interpretation of the disputed clauses contained in Article 20 of the respective Concession Agreements as one mandating arbitration (SMS Ltd. and CCC Ltd. Cases). In the same vein, he urged in favour of upholding the impugned

decision in the case of DSC Ltd., wherein the High Court refused to read arbitration into the Concession Agreement. To that end, he submitted the following:

***a)*** The issue for adjudication in the present appeals is no longer *res integra*, in light of this Court's decision in ***South Delhi Municipal Corporation v. SMS AAMW Tollways (P) Ltd.***[1] In that case, this Court set aside the High Court's erroneous interpretation of a similarly worded dispute resolution clause as an 'arbitration agreement'. Given the substantial similarity between the impugned clauses in the cases in hand and the clause considered in ***Tollways (supra)***, they must meet the same fate.

***b)*** The private contractors cannot successfully distinguish the ruling in ***Tollways (supra)*** on the sole ground that, while in that case only the contractor could make a reference to the Commissioner, the impugned clauses in these appeals allow either party to do so. The ability of both parties to initiate the reference does not, in itself, transform the clause into an arbitration agreement. As reaffirmed by this Court in ***Food Corporation of India v. National Collateral Management Services Limited***,[2] a reference to an officer of the authority, even if made by both parties, does not meet the essential attributes of an arbitration clause.

[1] (2019) 11 SCC 776.
[2] 2020 (19) SCC 464.

***c)*** The impugned clauses fail to satisfy the fundamental ingredients of an arbitration agreement, as laid down by this Court in ***Bihar State Mineral Development Corp v. Encon Builders (I) (P) Ltd.***[3] Unlike a valid arbitration clause, Article 20 does not provide for reference to a private tribunal or an independent adjudicator. Instead, it envisages a process controlled by the MCD Commissioner or his appointee, an arrangement that lacks the neutrality and party autonomy inherent in arbitration. Further, the private contractors are not devoid of any remedy as they can always approach the civil court for the dispute resolution.

***d)*** The conduct of the private contractors further reveals that resorting to arbitration was a mere afterthought, seemingly intended to prolong and complicate the dispute resolution process. In the case of SMS Ltd., the legal notice issued by the contractor expressly sought the initiation of mediation and, significantly, acknowledged that no arbitration agreement subsisted between the parties. Similarly, CCC Ltd. initially issued a notice under Section 80 of the Code of Civil Procedure, 1908, which is a procedural requirement before instituting a civil suit, thereby contradicting its later assertion that an arbitration agreement existed. DSC Ltd. similarly misconstrued Article 20 to claim existence of an arbitration agreement, where none existed.

[3] (2003) 7 SCC 418.

***e)*** The High Court's decision in CCC Ltd., rendered after this Court's unequivocal ruling in ***Tollways (supra)***, is clearly *per incuriam*, as it failed to consider that a similar dispute resolution clause had already been held to not constitute arbitration. Furthermore, the High Court's ruling in ***CCC Ltd.*** stands in stark contrast to its own decision in ***DSC Ltd.,*** wherein the learned Single Judge correctly applied the principles laid down in ***Tollways (supra)*** and refused to read an arbitration agreement into the Concession Agreement.

***f)*** The private contractor, at all relevant times, had access to non-exclusive remedies, as expressly contemplated under Article 21 of the Concession Agreements, which recognizes the availability of remedies under applicable law (Section 21.3 of Article 21) and lays down the governing legal framework (Section 21.7 of Article 21). Given that Section 42 of the Arbitration Act mandates that all arbitral proceedings be filed before a designated court, the inclusion of provisions preserving recourse to other legal remedies further demonstrates that the Concession Agreements did not envisage an arbitration framework.

