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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 4th December, 2025*

\+ ARB.P. 1294/2023 and I.A. 16788/2025

M/S ASHUTOSH INFRA PRIVATE LIMITED .....Petitioner

Through: Mr. Anand Kumar, Mr. Aditya Giri, Mr. Chetan Singh, Mr. Harshit Kumar and Mr. Preetesh Sharma, Advocates along with AR of Petitioner.

versus

M/S PEBBLE DOWNTOWN INDIA (P.) LTD & ORS. .....Respondents

Through: Mr. Akhil Sibal, Senior Advocate with Mr. Vikas Mishra, Mr. Nikhil Chawla, Mr. Varun Ahuja, Ms. Sugandha Shahi and Mr. Nilay Kaushal, Advocates for R-1.
Mr. Dhanesh Relan, Ms. Brinda Ajmani and Mr. Shikhar Misra, Advocates for R-2.
Mr. Rajshekar Rao, Senior Advocate with Ms. Nandini Sahni and Ms. Tanya Singh, Advocates for R-3 & R-4.

\+ O.M.P.(I) (COMM.) 152/2023 and CCP(O) 87/2024, I.A. 44069/2024

M/S ASHUTOSH INFRA PVT. LTD. .....Petitioner

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Mr. Shikhar Misra, Advocates for R-2.
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CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J.

1. ARB.P. 1294/2023 is filed by the Petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') for appointment of a Sole Arbitrator to adjudicate the disputes and differences between the parties arising out of Settlement Agreement dated 31.12.2021. O.M.P.(I) (COMM.) 152/2023 is filed by the Petitioner under Section 9 of 1996 Act seeking multiple interim reliefs.

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2. Case of the Petitioner as set out in the petition is that Petitioner is a company incorporated and registered under Companies Act, 1956. It is the lawful owner of piece and parcel of land bearing Rectangle No.56, Killa No.24/2(3-1), 25/1(3-15); Rectangle No.212, Killa No.2/2(0-10); Rectangle No.65, Killa No.4/2(3-5), 5/1(3-5), admeasuring 13 Kanals 16 Marlas (1.725 acres) situated in revenue estate of Ajronda, Sector-12, Tehsil and District Faridabad, Haryana. Petitioner and Respondent No.1/M/s Pebble Downtown India (P.) Ltd. entered into a Collaboration Agreement dated 25.06.2015, whereby Respondent No.1 was to *inter alia* develop and construct a commercial colony on the project land. Disputes having arisen between the parties out of the Collaboration Agreement, Sole Arbitrator was appointed, however, after he entered upon reference, parties resolved their disputes and executed a Settlement Agreement on 31.12.2021 incorporating terms of

settlement. On joint application filed by Petitioner and Respondent No.1, in accordance with Clause 69 of Collaboration Agreement, the Arbitrator passed a Consent Award on 08.04.2022, apportioning and identifying Petitioner's share as the owner and Respondent No.1's share as Developer in the commercial project as follows:-

Floor	Total Carpet Area	Owner's Share	Developer's Share
Lower Ground Floor	3148.105	1141.188 + 506.873 = 1648.061	1500.044
Upper Ground Floor	2696.774	977.581	1719.193
Mezzanine Floor	603.253	184.230	419.023
1st Floor	2790.136	1011.424	1778.712
2nd Floor	2855.67	1035.180	1820.490
3rd Floor	1947.554	705.988	1241.566
4th Floor & 5th Floor	1398.271	Nil	1398.271
	15439.763	5562.464	9877.299

3. It is averred in the petition that parties agreed that after expiry of six months from the date of receipt of Occupation Certificate i.e. 14.03.2022, Respondent No.1 will have no right to lease out Petitioner's share in the project and hence post 14.09.2022, Petitioner executed Sale Deeds dated 29.03.2023 and 31.03.2023 with M/s Shree Sai Sales Corporation in respect of 3 units out of 24 units falling to Petitioner's share. With an illegal design and oblique motive to frustrate the sale by the Petitioner, Respondent No.1 executed two ante-dated Lease Deeds on 06.04.2022 and leased out all 16 units and got them registered on 10.04.2023. The ante-dating is evident from the fact that while the date of execution of the Lease Deeds is shown as 06.04.2022, the date of purchase of the stamp papers is 12.04.2023.

4. It is further stated that at the time of settlement and passing of the Consent Award, Respondent No.1 had represented that the total carpet area

on the 4th and 5th floors in the demised premises was 1398.271 sq. mts., however, on actual measurement it was found to be 2195 sq. mts. and therefore, Petitioner is entitled to allocation of 36.25% share in the excess area on these floors, which Respondent No.1 refused to give. In order to preserve its share in the demised premises, Petitioner filed a petition in this Court under Section 9 of 1996 Act, being O.M.P.(I) (COMM.) 152/2023, seeking restraint orders against Respondent No.1 as also appointment of Local Commissioner to re-measure the actual carpet area of the two floors.

5. To complete the chronology of facts it is relevant to mention at this stage that when the Section 9 petition was listed on 22.05.2023, Court observed that *prima facie* Petitioner was able to show circumstances which cast a doubt on the execution of Lease Deeds dated 06.04.2022 and thus to maintain a balance, directed that Respondents No.3 and 4 will remain bound by their statement that any fitment activity carried out in the subject shops will be at their own peril and they will not claim special equity/right or title. A direction was also issued that these Respondents shall not begin commercial operations from the shops in question without prior permission of the Court. Respondent No.1 was restrained from dealing with Petitioner's share in the subject mall. With respect to the second issue of Petitioner's entitlement to share in the excess area on 4th and 5th floors, it was directed that this consideration will have to await replies from the Respondents. This order was challenged before the Supreme Court in SLP (C) No.14880/2023, which was dismissed. Petitioner sent notice invoking arbitration dated 18.08.2023 to Respondent No.1 under Section 21 of 1996 Act proposing the name of a former Judge of the Supreme Court as an Arbitrator, however, Respondent No.1 did not agree for arbitration. In this backdrop, ARB.P.

1294/2023 was filed by the Petitioner seeking appointment of a Sole Arbitrator, invoking clause 37 in the Settlement Agreement and clause QQ in the Consent Award, the arbitration clauses.

6. Learned counsel for the Petitioner submitted that Petitioner and Respondent No.1 entered into a Collaboration Agreement to develop and construct a commercial mall, whereunder Petitioner and Respondent No.1 were entitled to 36.25% and 63.75% shares respectively, in the built-up area. Disputes between the parties led to appointment of an Arbitrator, however, the disputes were amicably resolved and Settlement Agreement was executed, culminating into a Consent Award dated 08.04.2022. Under Clause 26 of the Collaboration Agreement, Respondent No.1's exclusive right to lease Petitioner's units expired on 14.09.2022 i.e on expiry of 6 months from the date of receipt of Occupation Certificate and Petitioner lawfully sold 3 units via Sale Deeds dated 29.03.2023 and 31.03.2023. Respondent No.1 obstructed the sale by executing ante-dated Lease Deeds on 06.04.2022, leasing out 16 units with an oblique motive to frustrate the sale by the Petitioner and thus this issue needs to be adjudicated through arbitration.

