

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

S.B. Arbitration Application No. 16/2023

1.

Mr. Jagdish Tambi S/o Late Shri K.L. Tambi, R/o 2/181, Sangram Colony, C Scheme, Jaipur
2.

Mrs. Sumitra Tambi W/o Jagdish Tambi, R/o 2/181, Sangram Colony, C Scheme, Jaipur
3.

Mr. Rajesh Tambi S/o Jagdish Tambi, R/o 2/181, Sangram Colony, C Scheme, Jaipur
4.

Mr. Rupesh Tambi S/o Jagdish Tambi, R/o 2/181, Sangram Colony, C Scheme, Jaipur
5.

Mr. Ratnesh Tambi S/o Jagdish Tambi, R/o 2/181, Sangram Colony, C Scheme, Jaipur

-----Applicants/Claimant

Versus

1.

Royal Orchid Hotels Limited, Through Its Managing Director, R/o 1, Golf Avenue, Adjoining KGA Golf Course, Airport Road, Bangalore 560008
2.

M/s Ksheer Sagar Developers Pvt. Ltd., Through Its Authorized Signatory, R/o Hotel Royal Orchid, Tonk Road, Jaipur.
3.

M/s Ksheer Sagar Buildcon Pvt. Ltd., Through Its Authorized Signatory, R/o Hotel Royal Orchid, Tonk Road, Jaipur.
4.

M/s Rajkamal Buildcon Pvt. Ltd., Through Its Authorized Signatory, R/o Hotel Royal Orchid, Tonk Road, Jaipur.
5.

M/s J.H. Builders Pvt. Ltd., Through Its Authorized Signatory, R/o Hotel Royal Orchid, Tonk Road, Jaipur.

-----Proforma Respondents

For Petitioner(s)	:	Mr. S.S. Hora with Mr. Mohit Khandelwal Mr. Sahajveer Baweja Mr. Aditya Gupta Mr. Pranav Sharma
For Respondent(s)	:	Mr. K.K. Sharma, Sr. Adv. assisted by Mr. Rishabh Khandelwal for R-1 Mr. Yash Sharma for R-2

HON'BLE THE ACTING CHIEF JUSTICE MR. SANJEEV PRAKASH SHARMA
Judgment

Date of conclusion of arguments	:	22/05/2026
Date on which judgment was reserved	:	22/05/2026
Whether the full judgment or only the operative part is pronounced	:	Full judgment
Date of pronouncement	:	26th/05/2026

1. This is an application which has been filed seeking appointment of an Arbitral Tribunal under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') and as per the arbitration clause enshrined in the Memorandum of Understanding (hereinafter referred to as 'MoU') dated 18.04.2007.

2. The Applicants are members of Jaipur-based Tambi family who carry on business in Jaipur through four (owner) companies, i.e., M/s Ksheer Sagar Developers (P.) Ltd., Ksheer Sagar Buildcon (P.) Ltd., Rajkamal Buildcon (P) Ltd. and J.H. Builders (P.) Ltd., who jointly own a parcel of land identified as Khasra No. 4/374, Gram-Chainpura Tonk Road, Jaipur. The Respondents are a Bangalore-based hotel group.

3. The brief facts giving rise to the present dispute is that on 18.04.2007, a MoU was executed between the Applicants and Respondent through which the Respondent had purchased 50% shareholding in the owner companies and the parties agreed to construct and run a hotel venture (hereinafter referred to as 'Hotel') on the land owned by the said companies. In pursuance of this MoU, a Hotel Operation Agreement (hereinafter referred to as 'HOA') was executed on 18.05.2007 and the management of the Hotel was handed over to the Respondent and it commenced operations in 2011. However, subsequently disputes arose between the parties as the Respondent was alleged to be acting in breach of the terms stipulated in the MoU and HOA.

4. These disputes include (but are not limited to) quantum of management fee to be charged, manner of charging and payment of management fee, misuse of their powers by the Respondent, etc. Upon failure of the attempts at reaching an amicable settlement of the disputes between the parties, the Applicants on 09.11.2021, served an arbitration notice upon the Respondents, seeking appointment of an Arbitral Tribunal for adjudication of the aforesaid disputes. Vide reply dated 08.12.2021, the Respondent raised certain objections to appointment of an Arbitral Tribunal, including the pre-condition of mutual conciliation between the parties, not specifying the dispute, etc. Post receipt of this reply, a meeting was held between representatives of both groups on 16.03.2022 and thereafter, but to no avail. Thereafter, the Applicants again issued a notice on 16.10.2022, invoking the arbitration clause, providing details of the disputes sought to be adjudicated and requesting the Respondent to provide the name of one arbitrator. The Respondents replied to this notice on 14.11.2022, refusing to nominate an arbitrator.