***g)*** This Court has consistently emphasized that contractual terms must be given their due meaning and cannot be rendered redundant or superfluous. In ***Ramana Dayaram Shetty v. International Airport Authority of India***,[4] it was held that words used in formal documents must be accorded their full

[4] (1979) 3 SCC 489.

significance. Applying this principle, the explicit reference to 'mediation' in the Concession Agreements, coupled with the existence of other provisions allowing for civil remedies, must be interpreted in a manner that preserves their intended effect. Any attempt to dilute the plain meaning of these provisions would result in an impermissible rewriting of the contract, which is contrary to settled legal principles.

**12.** On the other hand, the private contractors, represented by learned Senior Counsel Mr. Ritin Rai and Mr. Nakul Diwan, ardently urged that Article 20 across all three Concession Agreements clearly represents the form of an arbitration clause. In this regard, they canvassed the following submissions:

***a)*** A conjoint reading of Article 20 establishes a clear intent by the parties to refer disputes to arbitration. The principles laid down in ***K.K. Modi v. K.N. Modi***,[5] wherein this Court outlined the essential attributes of an arbitration agreement, are fully satisfied. *Firstly*, either party is entitled to invoke the process, ensuring mutual recourse. *Secondly*, the adjudicator is independent and impartial, as they may be appointed from 'within or outside' the MCD (*in the case of SMS Ltd., at least*). *Thirdly*, the process is structured and adjudicatory, closely resembling arbitral proceedings, as it involves the submission of written arguments, tendering of documentary evidence, and a binding decision. Additionally, Section 20.2 of

[5] (1998) 3 SCC 573.

Article 20 explicitly provides that the decision of the appointed authority shall be final, further strengthening the claim that the clause creates an arbitration framework.

***b)*** It is a settled principle that an arbitration agreement need not be in any specific form; what is determinative is the parties' intent.[6] Even in the absence of the explicit use of the words 'arbitration' or 'arbitrator', the substance of the clause determines its true character.[7] The intent to submit disputes to arbitration must be ascertained from a holistic reading of the contract rather than an isolated textual analysis of Article 20.[8]

***c)*** The conduct of the MCD in similar contractual arrangements contradicts its present stance. In a comparable dispute,[9] the MCD had previously admitted that an analogous clause amounted to an arbitration agreement and even participated in arbitral proceedings, resulting in an arbitral award in its favour. The MCD cannot now be permitted to approbate and reprobate, adopting contradictory positions at its convenience. Such an inconsistent stance is legally impermissible and renders MCD's present objection untenable.

***d)*** The cases in hand are factually distinguishable from ***Tollways (supra)*** since the dispute resolution framework under Article 20 of

[6] Rukmanibai Gupta v. Collector, Jabalpur, (1989) 4 SCC 556; Punjab State v. Dina Nath, (2007) 5 SCC 28.
[7] Jagdish Chander v. Ramesh Chander and ors., 2007 (5) SCC 719.
[8] MTNL v. Canara Bank, 2020 (12) SCC 767.
[9] SMS Parking Solutions Private Limited v. North Delhi Municipal Corporation, Arb. P. 166/2017.

the Concession Agreements allows either party to initiate the process, demonstrating a bilateral mechanism rather than an authority-driven process. The decision in ***Tollways (supra)*** dealt with a two-tiered internal review process, which involved an initial resolution by a 'Competent Officer' followed by an appellate review, resembling a departmental appeal rather than arbitration. By contrast, Article 20 does not contemplate such an internal review process but instead provides for final dispute resolution by an independent adjudicator. In recognition of these key factual distinctions, this Court had de-tagged the present matters from ***Tollways (supra)*** by its order dated 26.09.2018, thereby implicitly acknowledging that the two sets of cases are not identical in nature.

***e)*** In SMS Ltd.'s case, SDMC has suppressed material facts before this Court, raising serious doubts regarding its *bona fides* in the appeal. After the High Court's order, a learned arbitrator was appointed, and arbitration proceedings had commenced. The SDMC did not object to the jurisdiction of the Arbitrator at that stage; rather, it actively filed its Statement of Claim (**SOC**), thereby accepting and participating in the arbitral process. By failing to object to jurisdiction at the appropriate stage, SDMC waived its right to seek invalidation of the arbitral process.