7. It was further contended that the total carpet area on the 4th and 5th floors of the mall has also come under dispute due to misrepresentation of by Respondent No.1 at that stage, inasmuch as after obtaining the Auto CAD of 4th and 5th prepared by architect of Respondent No.1, when the architect of the Petitioner measured the total carpet area, it was revealed that the area was 2195 sq. mts. and not 1398.271 sq. mts. and owing to this, Petitioner was given lesser area of 506.873 sq. mts. i.e., 36.25% on lower ground floor in exchange of its share at the 4th and 5th floor. Petitioner has

thus become entitled to further area in the 800 sq. mts. (approx.) excess area, in the agreed proportion. Respondent No.1, however, refuses to honour the settlement and thus this legitimate claim of the Petitioner be referred to arbitration in terms of Clause 37 of the Settlement Agreement and Clause QQ of the Consent Award.

8. To make good the plea that even after settlement and Consent Award, Petitioner can seek reference to arbitration, it was argued that at the time of executing the Settlement Agreement, parties had clearly envisaged that further disputes may arise and for this reason Clause 37 was incorporated in the Settlement Agreement, which is an arbitration agreement. Additionally, Consent Award also contains arbitration Clause QQ for adjudication of disputes arising out of or in connection with the Settlement Agreement and/or the Collaboration Agreement. Moreover, sub-Clause (x) of Clause N of the Consent Award provides that in case deviation in the carpet area between the last sanctioned plan of the commercial project and proposed occupation plan of commercial project is less than 20-30 sq. mts., then there will be no change in owner's or developer's allocation, however, in case the said carpet area increased beyond 20-30 sq. mts., then the same will be shared proportionately by the parties as per their allocation, adjacent to their allocated areas. Since a deviation has been found beyond 20-30 sq. mts. and Respondent No.1 has declined to share the area proportionately, dispute has arisen between the parties on this aspect.

9. It was contended that the objection raised by the Respondents that no reference can be made as the claims are barred by *res judicata* in light of the Consent Award and/or are non-arbitrable, cannot be sustained. It is a settled law that jurisdiction of a referral Court under Section 11 of 1996 Act is

confined to determination of existence of a valid arbitration agreement and whether the petition itself is barred by limitation and all other issues pertaining to merits of the case; tenability of the claims; issue of *res judicata;* arbitrability etc., are in the domain of the Arbitral Tribunal. In support of this plea reliance was placed on the judgments of the Supreme Court in ***SBI General Insurance Company Limited v. Krish Spinning, 2024 SCC OnLine SC 1754; Indian Oil Corporation Limited v. SPS Engineering Limited, (2011) 3 SCC 507;*** and of this Court in ***Hindustan Construction Company Ltd. v. Indian Strategic Petroleum Reserves Ltd., 2025 SCC OnLine Del 3661.***

10. On the objection raised by Respondents No.2, 3 and 4 that they cannot be referred for arbitration being non-signatories to the arbitration agreement in the Collaboration Agreement and to the Settlement etc., the submission was that these Respondents are beneficiaries of the commercial transactions with Respondent No.1. Respondents No.3 and 4 are shell companies of Respondent No.1, in favour of whom Respondent No.1 executed ante-dated Lease Deeds, leasing all remaining 16 units falling to Petitioner's share after Petitioner sold 3 units from its allocated share, which fact was recognized by the Court when interim order was passed staying their commercial operations. Respondent No.2 is in possession of entire 4th and 5th floors, which includes the area of dispute i.e., 800 sq. mts., approximately. In any event, it is for the Arbitrator to decide whether non-signatories to an arbitration agreement are necessary parties to arbitration, in light of the judgment of the Supreme Court in ***Cox and Kings Limited v. SAP India Private Limited and Another, (2024) 4 SCC 1.***

11. Arguing on behalf of Respondent No.1, Mr. Akhil Sibal, learned

Senior Counsel opposed the appointment of Arbitrator on ground of non-arbitrability of disputes invoking the doctrine of *res judicata* and urging that after full and final settlement of disputes and passing of the Consent Award, there can be no fresh reference. It was emphasized that the Consent Award dated 08.04.2022 has the force of a final decree under Section 36 of 1996 Act and cannot be construed as a new contract with an arbitration agreement. Assuming that the Petitioner has any grievance with the Award, the only remedy is to challenge the Award under Section 34 of 1996 Act, *albeit* that remedy is now time barred.

12. It was further submitted that in terms of the Settlement Agreement and Consent Award, Respondent No.1 has fully constructed, built and developed the Pebble Mall and has handed over peaceful physical possession of identified and apportioned carpet areas falling to the share of the Petitioner in June, 2022, which was accepted by the Petitioner, without any protest and demur and parties have been enjoying their respective allocations under the agreement and the award till April, 2023, when Petitioner raised a frivolous dispute of excess area. Respondent No.1 has already leased 48 out of 57 units apportioned to it and Petitioner is a confirming party to the lease between Respondent No.1 and Respondent No.2. In fact Petitioner has also leased 25 out of 26 units apportioned to it and illegally sold 3 units to M/s Shree Sai Sales Corporation and is enjoying the rentals. Petitioner has no right to re-open a binding and concluded settlement acted upon by the parties and whereunder third party rights have been created and importantly, Respondent No.1 has altered its financial position.

13. Allegations of fraud and/or misrepresentation with regard to the

carpet area of 4th and 5th floors were strenuously denied and it was urged that the area was apportioned based on joint measurements by both the parties, as recorded in the settlement agreement and Petitioner accepted possession of its share, without any protest. Contents of paragraphs L, M, N, T, KK and LL of the Award show that shares of Petitioner and Respondent No.1 were specifically identified and apportioned in the Pebble Mall and parties agreed that neither of them will make any further claims or demands with respect to such apportionment and/or shares. It is trite that when a Court/Tribunal puts its seal of approval on a Settlement Agreement/ compromise, it ceases to be a contract and gets the status of decree of a Court, which continues to bind the parties thereto, unless set aside by a Competent Court. If the plea of the Petitioner is accepted, no settlement will be final and it will be open to a party to re-agitate the disputes thus making a mockery of the settlement. In this regard, reliance was placed on the judgments in ***Bhima Rama Jadhav v. Abdul Rashid, 1960 SCC OnLine Kar 21; Rani Pravabati Roy & Others v. Saileshnath Roy and Others, 1977 SCC OnLine Cal 8; Sarabjit Singh Chadha v. Dinesh Sehgal, 2021 SCC OnLine Del 3996;*** and ***Shankar Sitaram Sontakke and Another v. Balkrishna Sitaram Sontakke and Others, (1995) 1 SCR 99.***