5. An application was also filed previously under Section 9 of the Act of 1996 before the learned Additional District Judge No. 17, Jaipur Metropolitan (Arbitration Application No. 186/2018), wherein certain *ad-interim* orders were passed, granting reliefs to the Applicants and the same is presently *sub-judice* before the learned subordinate court.

6. Learned counsel for the Applicant submits that post commencement of the Hotel's operations, the Respondent started to act in breach of the terms stipulated under the MoU and HOA,

including breach of terms by charging in excess, certain kinds of fee payable to the Respondent stipulated under Clause 20 of the MoU, unauthorized collection of booking money from online travel agents in the Respondent's personal account as opposed to depositing it in the designated account as stipulated under Article XV of the HOA and deduction of higher rate of commission from the hotel than what was actually paid to such agents, resulting in unlawful gains for the Respondent.

7. Learned counsel further submitted that the Respondent is liable to refund such difference wrongfully retained by them to the designated account and pay interest on the money which is transferred to the designated account after an unjustifiable delay. Learned counsel further submits that the existence of disputes has been admitted by the Respondent multiple times in communication amongst the parties as well as before judicial, statutory and regulatory authorities.

8. Per contra, learned Senior Counsel for the Respondent, in their reply, submits that Clause 22 of the MoU requires the parties to attempt to resolve their disputes through mutual discussion and only then the matter may be referred to an Arbitral Tribunal. However, no such attempt at conciliation has been made in the present case and the Applicants have prematurely preferred an application before this Court for appointment of an Arbitral Tribunal. Learned Senior Counsel further submits that as no disputes have been raised by the Applicants under the MoU or in the notice dated 09.11.2021, the question of invocation of Clause 22 does not arise.

9. Learned Senior Counsel also submits that the Applicant failed to establish a dispute (arising out of the MoU) in the present Application or in the notice dated 16.10.2022 and therefore, the present application is liable to be dismissed. Learned Senior Counsel further submits that regarding the alleged dispute relating to management fees, the same is covered under Article XII of the HOA and it is not the Applicants who are paying the fee to the Respondent in their individual capacity and here, the Applicants are not a sole party but rather the agreement also has all the respondents as parties.

10. Learned Senior Counsel also submits that the management fee charged by the Respondent was agreed to amongst the parties *vide* meeting dated 26.05.2015 which was duly recorded and signed by representatives of the Applicant (with the said amount recorded in subsequent balance sheets which have been signed by the representative of the Applicant) and the said amount already being admitted to be charged since 2015 (when cause of action also arose), is now barred by limitation. Learned Senior Counsel also submits that the dispute pertaining to collection of money from the travel agents is not related to the Applicants but rather is covered under the HOA and that the amount received from online travel agents is received in the account of the Respondent and the details are sent to the Hotel (as evident from the details of amount received being communicated to the Hotel via email) and the same is adjusted in the books of the Hotel, with this practice being done since 2014 with the Applicant's knowledge and approval.

11. Learned Senior Counsel further submits that the reference to various clauses by the Applicants of the HOA is misplaced as the HOA is a completely distinct and separate agreement, containing its own arbitration clause under Article XXVIII and the same cannot be invoked by the Applicants, who are not a party to the same and therefore the present application is not maintainable. Learned Senior Counsel further submits that the MoU stipulated existence of three arbitrators, whereas, the HOA stipulated that the President of the Institute of Chartered Accountant of India will appoint an arbitrator upon the request of the parties (with no such request made yet). Learned Senior Counsel also submits that the same disputes as the present application were also raised under the Section 9 application, with a difference being, that in the former the arbitration clause relied upon is from the MoU, whilst in the latter it was from the HOA (with both of them being different). Learned Senior Counsel further submits that the present application for appointment of an arbitrator was filed in 2023, five years post filing of the application under Section 9 of the Act of 1996 and therefore is barred by limitation as cause of action (if any) arose in the year 2014.

12. Learned Senior Counsel for the Respondent also submits that the Applicant has failed to issue a notice prior to invocation of the arbitration clause enshrined under the HOA, as mandated by Section 21 of the Act of 1996 and that the issues/disputes raised in the notice dated 16.10.2022 do not arise out of the MoU and therefore, such a notice invoking the arbitration clause of the MoU is not a valid notice and that the Applicant has not invoked the

arbitration clause under the HOA. Learned Senior Counsel therefore, submits that the present application is not maintainable.

13. I have considered the submissions.

14. Prior to examination of the case, it would be apposite to quote the relevant provisions under the Act of 1996 as under:

"11. Appointment of arbitrators.-

.....
 (6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

[the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

[(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.]