***f)*** Governmental agencies must ensure that arbitration procedures comply with principles of equality and non-arbitrariness in public-

private contracts so that the rights of private parties are adequately safeguarded. The MCD cannot rely on ambiguous or cleverly drafted provisions to evade its contractual commitments.[10] As a State entity, the MCD is bound by principles of fairness, transparency, and reasonableness and cannot be allowed to take advantage of obscure textual clues at the expense of private parties' rights.

## C. ***ISSUES***

**13.** After considering the rival contentions, the voluminous record, the statutory framework, as well as the factual circumstances colouring these appeals, we find that the singular issue that falls for our consideration is:

**i.** Whether the dispute resolution clauses *viz.* Article 20 in the subject-Concession Agreements, constitute a valid arbitration agreement between the parties?

## D. ***ANALYSIS***

**14.** While considering the singular issue as formulated above, we find that its analysis necessitates a two-pronged inquiry: ***(i)*** what are the necessary ingredients of an enforceable arbitration agreement; and ***(ii)*** whether Article 20 of the subject-Concession Agreements contain those ingredients.

[10] Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 SCC OnLine SC 3219.

***D.1 What are the ingredients of an arbitration agreement?***

**15.** We must first explicate what a valid arbitration agreement contains under Indian law, as we are sufficiently cognizant of the factum that an agreement for arbitration is the *sine qua non* for invocation of the arbitral process—as is prayed for by the private contractors in the instant appeals.

D.1.1. The Indian Position

**16.** The Indian statutory framework governing arbitration gains primacy in our quest to untie the knot projected by the parties before us. The Arbitration Act serves as the principal legislation which forms a holistic code on the subject. Since its enactment back in 1996, it has been supplemented by several key Amendments, in the years 2015, 2019, and 2021. These changes have been a consistent endeavour to grant greater autonomy to arbitral tribunals by restricting judicial intervention and expanding their powers and privileges.

**17.** In the context of the current controversy, we may firstly pivot our attention to Section 7 of the Arbitration Act, which defines an arbitration agreement as follows:

> "***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 telecommunication 1 [including communication through electronic means] which provide a record of the agreement; or*
> *(c) an exchange of statements 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.*"

**18.** It may be seen that the above-reproduced provision succinctly summarises the basic building blocks of a valid arbitration agreement, including its genesis and structure. The emphasis laid on the existence of a defined legal relationship, whether contractual or not, underscores the breadth of applicability of arbitration law. Furthermore, Section 7 places significant weight on the form and record of the agreement, with a view to ensure clarity and certainty in arbitral arrangements.

**19.** The statutory requirement that the agreement be in writing—whether through a formally signed document, an exchange of communications, or even unchallenged pleadings—reflects the Legislature's intent to liberally accommodate the realities of modern commercial communication, including electronic correspondence.

**20.** Another notable feature is found in sub-section (5), which serves to widen the expression 'arbitration clause' by expressly providing for incorporation by reference. Overall, this statutory approach is one which prioritises substance over form in the case of valid arbitration

agreements, which ultimately culminate in an arbitral award, enforceable under Section 36 of the Arbitration Act.

**21.** In the decisions cited by the parties before us, it is evident that this Court has consistently attempted to de-fog the surroundings of a proper arbitration clause, to make its precise form and substance more discernible. For instance, in ***Encon Builders (supra)***, this Court held that the essential elements of an arbitration agreement comprise the parties' consensual intent to settle a present or future difference through a private tribunal, and that such a decision would be binding upon them. In other words, consensus and intent of both parties is given elaborate weightage in the determination of an arbitration agreement.