14. Existence of a valid arbitration agreement was also questioned by Respondent No.1 on the ground that clauses 37 and QQ do not satisfy the ingredients of Section 7(1) of 1996 Act, which provides that an ‘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. Neither the arbitral award nor the Settlement Agreement constitutes ‘a defined legal

relationship' and *sans* existence of a valid arbitration agreement between the Petitioner and Respondent No.1, which is a *sine qua non* for reference under Section 11 of 1996 Act, no reference can be made to arbitration. The law laid down by the Supreme Court in ***Krish Spinning (supra),*** ought not to be interpreted to mean that referral Court's functions are merely administrative and ministerial and it is not required to apply its mind and test the existence and validity of the arbitration agreement invoked by a party. Notably, even after the judgment of the Supreme Court in ***Krish Spinning (supra),*** Courts have declined appointment of the Arbitrators, where manifestly the disputes are non-arbitrable and in this context, reliance was placed on the judgments of the Supreme Court in ***Dushyant Janbandhu v. Hyundai Autoever India Pvt. Ltd., (2024) SCC OnLine SC 3691; HPCL Bio-Fuels v. Shahaji Bhanudas Bhad, (2024) SCC OnLine SC 3190*** and of this Court in ***ARSS Infrastructure Projects Ltd. v. National Highway and Infrastructure Development Corporation Ltd., (2025) SCC OnLine Del 1482;*** and ***Jaiprakash Associates Limited v. Nhpc Limited, (2025) SCC OnLine Del 170.*** Significantly, in all these cases, existence of arbitration agreement was not disputed yet the prayer for appointment of Arbitrators was declined.

15. Mr. Sibal attempted to distinguish the judgment of the Supreme Court in ***SPS Engineering (supra)*** on the ground that in the said case, there was no dispute that a valid arbitration clause existed between the parties fulfilling all ingredients of Section 7 of 1996 Act. Moreover, it was held that decision on *res judicata* requires consideration of pleadings, claims, issues in the previous round of arbitration in juxtaposition with pleadings, claims and issues in the second round of arbitration and therefore, this determination must be left to the Arbitral Tribunal. In the present case, all

issues pertaining to measurement of the areas is question, their identification and apportionment stand settled and crystallized in the Consent Award and no further consideration on facts or documents is required. All disputes *qua* the carpet area of the 4th and 5th floors as also the execution of Lease Deeds in the identified and apportioned areas between the parties were settled and a quietus was put and thus this is an open and shut case of a reference being barred by *res judicata* and the disputes being non-arbitrable.

16. Learned counsel for Respondent No.2/PVR Limited submitted that no reference can be made to arbitration *qua* the said Respondent, who is a *bona fide* third-party lessee with no privity of contract with the Petitioner. Respondent No.2 is neither a signatory to the Collaboration Agreement nor the Settlement Agreement and the Consent Award has nothing to do with the said Respondent. Answering Respondent's legal relationship was only with Respondent No.1, strictly governed by clauses of Lease Deed dated 07.10.2022 executed between them with its own distinct arbitration clause 18, envisaging reference of disputes between Respondent No.1 and Respondent No.2 to arbitration. Furthermore, Petitioner in essence seeks relief of cancellation of Respondent No.2's Lease Deed which falls within exclusive jurisdiction of a Civil Court as per Section 31 of the Specific Relief Act, 1963 and hence the dispute, if any, is non-arbitrable. For this proposition, reliance was placed on the judgment of the Supreme Court in ***Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1.*** All other arguments addressed by Respondent No.1 were adopted by Respondent No.2.

17. Arguing on behalf of Respondents No.3 and 4, Mr. Rajshekar Rao, learned Senior Counsel while adopting the arguments of the other

Respondents urged that there is no privity of contract between the said Respondents and the Petitioner. This petition stems out of Clause 37 of Settlement Agreement and Clause QQ of Consent Award and Respondents No.3 and 4 are privy to none and have been erroneously impleaded on the ground that they have acquired rights from Respondent No.1. In essence, the allegation concerning Respondent Nos.3 and 4 is that the Lease Deeds executed by Respondent No.1 in their favour were ante-dated, which is factually incorrect. This petition is only a guise to re-agitate disputes which stand settled and the terms of settlement are now a part of a Consent Award. The Consent Award is legally binding as a decree of a Court and cannot be indirectly challenged by seeking fresh arbitration. Alternatively, even assuming there is a valid arbitration agreement between Petitioner and Respondent No.1, the same cannot be invoked and/or enforced against Respondents No.3 and 4.

18. It was also submitted that Petitioner is wrongly involving Respondents No.3 and 4 in a demarcation dispute, with which they have no concern. The lease deeds are independent and distinct transactions, wholly unrelated with the demarcation dispute or any other dispute arising from Collaboration Agreement, Settlement Agreement and Consent Award. Respondent No.1 entered into a Term Sheet dated 09.03.2022 with Respondent No.3 on behalf of the Petitioner and acting in accordance with the same, a valid Lease Deed was executed on 06.04.2022, which was registered on 10.04.2023 and all these transactions were signed well within six months from the date of Occupation Certificate issued on 14.03.2022. The same position obtains in respect of Term Sheet dated 09.03.2022 with Respondent No.4. Petitioner has sold 3 shops to a third party and has no

locus standi to seek relief of appointment of Arbitrator *qua* the said shops. It is only the vendee, who can contest the rights of Respondent No.3 and as a matter of record, vendee has already filed a suit being CS(COMM.) 12/2025 before the District Court, Faridabad, which is pending adjudication. At the highest, assuming that Petitioner has any rights *qua* the lease properties, the remedy lies before Civil Courts and not in invoking arbitral mechanism.

19. Heard learned Senior Counsels and other counsels appearing for the respective parties and examined their submissions.

20. By petition under Section 11 of 1996 Act, Petitioner seeks appointment of a Sole Arbitrator and reference of disputes for adjudication. Respondent No.1 has taken two-fold objections to appointment of the Arbitrator *viz:* (a) non-existence of valid arbitration agreement between the parties; and (b) full and final settlement entered into between Petitioner and Respondent No.1 culminating into a Consent Award. Respondents No.2 to 4 question the reference to arbitration on an additional ground that they are non-signatories to the original Collaboration Agreement, Settlement Agreement and Consent Award and cannot be referred to arbitration.