.....
21. Commencement of arbitral proceedings.-

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

15. It would also be apposite to quote the arbitration clause (Clause 22) of the MoU under which the present application has been filed:

"Arbitration: For any dispute between both the Groups relating to the MOU and the hotel venture which can not be resolved through mutual discussion or conciliation then the matter shall be referred to the Arbitration Tribunal for which one

Arbitrator from each group will be nominated and an Umpire shall be jointly appointed by both the appointed Arbitrators who will together constitute the Arbitration Tribunal."

16. Prior to framing the issues for adjudication in the present case, it would be apposite to circumscribe the scope of judicial inquiry at this stage. In this regard, a three-judge bench of the Apex Court in **SBI General Insurance Company Limited vs Krish Spinning¹** had held as under:

"(c) Judicial interference under the 1996 Act

.....

113. *The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.*

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

115. *The aforesaid approach serves a twofold purpose — firstly, it allows the Referral Court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the Arbitral Tribunal to rule on the issue of existence of the arbitration agreement in depth.*

116. *Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow: (SCC p. 104, para 220)*

"220. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the

1 (2024) 12 SCC 1

validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the Referral Court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a time-bound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators." (emphasis supplied)

.....
120. *By referring disputes to arbitration and appointing an arbitrator by exercise of the powers under Section 11, the Referral Court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the Arbitral Tribunal does not in any way mean that the Referral Court is diluting the sanctity of "accord and satisfaction" or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principle of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in arbitral proceedings is given full effect. Once the Arbitral Tribunal is constituted, it is always open for the defendant to raise the issue of "accord and satisfaction" before it, and only after such an objection is rejected by the Arbitral Tribunal, that the claims raised by the claimant can be adjudicated.*

.....
126. *The power available to the Referral Courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the Referral Court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the Arbitral Tribunal at the nascent stage of Section 11, the Referral Courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected."*

17. Furthermore, this Court, in a recent decision delivered in **Ashok Kumar Gupta And Another vs Prakash Chandra Gupta And Another**², after considering the decision of the Apex Court in **SBI General Insurance Company Limited** (supra), had held as under:

"13. While considering an application under Section 11 of the Act of 1996, this Court would only examine whether there is any arbitration clause existing between the parties and whether there is any dispute which has arisen between the parties....."

18. In light of the above decisions, the scope of examination at this stage is limited to the existence of an arbitration clause between the parties as well as the existence of a dispute amongst them. A perusal of Clause 22 of the MoU would show the existence of a valid arbitration clause amongst the parties, thereby satisfying the first condition. Regarding the second condition, a perusal of the present application and the Section 9 application makes it evident that there exists certain arbitrable disputes amongst the parties.

19. Furthermore, regarding the contention advanced by the learned Senior Counsel for the Respondent regarding the notice under Section 21 of the Act of 1996 being sent pursuant to the arbitration clause enshrined under the MoU, instead of the HOA (from which the disputes mentioned in the notice dated 16.10.2022 are alleged to have arisen), a perusal of the application filed under Section 9 of the Act of 1996 would show that dispute mentioned in the present application pertaining to alleged charging of excess management fee has been mentioned. While reference here is only made to the relevant clause under the HOA (as both the agreements contain *pari materia* clauses), knowledge of existence of this dispute under both agreements cannot be denied. Furthermore, the Section 9 application also makes reference of the dispute pertaining to collection of monies in the designated account. Hence, since the disputes arising out of

both the HOA and MoU were raised, non-service of a separate notice under Section 21 of the Act of 1996 cannot serve as a bar on filing of the present application. Furthermore, the broad scope of the arbitration clause enshrined under the MoU is evident from the usage of the phrase "*and the hotel venture*". Also, regarding the distinct nature of arbitration clauses, it would also be apposite to quote a decision delivered by a seven-judge bench of the Apex Court in **Interplay Between Arbitration Agreements Under Arbitration And Conciliation Act, 1996 And Stamp Act, 1899, In Re³**

"114. The separability presumption, as incorporated under Article 16(1) of the Model Law, as well as Section 16 of the Arbitration Act, is qualified by the expression "for that purpose". A plain reading may suggest that Section 16 has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes. However, the Digest of Case Laws on UNCITRAL Model Law states that:

"the language used in the second sentence does not prevent the application of the separability presumption when a jurisdictional question is raised before a court."

Gary Born suggests that the better view is that the separability presumption contained in Article 16(1) states a general rule of contractual validity "which is applicable for all purposes." The judicial view that emerges from the Indian courts also seems to suggest that an arbitration agreement is treated as distinct and separate from the underlying contract as a general rule of substantive validity."