**22.** ***K. K. Modi (supra)*** adroitly consolidated and reiterated the law relating to arbitration agreements, and held as follows:

> "***17.*** *Among the attributes which must be present for an agreement to be considered as an arbitration agreement are:*
> *(1) The arbitration agreement must contemplate that the* ***decision of the tribunal will be binding on the parties to the agreement****,*
> *(2) that the* ***jurisdiction of the tribunal to decide the rights of parties must derive either from the consent of the parties*** *or from an order of the court or from a statute, the terms of which make it clear that the process is to be an arbitration,*
> *(3) the agreement must contemplate that substantive rights of parties will be determined by the agreed tribunal,*
> *(4) that the tribunal will determine the rights of the parties in* ***an impartial and judicial manner with the tribunal owing an equal obligation of fairness towards both sides,***

> *(5) that the agreement of the parties to refer their disputes to the* ***decision of the tribunal must be intended to be enforceable in law*** *and lastly,*
> *(6) the agreement must contemplate that the tribunal will make a decision upon a dispute which is already formulated at the time when a reference is made to the tribunal.*
>
> ***18.*** *The other factors which are relevant include, whether the agreement contemplates that the tribunal will receive evidence from both sides and hear their contentions or at least give the parties an opportunity to put them forward; whether the wording of the agreement is consistent or inconsistent with the view that the process was intended to be an arbitration, and whether the agreement requires the tribunal to decide the dispute according to law.*"
>
> [Emphasis supplied]

**23.** ***K. K. Modi (supra)*** thus afforded importance to the elements of finality, consent, and impartiality in a valid arbitration clause. In the ***Tollways (supra)*** case, which has been studiously relied upon by the parties before us, this Court precisely explained that, "*Arbitration has always been understood to mean* ***the process by which a dispute is resolved by an arbitrator chosen or acceptable to both sides under an arbitration agreement between the two parties****...*"

D.1.2. The Consonance between Indian Law & Foreign Jurisdictions

**24.** The structure of valid arbitration agreements across jurisdictions reveals a broadly consistent understanding of arbitration, with Indian law largely aligning with international norms derived from the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law on International Commercial Arbitration, 1985, which has significantly influenced arbitral legislation worldwide.

**25.** For example, in the **United Kingdom**, the Arbitration Act, 1996 governs both domestic and international arbitrations. Section 5 thereof stipulates that an arbitration agreement must be in writing, while Section 6(1) defines such an agreement as one under which parties agree to submit present or future disputes to arbitration. This Act does not expressly require that the legal relationship be contractual; however, the context of a defined relationship is presumed.

**26.** In the **United States of America**, the Federal Arbitration Act, 9 U.S.C. § 2, provides that an arbitration clause must be in writing and contained within a contract involving commerce. The provision must also evince the parties' agreement to submit future disputes to arbitration. While the Federal Arbitration Act applies primarily to inter-state commerce, in purely domestic contexts, several States within the United States have enacted complementary statutes mirroring its core requirement of a written agreement to arbitrate disputes arising from a contractual relationship.

**27.** The Arbitration Act (Cap. 10) in **Singapore** governs domestic arbitrations and requires an arbitration agreement to firstly be in writing. The agreement must pertain to disputes arising from a defined legal relationship, contractual or otherwise, and must reflect the parties' intention to submit those disputes to arbitration, either generally or in respect of particular disputes.

**28.** In **France**, the Code of Civil Procedure, Book IV, pertains to domestic arbitration. Article 1442 thereof mandates that the arbitration agreement be in writing and relate to existing or future disputes. While the Code does not require an express reference to a legal relationship, the statutory and commercial context implies such a connection. Article 1443, moreover, mandates that a valid arbitration clause must itself appoint the arbitrator, or provide for the method of such an appointment.

**29.** What we discern from the limited comparative analysis above is that legislative frameworks around the world have common elements governing their arbitration agreements *inter alia* including a written agreement, a defined legal relationship, and a clear agreement to submit present or future disputes to arbitration.