21. Before proceeding to examine the objections raised by the Respondents, it is imperative to look into the scope and ambit of the jurisdiction of this Court as a referral Court under Section 11(6) of 1996 Act. It is trite that under Section 11(6) of 1996 Act, Court is only required to examine the existence of a valid arbitration agreement on the basis of Section 7 of 1996 Act and whether the petition is barred by period of limitation prescribed under Article 137 of the Limitation Act, 1963 i.e., 3 years from the date when the right to apply accrues in favour of the Petitioner and right to apply has been held to commence from the date when

a valid notice invoking arbitration has been sent by the Petitioner to the other party and there is a failure or refusal on part of that other party in complying with the requirements of the notice. In ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, in Re, (2024) 6 SCC 1,*** seven-Judge Bench of the Supreme Court referred to several earlier judgments on the scope of judicial interference at the reference stage and noted the paradigm shift in law due to legislative amendment by the Arbitration and Conciliation (Amendment Act), 2015 ('2015 Amendments'), whereby Section 11(6-A) was inserted. The Supreme Court observed that the decision in ***SBP & Co. v. Patel Engineering Ltd. and Another, (2005) 8 SCC 618*** and ***National Insurance Company Limited v. Boghara Polyfab Private Limited, (2009) 1 SCC 267,*** allowed for greater judicial interference at pre-arbitral stage and referral Courts were encouraged to conduct mini trials instead of summarily dealing with the preliminary issues. The Law Commission recognising that one of the problems plaguing implementation of the 1996 Act was pendency of Section 11 applications for years, decided to remedy the situation and proposed the 2015 Amendment Act to reduce the judicial intervention at pre-arbitral stage. The Statement of Objects and Reasons as noted in the judgment states that sub-Section (6-A) was inserted in Section 11 to provide that referral Court shall confine to the examination of an arbitration agreement. The Supreme Court then referred to the judgment in ***Duro Felguera, S.A. v. Gangavaram Port Limited, (2017) 9 SCC 729,*** wherein the effect and impact of 2015 Amendment Act was clarified and it was held that the intention of the legislature in incorporating Section 11(6-A) was to limit the scope of referral Court's jurisdiction to only one aspect i.e.,

existence of an arbitration agreement and to determine this, Court only needs to examine whether the underlying contract contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. The Supreme Court then referred to the judgment in ***Mayavati Trading Private Limited v. Pradyuat Deb Burman, (2019) 8 SCC 714,*** passed by three-Judge Bench of the Supreme Court affirming the reasoning in ***Duro Felguera (supra)*** and observing that the examination under Section 11(6-A) was confined to examination of existence of an arbitration agreement and is to be understood in the narrow sense as also that position of law prior to 2015 Amendment Act, as set forth by decisions of the Supreme Court in ***Patel Engineering (supra)*** and ***Boghara Polyfab (supra),*** has been legislatively overruled.

22. After referring to several judgments on the issue as also legislative intent behind incorporating Section 11(6-A), the Supreme Court in ***In Re: Interplay (supra)*** held that Section 11 confines Court's jurisdiction to examination of existence of an arbitration agreement and the use of the term 'examination' in itself connotes that the scope of power is limited to a *prima facie* determination. It was further held that since the 1996 Act is a self-contained code, the requirement of 'existence' of an arbitration agreement draws effect from Section 7 of 1996 Act. In this context, once again reference was made to the judgment in ***Duro Felguera (supra),*** wherein the Supreme Court held that the referral Court would only consider whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Similarly, validity of the arbitration agreement, in view of Section 7, should be restricted to requirement of formal validity such as the

agreement must be in writing. It was held that this interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16 of 1996 Act and while so holding, the Supreme Court in ***In Re: Interplay (supra)*** clarified the position of law laid down in ***Vidya Drolia (supra)*** in context of Sections 8 and 11 of 1996 Act. Relevant passages from the judgment are as follows:-

> *"**152.** The extent of judicial interference at the referral stage was scrutinised by a Bench of two Judges of this Court in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] This Court held that when the intervention of the Court is sought under Section 11 of the Arbitration Act, the following categories of issues will arise before the Referral Court:*
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> ***152.1.** The issues which the Chief Justice or his designate is bound to decide. These issues were : first, whether the party making the application has approached the appropriate High Court; and second, whether there is a valid arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement;*
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> ***152.2.** The issues which the Chief Justice or his designate may choose to decide or leave them to the decision of the Arbitral Tribunal. These issues were : first, whether the claim is a dead (long-barred) claim or a live claim; and second, whether the parties have concluded the contract/transaction by recording the satisfaction of their mutual rights and obligations or by receiving the final payment without objection; and*
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> ***152.3.** The issues which the Chief Justice or their designate should leave exclusively to the Arbitral Tribunal. These issues were : first, whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); and second, merits or any claim involved in the arbitration.*
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> ***153.** The decisions of this Court in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] allowed for greater judicial interference at the pre-arbitral stage. In effect, the Referral Courts were encouraged to conduct mini trials instead of summarily dealing with the preliminary issues. This was also noted by the Law Commission of India, which observed that judicial intervention in the arbitral proceedings is a pervasive problem in India leading to*

significant delays in the arbitration process. [Law Commission of India, 246th Report (2014).] The Law Commission recognised that one of the problems plaguing implementation of the Arbitration Act was that Section 11 applications were kept pending for years by the Courts. To remedy the situation, the Law Commission proposed changing the then existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court". It also clarified that the power of appointment of arbitrators ought not to be regarded as a judicial act.

154. *Significantly, the Law Commission observed that there was a need to reduce judicial intervention at the pre-arbitral stage, that is, prior to the constitution of the Arbitral Tribunal. Accordingly, it proposed limiting the scope of the judicial intervention at the referral stage under Sections 8 and 11 of the Arbitration Act "to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void". The Law Commission suggested insertion of sub-section (6-A) under Section 11 which would read:"Any appointment by the High Court or the person or institution designated by it under sub-section (4) or sub-section (5) or sub-section (6) shall not be made only if the High Court finds that the arbitration does not exist or is null and void." In light of the recommendations of the Law Commission, Parliament passed the Arbitration and Conciliation (Amendment) Act, 2015 ("the 2015 Amendment Act") to incorporate Section 11(6-A).*

155. *The Statement of Objects and Reasons of the 2015 Amendment Act states that sub-section (6-A) is inserted in Section 11 to provide that the Supreme Court or the High Court while considering application under sub-sections (4) to (6) "shall confine to the examination of an arbitration agreement". With the coming into force of the 2015 Amendment Act, the nature of preliminary examination at the referral stage under Section 11 was confined to the existence of an arbitration agreement. It also incorporates a non obstante clause which covers "any judgment, decree or order of any court". By virtue of the non obstante clause, Section 11(6-A) has set out a new position of law, which takes away the basis of the position laid down by the previous decisions of this Court in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . It is also important to note that Parliament did not incorporate the expression "or is null and void" as was suggested by the Law Commission. This indicates that Parliament intended to confine the jurisdiction of the Courts at the pre-arbitral stage to as minimum a level as possible.*

156. *The effect and impact of the 2015 Amendment Act was subsequently clarified by this Court. In Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , Kurien Joseph, J. noted that the intention of the*

legislature in incorporating Section 11(6-A) was to limit the scope of the Referral Court's jurisdiction to only one aspect — the existence of an arbitration agreement. To determine the existence of an arbitration agreement, the Court only needs to examine whether the underlying contract contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. This Court further held that Section 11(6-A) incorporates the principle of minimal judicial intervention : (SCC p. 765, para 59)

> *"59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists- nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."*