20. With regard to the above legal position, it would be apposite to quote the following judgments of the Apex Court and this Court respectively:

(a) **Adavya Projects Private Limited vs Vishal Structurals Private Limited And Others⁴:**

³ (2024) 6 SCC 1

⁴ (2025) 9 SCC 686

"17. A plain reading of the provision shows that in the absence of an agreement between the parties, arbitral proceedings are deemed to have commenced when the respondent receives a request to refer disputes to arbitration. It is clear that Section 21 does not expressly mandate the claimant to send a notice invoking arbitration to the respondents. However, the provision necessarily mandates such notice as its receipt by the respondent is required to commence arbitral proceedings, unless the parties have mutually agreed on another date/event for determining when the arbitral proceedings have commenced."

(b) Shekharchand Sacheti And Another vs S.M.F.G India

Home Finance Company Limited And Another⁵:

"The essence of the matter is that merely stating that a dispute has arisen between the parties and referring to a claim does not satisfy the requirements of Section 21 of the Act of 1996 and a valid notice must be served to the other party to initiate the arbitration proceedings and in absence of notice under Section 21, the arbitration application cannot be entertained.

31. But in the instant case, the respondents were not taken by surprise regarding invocation of the arbitration clause by the applicants for the first time before this Court inasmuch as the applicants submitted a suit for partition of property against the respondents before the Court of ADJ, where an application was submitted by none other than the respondents themselves under Sections 8 and 5 of the Act of 1996 that Civil Suit is not maintainable and an Arbitration Application under Section 11 of the Act is maintainable, hence accepting their prayer, the learned ADJ returned the plaint to the applicants under Order 7 Rule 10 CPC for its presentation before the competent court of law, and only thereafter, the applicants have submitted the instant application. Thus, it can safely be said that the respondents were not taken by surprise by the filing of this arbitration application, for the appointment of an arbitrator before this Court, especially given that no prior written notice was issued by the applicants. It is inconceivable to suggest that the respondents were unaware of the dispute concerning the partition of the property in question. The applicants approached the Civil Court for partition by way of filing a Civil suit, but the same was returned by the Civil Court under Order 7 Rule 10 CPC, at the request/prayer of the respondents and even the interim order under Section 9 of the Act of 1996 was passed against the respondents under the provisions of Act of 1996 by the concerned competent Court of law. Hence, the respondents were well versed with the entire dispute raised against them. Therefore, under

these peculiar circumstances, this application under Section 11 of the Act of 1996 is maintainable even without issuing a proper notice to the respondent under Section 21 of the Act of 1996 by the applicants."

(c) Ashok Kumar Gupta (supra):

"15. With regard to the aforesaid, we find that both the parties have resorted to filing applications under Section 9 of the Act of 1996, seeking interim relief with the intention to initiate arbitration proceedings for solving the dispute finally. Thus, knowledge of existence of a dispute was there amongst the parties. Also, a perusal of the text of Section 21 would show the absence of any explicit mention of the word 'notice' but rather only refers to the time when a "request" for arbitration is received, indicating that issuance of a notice is not a statutory requirement under the said provision. Therefore, non issuance of the same cannot be utilised as a ground in this case to challenge the maintainability of the present application as the parties already have knowledge of the existence of an arbitrable dispute....."

21. Therefore, in view of the above, this application for appointment of Arbitrator deserves to be allowed. This court, therefore, appoints Hon'ble Mr. Justice Ajay Rastogi (former judge, Supreme Court of India) residing at A-6, First Floor, Anand Niketan, New Delhi, as the sole arbitrator to adjudicate the dispute between the parties in compliance with the provisions of the Act of 1996. The appointment of the sole arbitrator is subject to the declarations made under Section 12 of the Act of 1996 regarding independence, impartiality and the ability to devote sufficient time to ensure completion of the arbitration within the prescribed period.

22. The fee payable to the sole arbitrator will be in accordance with the provisions enshrined in the Manual of Procedure of Alternative Dispute Resolution, 2009 (as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment),

2017 vide notification dated 23.03.2017) read with the 4th Schedule appended to the Act of 1996 or as determined by the arbitrator with the consensus of the parties.

23. The Registry is directed to intimate the Arbitrator for their approval and declaration as per Section 11(18) read with Section 12(1) of the Act of 1996.

24. All issues raised by the parties shall be decided by the Arbitrator in accordance with law.

25. Since Section 29A of the Act of 1996 stipulates completion of the proceedings within its stipulated time period, the parties are expected to appear before the Arbitrator on the date so informed by the Arbitrator subject to agreement by the parties. Furthermore, the parties shall provide their respective e-mail/ contact number/mobile number and/or also of their authorized representatives/lawyers appearing on their behalf before the Arbitrator, in order to facilitate the Arbitrator to send information/communication to the parties, whenever required. The information sent by the Arbitrator, on such address/ e-mail/ cellphone of the parties or to their authorized representatives/ lawyers, shall be treated as sufficient communication unless same is not changed.

26. The Arbitration Application stands disposed off accordingly.

(SANJEEV PRAKASH SHARMA), ACTING CJ