D.1.3. The Necessary Ingredients of a Valid Arbitration Agreement

**30.** Considering the global position on the validity of arbitration agreements in *tandem* with the settled law that holds the field in India, we find that the existence of an arbitration agreement necessarily postulates the presence of the following ingredients:

**i. Clear Intent to Arbitrate**

The agreement must reflect a definitive and mutual intention to refer disputes to arbitration, excluding the jurisdiction of civil courts in respect of such matters. *Consensus ad-idem* or 'meeting of the minds' of the respective parties towards settling any

disputes that may arise between them through the process of arbitration must be made out from the form and substance of the legal agreement or contract. This ideally entails the parties reducing their intention of entering into an arbitration agreement into some tangible medium.

**ii. Binding Adjudicatory Process**

The arbitration agreement must contemplate a binding and enforceable resolution of disputes. The process must culminate in a final and conclusive award, not a non-binding recommendation or mediation outcome. In essence, the result of the arbitral process should be final and binding on both the parties.

**iii. Compliance with Arbitration Norms**

While the statutory minimums do not universally require specification of seat, venue, or applicable procedural rules, best practices and several foreign jurisdictions encourage clarity in these respects to ensure legal certainty. The agreement should allow for party autonomy in the appointment of arbitrators and procedural conduct, subject to statutory safeguards. The adversarial process, which inheres in the institution of arbitration, must also be given due credence *via* provision for an impartial adjudicatory body, whose decisions involve deference to the principles of natural justice.

**31.** We may, however, hasten to add that the aforementioned elemental test is a conjunctive one, and not a disjunctive one. In other words, all the elements identified hereinabove must co-exist, apart from being duly proven by the party which seeks to assert that an arbitration agreement subsists.

**32.** Consequently, it stands clarified that a dispute resolution clause may only rise to the level of a valid arbitration clause or agreement when it signifies a clear intent to arbitrate, entails a binding adjudicatory process, and contemplates compliance with general arbitral norms.

***D.2. Does Article 20 of the subject-Concession Agreements constitute an arbitration agreement?***

**33.** The second limb of this issue, concerns the consideration of the facts and circumstances of these appeals amidst the legal backdrop we have previously set out. We may, at this stage, revert back to **paragraph 9** where the dispute resolution clauses contained in all the three Concession Agreements are extracted and reproduced.

**34.** At the very outset, it may be seen that Articles 20 in the cases of DSC Ltd. and CCC Ltd. are identical for all intents and purposes while the same clause in the case of SMS Ltd. is faintly different. For the sake of completeness, we may note these minute differences before proceeding with the analysis.

**35.** *Firstly*, the cases of DSC Ltd. and CCC Ltd. add certain specific sub-provisions regarding the '*mediation*' process itself, while only summary

procedure is prescribed in the case of SMS Ltd. *Secondly*, the stipulation that an officer may be appointed '*from within or without MCD*' features solely in the SMS Ltd. agreement, and is conspicuously absent in the clauses pertaining to DSC Ltd. and CCC Ltd. *Thirdly*, the latter two agreements introduce an express declaration that the officer's decision shall be '*final and binding*', a formulation that is absent in the SMS Ltd. version.

**36.** Having equipped ourselves with the requisite recitals, we now turn to appraising the same on the anvil of the law elucidated hereinabove pertaining to valid arbitration agreements.

D.2.1. Intent to Arbitrate

**37.** The first and foremost requirement of an arbitration agreement, when it is in writing, is that the parties must have consciously and unambiguously agreed to submit their disputes to arbitration. This intent must be evident from the language of the contract and the surrounding contractual framework.

**38.** A plain reading of Article 20 across all three Concession Agreements does not reveal any express intent to arbitrate. We say so for the following reasons:

***(a)*** It may be noted that the subject-clause itself is titled as 'Mediation by Commissioner', which immediately raises a conundrum as to the mode of dispute resolution. We are well aware of the judicial precedents that waive the need for express reference to arbitration

or an excessive focus on nomenclature.[11] However, such principles cannot be stretched so far so as to make them wholly unworkable. It is inconceivable to us as to why two parties, who are *ad idem* in wanting to settle their disputes through arbitration, would label the dispute resolution clause in such a befuddling manner. The title of the clause (Section 20.1 of Article 20) unequivocally indicates a non-adjudicatory and conciliatory process rather than an arbitration mechanism.