157. *In 2017, the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India submitted a report noting that while the 2015 amendment facilitated the speedy disposal of Section 11 applications, they failed to limit judicial interference in arbitral proceedings. Accordingly, the High-Level Committee recommended the amendment of Section 11 to provide for appointment of arbitrators solely by arbitral institutions designated by the Supreme Court in case of international commercial arbitrations or the High Court in case of all other arbitrations. In view of the report of the High-Level Committee, Parliament enacted the Arbitration and Conciliation (Amendment) Act, 2019 ("the 2019 Amendment Act") omitting Section 11(6-A) so as to leave the appointment of arbitrators to arbitral institutions. Section 1(2) of the 2019 Amendment Act provides that amended provisions shall come into force on such date as notified by the Central Government in the official gazette. However, Section 3 of the 2019 Amendment Act which amended Section 11 by omitting Section 11(6-A) is yet to be notified. Till such time, Section 11(6-A) will continue to operate.*

158. *In Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , a three-Judge Bench of this Court affirmed the reasoning in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] by observing that the examination under Section 11(6-A) is "confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense". Moreover, it held that the position of law prior to the 2015 Amendment Act, as set forth by the decisions of this Court in Patel Engg. [SBP &*

Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , has been legislatively overruled. Thus, this Court gave effect to the intention of the legislature in minimising the role of the Courts at the pre-arbitral stage to the bare minimum.

159. *Thereafter, in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , another three-Judge Bench of this Court, affirmed the ruling in Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] that Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] has been legislatively overruled. In Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , one of the issues before this Court was whether the Court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability. This Court began its analysis by holding that an arbitration agreement has to satisfy the mandate of the Contract Act, in addition to satisfying the requirements stipulated under Section 7 of the Arbitration Act to qualify as an agreement.*

160. *In the course of the decision, one of the questions before this Court in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] was the interpretation of the word "existence" as appearing in Section 11. It was held that existence and validity are intertwined. Further, it was observed that an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Therefore, this Court read the mandate of valid arbitration agreement contained in Section 8 into the mandate of Section 11, that is, "existence of an arbitration agreement".*

161. *At the outset, Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] noted that "Section 11 has undergone another amendment vide Act 33 of 2019 with effect from 9-8-2019." The purport of the omission of the said clause was further explained in the following terms : (SCC p. 115, para 145)*

> *"145. Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the Arbitral Tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in Patel Engg. [SBP &*

Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] would become applicable."

162. *Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] proceeds on the presumption that Section 11(6-A) was effectively omitted from the statute books by the 2019 Amendment Act. This is also reflected in the conclusion arrived at by the Court, as is evident from the following extract : (SCC p. 121, para 154)*

> *"154. ... 154.1. Ratio of the decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the Court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable."*
>
> *(emphasis supplied)*

163. *We are of the opinion that the above premise of the Court in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is erroneous because the omission of Section 11(6-A) has not been notified and, therefore, the said provision continues to remain in full force. Since Section 11(6-A) continues to remain in force, pending the notification of the Central Government, it is incumbent upon this Court to give true effect to the legislative intent.*

164. *The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the Referral Court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the Court's jurisdiction to the examination of the existence of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the Referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.*

165. *The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro*

Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in the context of Section 8 and Section 11 of the Arbitration Act.

166. *The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.*

167. *Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, The Law Lexicon (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234]"*

23. In this context, I may also allude to the judgment of the Supreme Court in ***Krish Spinning (supra),*** where one of the questions that fell for determination was with respect to the scope and standard of judicial scrutiny under Section 11(6) of 1996 Act, more particularly, in light of the second question whether the execution of a discharge voucher towards full and final settlement between the parties would operate as bar to invoke arbitration.

24. The Supreme Court referred to earlier judgments of the Supreme Court including ***Patel Engineering (supra)*** and ***Boghara Polyfab (supra)*** and observed that in these two decisions the scope of interference under Section 11 was substantially expanded. Reference was also made to the decision in ***United India Insurance Company Limited v. Antique Art Exports Private Limited, (2019) 5 SCC 362,*** where reliance was placed on the judgments in ***Union of India and Others v. Master Construction Company, (2011) 12 SCC 349*** and ***New India Assurance Company Limited v. Genus Power Infrastructure Limited, (2015) 2 SCC 424,*** both decisions delivered before insertion of Section 11(6-A) and it was held that in ***Antique Art (supra),*** the Supreme Court had failed to take into account the legislative intent behind insertion of Section 11(6-A), which was succinctly explained in ***Duro Felguera (supra).*** The Supreme Court then referred to and relied on the judgment in ***Mayavati Trading (supra)*** overruling the decision in ***Antique Art (supra).*** In ***Krish Spinning (supra),*** the Supreme Court observed that the position after the decisions in ***Mayavati Trading (supra)*** and ***Vidya Drolia (supra)*** was that ordinarily, Court while exercising in its power under Section 11 of 1996 Act will only look into the existence of an arbitration agreement and would refuse arbitration only as a demurrer when the claims are *ex facie* frivolous and non-arbitrable. Thereafter, examining

the effect of the decision in ***In Re: Interplay (supra),*** it was held by the Supreme Court in ***Krish Spinning (supra)*** that scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7 and this examination is limited to requirement of formal validity such as the agreement should be in writing and nothing else. It was observed that for this reason, it was difficult to hold that the observations made in ***Vidya Drolia (supra)*** and adopted in ***NTPC Limited v. SPML Infra Limited, (2023) 9 SCC 385,*** that jurisdiction of the referral Court when dealing with the issue of *"accord and satisfaction"* extends to weeding out *ex facie* non-arbitrable and frivolous disputes, would continue to apply, despite the decision in ***In Re: Interplay (supra).*** Relevant passages from ***Krish Spinning (supra),*** are as follows:-

> *"73. The net effect of the decisions in SBP & Co. (supra) and Boghara Polyfab (supra) was that the scope for interference available to the referral courts when acting under Section 11 of the Act, 1996 was substantially expanded. The referral courts were conferred with the discretion to conduct mini trials and indulge in the appreciation of evidence on the issues concerned with the subject matter of arbitration. The Law Commission of India in its 246th report took note of the issue of significant delays being caused to the arbitral process due to enlarged scope of judicial interference at the stage of appointment of arbitrator and suggested as follows:*
>
> > *i. First, that the power of appointment conferred upon the Chief Justice be devolved on to the Supreme Court and the High Court, as the case may be; and*
> >
> > *ii. Secondly, the power of appointment under Section 11 be clarified to be an administrative power and not a judicial one.*
> >
> > *iii. Thirdly, the scope of interference under Sections 8 and 11 respectively of the Act, 1996 be restricted only to those cases where the court finds that no arbitration agreement exists or is null and void.*
>
> *74. The Law Commission suggested the insertion of Section 11(6-A) in the Act, 1996. The aforesaid recommendations of the Commission were taken note of by the Parliament and accordingly the Act, 1996 was amended in 2015 to incorporate Section 11(6-A), which reads thus:*
>
> > *"(6A) The Supreme Court or, as the case may be, the High Court,*

while considering any application under subsection (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."