***(b)*** What adds fuel to the fire is the conspicuous absence of the words 'arbitration' or 'arbitrator' from the dispute resolution clauses. Even the expression `Arbitration Act' is itself entirely missing. These terms are generally included in arbitration agreements to reflect the parties' true intention.

***(c)*** Moreover, the reference is to the 'Commissioner, MCD,' rather than to an arbitral tribunal or an independent third-party adjudicator. This suggests an internal dispute resolution mechanism rather than an external arbitration forum.

***(d)*** The DSC Ltd. and CCC Ltd. agreements introduce further procedural details, such as the officer calling for additional documents and conducting interviews. However, none of these procedural steps alter the fundamental nature of the process,

[11] Infrastructure Leasing & Financial Services Ltd. v. HDFC Bank Ltd., 2023 SCC OnLine SC 1371; Yellapu Uma Maheswari v. Buddha Jagadheeswararao, (2015) 16 SCC 787; Assam Small Scale Ind. Dev. Corp. Ltd. & Ors. v. J.D. Pharmaceuticals & Anr, 2005 Supp (4) SCR 232.

which at best is an elaborate administrative fact-finding exercise, rather than an arbitral adjudication.

***(e)*** Additionally, the appointment of the decision-maker is entirely within the control of MCD, with no role for the other contracting party in selecting or influencing the selection of the officer. This further undermines the claim that the clause was intended to establish an arbitration framework.

D.2.2. Final and Binding Nature

**39.** A key argument advanced by the private contractors is that the decision rendered under Article 20 is 'final and binding', thereby making it akin to an arbitral award. While it is true that an arbitration clause must result in a conclusive determination, finality alone does not equate it to arbitration.

**40.** We may note at the outset that in SMS Ltd. the phrase used is 'final', not 'final and binding' which instead finds mention in the cases of DSC Ltd. and CCC Ltd. On a textual and surface-level analysis, Article 20 across all cases thus *prima facie* seems to satisfy the subject-ingredient; however, it does not impact the outcome of these cases.

**41.** We say so because other forms of decision-making—such as expert determinations, departmental adjudications, and administrative reviews—even when found to be final and binding, do not *ipso facto* constitute arbitration. The arduous task of ascertaining and identifying

the category to which these cases fall is beyond the scope of these appeals.

D.2.3. Compliance with Arbitral Norms

**42.** Finally, we turn to analyzing Article 20 under the lens of its alliance with the norms of arbitration. This particular characteristic is quite important for a valid arbitration agreement. If a clause does not sufficiently align with the accepted best practices of contemporary arbitration, it will generally be unworkable and essentially dead letter. What is also envisaged under this element is the compliance with the Arbitration Act and its subsequent Amendments.

**43.** It may be clarified here that there is no straitjacket formula for listing arbitral norms exhaustively, as these norms may vary from time to time. While we cannot delineate arbitral norms from stem to stern, we have short-listed some of these norms for the purposes of these appeals, which unfortunately do not find any explicit or implicit mention in the subject-dispute resolution clauses.

*D.2.3.1. Party Autonomy in Arbitrator Appointment*

**44.** Clearly, in the facts of the instant appeals, the officer who decides the dispute(s) is appointed exclusively by MCD/SDMC, with no input from the other contracting party, i.e. the private contractors. In contrast, valid arbitration agreements invariably provide for a mutually agreed-upon arbitrator or an independent appointing authority, such as a

Court or an arbitral institution lest they run afoul of the settled principles of bi-partisanship and equality.

*D.2.3.2. Adversarial Process*

**45.** In ***Encon Builders (supra)***, this Court held that arbitration must be a structured adjudicatory process, where parties are afforded the opportunity to argue their case before a neutral and independent decision-maker. In our considered opinion, Article 20 lacks such an inquiry. It is admitted that there are no provisions for (***i***) oral hearings; (***ii***) examination and cross-examination of witnesses; and (***iii***) application of formal rules of evidence or procedure in the impugned clauses. The appointed officer merely reviews written submissions and, at most, may seek additional documents or conduct interviews.

**46.** We have thus no hesitation in holding that Article 20 lacks the judicial element that lends arbitration its unique credibility as an adjudicatory mechanism, distinct from other forms of dispute resolution. By omitting the essential procedural safeguards of adversarial proceedings and impartial adjudication, the clause fails to meet the threshold requirements of arbitration and cannot be sustained as such.

*D.2.3.3. Neutrality and Independence of the Arbitrator*

**47.** The principles of natural justice, of course, must inhere in any judicial process, even if that process is pseudo-judicial. That is precisely why it is necessary for the Arbitrator to be an impartial functionary in any supposed arbitration agreement. When such a requirement is unmet,

that mode of dispute resolution may not have the benefit of being termed as 'arbitration'. In ***Tollways (supra)***, this Court expressly held that a dispute resolution mechanism controlled by one party lacks the independence required for arbitration.

**48.** Under Article 20, the decision-maker is an officer of MCD, making the process inherently biased in favour of the Municipal Corporation(s). It does not even provide for the officer to be a legally qualified adjudicator, further calling into question the nature of the decision-making process. Moreover, while Article 20 in the case of SMS Ltd. at the very least specifies that the appointed officer may be from 'within or without MCD', the latter two cases—DSC Ltd. and CCC Ltd.—completely dispense with even this limited semblance of impartiality. The absence of any requirement for an external appointee in these cases further entrenches the one-sided nature of the appointment process, allowing MCD to unilaterally select a decision-maker from within its own ranks, thereby compromising the neutrality essential to any adjudicatory mechanism.

**49.** In conclusion, a holistic analysis of Article 20 across the subject Concession Agreements leads us to the inescapable conclusion that it does not satisfy the requirements of an arbitration agreement under Section 7 of the Arbitration Act. While certain textual elements—such as the use of the phrase 'final and binding' in the cases of DSC Ltd. and CCC Ltd.—may superficially resemble arbitration, a deeper examination reveals that the clause is procedurally and structurally deficient in

ways that render it incapable of operating as an arbitration clause in law.

**50.** Article 20 lacks the judicial element that lends arbitration its distinct credibility as an adjudicatory mechanism. It is not an arbitration clause either in letter, or in spirit and effect. Its ambiguity and lack of procedural integrity have, if anything, resulted in greater litigation rather than expeditious resolution, thereby undermining the very purpose of arbitration.

**51.** Accordingly, we hold that Article 20 does not constitute an arbitration agreement under the Arbitration Act. The impugned judgments of the High Court in the cases SMS Ltd. and CCC Ltd., dated 09.03.2017 and 02.11.2022 respectively, which construed it as such, are set aside. The view taken in DSC Ltd. *vide* judgment dated 29.07.2022, which correctly rejected arbitration, is affirmed.

**52.** We may also clarify that the controversy this Court was faced with in ***Tollways (supra)*** was broadly similar to the instant appeals. The dispute resolution clauses in ***Tollways (supra)*** and the present cases both evidently lack the ingredients that we have comprehensively set out hereinabove. Consequently, we see no reason to take a different view than the one taken by a Co-ordinate Bench of this Court in ***Tollways (supra)***, which is hereby reiterated.

## E. ***EPILOGUE***

**53.** Having already reached a conclusion *vis-à-vis* the core contentious issue in these set of appeals, we would nonetheless like to make certain observations regarding arbitration agreements in the Indian legal milieu before parting with these appeals.

**54.** It is doubtless laudable how rapidly the Indian legal ecosystem has evolved to accommodate arbitration. The Indian Legislature and Judiciary have clearly worked in lockstep to ensure that the arbitral process is regulated efficiently, and suffers from minimal judicial intervention. That being said, we are constrained to observe that much and more remains to be done.