75. Interestingly, Section 11(6-A) was omitted by the 2019 amendment to the Act, 1996 on the basis of a report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India. However, in the absence of the omission being notified, Section 11(6-A) of the Act, 1996 continues to remain on the statute book and thus has to be given effect as such.

76. The impact of the addition of Section 11(6-A) was elaborately discussed by this Court in Duro Felguera, S.A. v. Gangavaram Port Ltd reported in (2017) 9 SCC 729 as follows:

"48. […] From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.

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59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [(2005) 8 SCC 618] and Boghara Polyfab [(2009) 1 SCC 267]. This position continued till the amendment brought about in 2015. <u>After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."</u>

(Emphasis supplied)

77. Despite the decision in Duro Felguera (supra), this Court in United India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd. reported in (2019) 5 SCC 362, while dealing with the issue of "full and final settlement" in the context of appointment of an arbitrator, held that mere bald allegation by a party that the discharge voucher was obtained under coercion or undue influence would not entitle it to seek referral of the dispute to arbitration unless it is able to produce prima facie evidence of the same during the course of proceedings under Section 11(6) of the Act, 1996. Important paragraphs from the said decision are extracted hereinbelow:

<u>"15. From the proposition which has been laid down by this Court,</u>

what reveals is that a mere plea of fraud, coercion or undue influence in itself is not enough and the party who alleged is under obligation to prima facie establish the same by placing satisfactory material on record before the Chief Justice or his Designate to exercise power under Section 11(6) of the Act, which has been considered by this Court in New India Assurance Co. Ltd. case [...]

xxx xxx xxx

17. It is true that there cannot be a rule of its kind that mere allegation of discharge voucher or no claim certificate being obtained by fraud/coercion/undue influence practised by other party in itself is sufficient for appointment of the arbitrator unless the claimant who alleges that execution of the discharge agreement or no claim certificate was obtained on account of fraud/coercion/undue influence practised by the other party is able to produce prima facie evidence to substantiate the same, the correctness thereof may be open for the Chief Justice/his Designate to look into this aspect to find out at least prima facie whether the dispute is bona fide and genuine in taking a decision to invoke Section 11(6) of the Act.

18. In the instant case, the facts are not in dispute that for the two incidents of fire on 25-9-2013 and 25-10-2013, the appellant Company based on the Surveyor's report sent emails on 5-5-2016 and 24-6-2016 for settlement of the claims for both the fires dated 25-9-2013 and 25-10-2013 which was responded by the respondent through email on the same date itself providing all the necessary information to the regional office of the Company and also issued the discharge voucher in full and final settlement with accord and satisfaction. Thereafter, on 12-7-2016, the respondent desired certain information with details, that too was furnished and for the first time on 27-7-2016, it took a U-turn and raised a voice of undue influence/coercion being used by the appellant stating that it being in financial distress was left with no option than to proceed to sign on the dotted lines. As observed, the phrase in itself is not sufficient unless there is a prima facie evidence to establish the allegation of coercion/undue influence, which is completely missing in the instant case.

19. In the given facts and circumstances, we are satisfied that the discharge and signing the letter of subrogation was not because of any undue influence or coercion as being claimed by the respondent and we find no difficulty to hold that upon execution of the letter of subrogation, the claim was settled with due accord and satisfaction leaving no arbitral dispute to be examined by an arbitrator to be appointed under Section 11(6) of the Act.

20. The submission of the learned counsel for the respondent that after insertion of sub-section (6-A) to Section 11 of the Amendment Act, 2015 the jurisdiction of this Court is denuded and the limited mandate

of the Court is to examine the factum of existence of an arbitration and relied on the judgment in Duro Felguera, S.A. v. Gangavaram Port Ltd. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] The exposition in this decision is a general observation about the effect of the amended provisions which came to be examined under reference to six arbitrable agreements (five agreements for works and one corporate guarantee) and each agreement contains a provision for arbitration and there was serious dispute between the parties in reference to constitution of Arbitral Tribunal whether there has to be Arbitral Tribunal pertaining to each agreement. In the facts and circumstances, this Court took note of sub-section (6-A) introduced by the Amendment Act, 2015 to Section 11 of the Act and in that context observed that the preliminary disputes are to be examined by the arbitrator and are not for the Court to be examined within the limited scope available for appointment of arbitrator under Section 11(6) of the Act. Suffice it to say that appointment of an arbitrator is a judicial power and is not a mere administrative function leaving some degree of judicial intervention; when it comes to the question to examine the existence of a prima facie arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted.

21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication.

22. In our considered view, the High Court has committed a manifest error in passing the impugned order and adopting a mechanical process in appointing the arbitrator without any supportive evidence on record to prima facie substantiate that an arbitral dispute subsisted under the agreement which needed to be referred to the arbitrator for adjudication."

(Emphasis supplied)

78. It is pertinent to observe that in Antique Art (supra) the Court placed reliance on the decisions in Master Construction (supra) and New India Assurance (supra). Both these decisions were delivered before the insertion of Section 11(6-A) by the 2015 amendment to the Act, 1996.

Thus, this Court in Antique Art (supra) failed to take into account the legislative intent behind the introduction of Section 11(6-A), which was also succinctly explained in Duro Felguera (supra).

79. A three-Judge Bench of this Court in Mayavati Trading Private Limited v. Pradyut Deb Burman reported in (2019) 8 SCC 714 overruled the decision in Antique Art (supra) and clarified that the position of law existing prior to the 2015 amendment to the Act, 1996 under which referral courts had the power to examine the aspect of "accord and satisfaction" had come to be legislatively overruled by Section 11(6-A) of the Act, 1996. The Court, while affirming the reasoning given in Duro Felguera (supra), observed thus:

> *"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA [Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59*
>
> *11. We, therefore, overrule the judgment in Antique Art Exports (P) Ltd. [United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd., (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above."*
>
> *(Emphasis supplied)*

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90. In NTPC Ltd. v. SPML Infra Ltd. reported in (2023) 9 SCC 385, a twoJudge Bench of this Court was again faced with the issue of "accord and satisfaction" in the context of a Section 11 petition for appointment of arbitrator. Placing reliance on Vidya Drolia (supra), this Court gave the "Eye of the Needle" test to delineate the contours of the power of interference which the referral court may exercise under Section 11 of the Act, 1996. The first prong of the said test requires the court to examine the validity and existence of the arbitration agreement which includes an examination of the parties to the agreement and the privity of the applicant to the contract. The second prong of the test requires the court to, as a general rule, leave all questions of non-arbitrability to the arbitral tribunal and only as a demurrer reject the claims which are ex-facie and manifestly non-arbitrable. However, it was clarified that the standard of

the aforesaid scrutiny is only prima facie, that is, unlike the pre-2015 position, the scrutiny does not entail elaborate appreciation of evidence and conduct of mini trials by the referral courts. The relevant observations made therein are reproduced hereinbelow:

> *"24. Following the general rule and the principle laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , this Court has consistently been holding that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. [Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671, paras 29, 30 : (2021) 3 SCC (Civ) 307] , Sanjiv Prakash v. Seema Kukreja [Sanjiv Prakash v. Seema Kukreja, (2021) 9 SCC 732 : (2021) 4 SCC (Civ) 597] , and Indian Oil Corpn. Ltd. v. NCC Ltd. [Indian Oil Corpn. Ltd. v. NCC Ltd., (2023) 2 SCC 539 : (2023) 1 SCC (Civ) 88] , the parties were referred to arbitration, as the prima facie review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the Court may not refer parties to arbitration when it is clear that the case is manifestly and ex facie nonarbitrable, in BSNL v. Nortel Networks (India) (P) Ltd. [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352] (hereinafter "Nortel Networks") and Secunderabad Cantonment Board v. B. Ramachandraiah & Sons [Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, (2021) 5 SCC 705 : (2021) 3 SCC (Civ) 335] , arbitration was refused as the claims of the parties were demonstrably time-barred.*
>
> ***Eye of the needle***
>
> *25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.*
>
> *26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie nonarbitrable [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4 : (2021) 1 SCC (Civ) 549] […]*
>
> *27. The standard of scrutiny to examine the non-arbitrability of a*

claim is only prima facie. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 134 : (2021) 1 SCC (Civ) 549] and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 47 : (2021) 3 SCC (Civ) 352] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4 : (2021) 1 SCC (Civ) 549].”

(Emphasis supplied)

91. The justification given in NTPC v. SPML (supra) for allowing the scrutiny of arbitrability at the stage of Section 11 petition was that the referral court is under a duty to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable, and any interference by the referral court preventing such ex-facie meritless arbitration could be termed as legitimate. It was observed thus:

“28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable . It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549] . Further, as noted in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549] . Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22, 26]”

92. The position that emerges from the aforesaid discussion of law on the subject as undertaken by us can be summarised as follows: -

i. There were two conflicting views which occupied the field under the

Arbitration Act, 1940. While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.

ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven-Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 Special Leave Petition (C) Nos. 3792/2024 & 7220/2024 Page 62 of 85 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.

iii. The decision in SBP & Co. (supra) was applied in Boghara Polyfab (supra) and it was held by this Court that the Chief Justice or his designate, in exercise of the powers available to them under Section 11 of the Act, 1996, can either look into the question of "accord and satisfaction" or leave it for the decision of the arbitrator. However, it also specified that in cases where the Chief Justice was satisfied that there was indeed "accord and satisfaction", he could reject the application for appointment of arbitrator. The prima facie standard of scrutiny was also expounded, stating that the party seeking arbitration would have to prima facie establish that there was fraud or coercion involved in the signing of the discharge certificate. The position elaborated in Boghara Polyfab (supra) was adopted in a number of subsequent decisions, wherein it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition. iv. The view taken by SBP & Co. (supra) and Boghara Polyfab (supra) was seen by the legislature as causing delays in the disposal of Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in the Act, 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in Duro Felguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".

v. Despite the introduction of Section 11(6-A) and the decision in Duro Felguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in Duro Felguera (supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to the Court while exercising its power under Section 11 of the Act, Special Leave Petition (C) Nos. 3792/2024 & 7220/2024 Page 64 of 85 1996 to go into the question of whether "accord and satisfaction" had taken place.

vi. The decision in Vidya Drolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated. It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex-facie frivolous and devoid of merit.

93. Thus, the position after the decisions in Mayavati Trading (supra) and Vidya Drolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable.

iii. ***What is the effect of the decision of this Court in In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1966 and the Indian Stamp Act 1899 on the scope of powers of the referral court under Section 11 of the Act, 1996?***

94. A seven-Judge Bench of this Court, in In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1966 and the Indian Stamp Act 1899 reported in 2023 INSC 1066, speaking eruditely through one of us, Dr Dhananjaya Y. Chandrachud, Chief Justice of India, undertook a comprehensive analysis of Sections 8 and 11 respectively of the Act, 1996 and, inter alia, made poignant observations about the nature of the power vested in the Courts insofar as the aspect of appointment of arbitrator is concerned. Some of the relevant observations made by this Court in In Re: Interplay (supra) are extracted hereinbelow:

"179. […] However, the effect of the principle of competence-competence is that the arbitral tribunal is vested with the power and authority to determine its enforceability. The question of

enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court (or the High Courts, as the case may be) is merely giving effect to the principle enshrined in Section 16. The appointment of an arbitral tribunal does not necessarily mean that the agreement in which the arbitration clause is contained as well as the arbitration agreement itself are enforceable. The arbitral tribunal will answer precisely these questions.

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185. The corollary of the doctrine of competence-competence is that courts ***may only examine whether an arbitration agreement exists*** *on the basis of the prima facie standard of review. The nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp-duty has not been paid or is inadequate is such as cannot be decided on a prima facie basis. Objections of this kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. Obligating the court to decide issues of stamping at the Section 8 or Section 11 stage will defeat the legislative intent underlying the Arbitration Act.*

186. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain the domain of the arbitral tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). The exercise of the jurisdiction of the courts of the country over the substantive dispute between the parties is only possible at two stages:

a. If an application for interim measures is filed under Section 9 of the Arbitration Act; or

b. If the award is challenged under Section 34. Issues which concern the payment of stamp-duty fall within the remit of the arbitral tribunal. The discussion in the preceding segments also make it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9."

(Emphasis supplied)

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110. 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.

111. 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.

112. The aforesaid approach serves a two-fold 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.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) 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:

> *"209. 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 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 timebound 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)*

114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re: Interplay (supra).

115. The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration

agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by "accord and satisfaction".

116. The question of "accord and satisfaction", being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.

117. 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 doesn't 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 principal 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.

118. Tests like the "eye of the needle" and "ex-facie meritless", although try to minimise the extent of judicial interference, yet they require the referral court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place arbitral autonomy and judicial non-interference on the highest pedestal.

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127. In Arif Azim (supra), while deciding an application for appointment of arbitrator under Section 11(6) of the Act, 1996, two issues had arisen for our consideration:

> *i. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?*
>
> *ii. Whether the court may decline to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly timebarred?*

128. On the first issue, it was observed by us that the Limitation Act, 1963

is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

130. On the second issue it was observed by us in paragraph 67 that the referral courts, while exercising their powers under Section 11 of the Act, 1996, are under a duty to "prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a timeconsuming and costly arbitration process."

131. Our findings on both the aforesaid issues have been summarised in paragraph 89 of the said decision thus:

> *"89. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the Act, 1996, the courts should satisfy themselves on two aspects by employing a two-pronged test – first, whether the petition under Section 11(6) of the Act, 1996 is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal."*

132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re: Interplay (supra).

133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral

court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re: Interplay (supra).

134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein.

F. CONCLUSION

135. The existence of the arbitration agreement as contained in Clause 13 of the insurance policy is not disputed by the appellant. The dispute raised by the claimant being one of quantum and not of liability, prima facie, falls within the scope of the arbitration agreement. The dispute regarding "accord and satisfaction" as raised by the appellant does not pertain to the existence of the arbitration agreement, and can be adjudicated upon by the arbitral tribunal as a preliminary issue."