**55.** As the facts of these appeals clearly illustrate, the drafting of arbitration clauses in commercial agreements in India leaves much to be desired. Despite arbitration being introduced as a means of ensuring speedy and effective dispute resolution, it is evident and ironic that, in certain cases, the process has been misused to further complicate and prolong the resolution of disputes. The manner in which ambiguity is embedded into such agreements raises serious concerns. Whether this stems from administrative oversight or deficient legal advice is a matter best left for separate consideration.

**56.** However, it is evident that the rival parties in these appeals are neither paupers nor indigent individuals who may have been disadvantaged by inadequate legal representation, thereby prolonging the litigation. On

the contrary, one party is a statutory civil body in the National Capital Region, ostensibly operating with its own legal department, while the other comprises prominent and affluent contractor-builders with ample resources to retain the finest legal counsel available in the country.

**57.** What is most shocking to our judicial conscience is the incontrovertible reality that the parties in the present cases have spent nigh a decade acrimoniously litigating over the method of dispute resolution itself, while their actual qualms against each other remain deeply buried under the surface—effectively stuck in limbo. A legal dispute that lingers for years over the mere mode of adjudication, before even touching the merits, is akin to a traveller stranded at a crossroads, endlessly debating which path to take while the journey itself remains unbegun. Justice, like the destination, recedes further into the horizon, not for lack of resolution but for want of a decision on how to resolve.

**58.** This willful and wanton wastage of judicial time is similarly a practice that is highly deplorable, to say the least. It is high time that arbitration clauses are worded with piercing precision and clarity, and that they are not couched in ambiguous phraseology. This is a responsibility and onus that every legal counsel, advisor, and practitioner must shoulder most dutifully. We would, in fact, take this opportunity to advise, if not caution and warn, the legal fraternity against engaging in such practices which result in a criminal wastage of precious judicial time. Indeed, their professional credentials will not earn any stripes if they indulge in such juggling of words.

**59.** Equally, the Courts or judicial fora of our country—as a matter of judicial best policy—must show an unwavering tendency towards rejecting shoddily drafted clauses at the very threshold. Such cases, which *prima facie* disclose *mala fides* woven into the very Agreement they seek adjudication over, must be thrown out of the Court, as they have been indulged for far too long. We would complementarily urge the Courts to invoke their *suo moto* powers in appropriate cases wherein legal firms or counsel are found designing 'arbitration clauses' which deliberately mislead and misguide. The time is not far when personal liability must be assigned for such unscrupulous acts, along with the sanctioning of the harshest punitive measures against the actors. We are confident that these steps are vital to infuse probity, transparency, and professionalism into Indian arbitration. Needless to say, to uphold the integrity of the arbitral process, the sanctity of such agreements must be preserved.

## F. ***CONCLUSION AND DIRECTIONS***

**60.** In light of the foregoing analysis, and in continuation of the conclusions arrived at hereinabove we seek it fit to dispose of these appeals with the following directions:

**i.** Article 20 of the Concession Agreements executed in all the three appeals before does not form an arbitration agreement, and thus cannot be brought under the purview of the Arbitration Act.

**ii.** The impugned judgments of the High Court in the cases of SMS Ltd. and CCC Ltd. are hereby set aside.

**iii.** The impugned judgment of the High Court in the case of DSC Ltd. is hereby upheld.

**iv.** It is, however, clarified that the parties across all three appeals are at liberty to pursue their alternative remedies in accordance with law.

**61.** The instant appeals stand disposed of in the above terms.

**62.** Consequently, pending interlocutory applications, if any, are also disposed of.

**63.** Ordered accordingly.

**.....J.**
**(SURYA KANT)**

**.....J.**
**(NONGMEIKAPAM KOTISWAR SINGH)**

**NEW DELHI**
**DATED: 15.05.2025**