25. From a conspectus of the aforesaid judgments, it is crystal clear that the scope of jurisdiction under Section 11(6) of 1996 Act is limited to examining the existence of a valid arbitration agreement between the parties on the touchstone of Section 7 of 1996 Act and whether the petition is barred by limitation and no more. It is nobody's case that the petition is time barred. Therefore, I will now examine whether there exists an arbitration agreement between Petitioner and Respondent No.1 for reference of disputes raised by the Petitioner to arbitration. At the cost of repetition, I may briefly recapitulate the narrative of facts. Petitioner and Respondent No.1 entered into a Collaboration Agreement dated 25.06.2015, whereby Respondent

No.1 was to *inter alia* develop and construct a commercial project on the project land. Disputes having arisen, Petitioner took recourse to Section 9 of 1996 Act and filed a petition before District Court, Faridabad. However, during the pendency of the petition, parties entered into an amicable settlement and terms of settlement were incorporated in a Settlement Agreement dated 31.12.2021. In the meantime, the Arbitrator appointed by the parties entered upon reference. After Settlement Agreement was executed, parties jointly approached the Arbitrator and a Consent Award was passed on 08.04.2022 in terms of the settlement. According to the Petitioner, post the Consent Award disputes once again arose between the parties, owing to execution of ante-dated Lease Deeds dated 06.04.2022 by Respondent No.1, leasing 16 units to third parties as also in respect of the total carpet area on the 4th and 5th floors in the Mall, in lieu of which Petitioner had taken an area of 506.873 sq. mts. i.e., 36.25% of 1398.271 sq. mts. on Lower Ground Floor. Petitioner asserts that after the Consent Award when Auto CAD of 4th and 5th floors was obtained and the Architect of the Petitioner company measured the total carpet area, it was revealed that the actual area was 2195 sq. mts. and not 1398.271 sq. mts. as represented by Respondent No.1 at the time of settlement. Hence, Petitioner sought its share in the extra area of 800 sq. mts. (approximately), proportionate to its agreed share and also sent a notice under Section 21 of 1996 Act but Respondent No.1 declined to indulge on the ground that there was full and final settlement of all the disputes and any further claim was barred by *res judicata* and consequently, the disputes were non-arbitrable.

26. Ordinarily, if the parties enter into a full and final settlement of their disputes and in a pending arbitration a Consent Award is passed, Court

would not entertain a petition under Section 11 of 1996 Act. However, the Supreme Court has held in ***Krish Spinning (supra)*** that a dispute pertaining to full and final settlement itself, by necessary implication being a dispute arising out of or in relation to or under the substantive contract, would not be precluded from reference to arbitration as the arbitration agreement contained in the original contract continues to be in existence even after the parties have discharged the original contract by *"accord and satisfaction"*. It was observed that there is no rule of an absolute kind which precludes arbitration in cases where a full and final settlement has been arrived at. Relevant passages are as follows:-

> *"54. Although ordinarily no arbitrable disputes may subsist after execution of a full and final settlement, yet any dispute pertaining to the full and final settlement itself, by necessary implication being a dispute arising out of or in relation to or under the substantive contract, would not be precluded from reference to arbitration as the arbitration agreement contained in the original contract continues to be in existence even after the parties have discharged the original contract by "accord and satisfaction".*
>
> *55. The aforesaid position of law has also been consistently followed by this Court as evident from many decisions. In Boghara Polyfab (supra), while rejecting the contention that the mere act of signing a "full and final discharge voucher" would act as a bar to arbitration, this Court held as follows:*
>
> > *"44. ... None of the three cases relied on by the appellant lay down a proposition that mere execution of a full and final settlement receipt or a discharge voucher is a bar to arbitration, even when the validity thereof is challenged by the claimant on the ground of fraud, coercion or undue influence. Nor do they lay down a proposition that even if the discharge of contract is not genuine or legal, the claims cannot be referred to arbitration. [...]"*
>
> *56. Again, in R.L. Kalathia and Company v. State of Gujarat reported in (2011) 2 SCC 400, it was re-iterated that the mere issuance of the no-dues certificate would not operate as a bar against the raising of genuine claims even after the date of issuance of such certificate. The relevant observations are extracted hereinbelow:*
>
> > *"13. From the above conclusions of this Court, the following principles emerge:*

(1) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

(Emphasis supplied)

57. The position that emerges from the aforesaid discussion is that there is no rule of an absolute kind which precludes arbitration in cases where a full and final settlement has been arrived at. In Boghara Polyfab (supra), discussing in the context of a case similar to the one at hand, wherein the discharge voucher was alleged to have been obtained on ground of coercion, it was observed that the discharge of a contract by full and final settlement by issuance of a discharge voucher or a no-dues certificate extends only to those vouchers or certificates which are validly and voluntarily executed. Thus, if the party said to have executed the discharge voucher or the no dues certificate alleges that the execution was on account of fraud, coercion or undue influence exercised by the other party and is able to establish such an allegation, then the discharge of the contract by virtue of issuance of such a discharge voucher or no dues certificate is rendered void and cannot be acted upon.

58. It was further held in Boghara Polyfab (supra) that the mere execution of a full and final settlement receipt or a discharge voucher would not by itself operate as a bar to arbitration when the validity of such a receipt or voucher is challenged by the claimant on the ground of fraud, coercion or undue influence. In other words, where the parties are not ad idem over accepting the execution of the no-claim certificate or the discharge voucher, such disputed discharge voucher may itself give rise to an arbitrable dispute.

59. Once the full and final settlement of the original contract itself becomes a matter of dispute and disagreement between the parties, then such a dispute can be categorised as one arising "in relation to" or "in connection with" or "upon" the original contract which can be referred to arbitration in accordance with the arbitration clause contained in the

> *original contract, notwithstanding the plea that there was a full and final settlement between the parties."*

27. From a plain reading of the aforesaid passages, it is clear that execution of a full and final settlement may not preclude a party from taking recourse to arbitration if a dispute arises from the settlement itself and this law applies with full vigour in the present case for an additional reason that the parties themselves envisaged and agreed to refer disputes arising from the Settlement Agreement to arbitration by incorporating Clause 37 in the Settlement Agreement, which is as follows:-

> *"37. The Parties agree that in case of any dispute arising out of or in connection therewith or in relation thereto then the Parties shall try to resolve the same amicably failing which the same shall be decided through the arbitration by a sole arbitrator to be mutually appointed by the Parties herein in accordance with law. The award passed by the sole arbitrator shall be in English. The seat and venue of the said arbitration proceedings shall be at New Delhi. The award passed by the Sole Arbitrator shall be binding the Parties."*

28. A bare reading of the clause shows that parties agreed that in case any dispute arose out of or in connection with the Settlement Agreement or in relation thereto, parties shall try to resolve the same amicably failing which the disputes shall be decided through arbitration by a Sole Arbitrator and the award passed by the Sole Arbitrator shall be binding on the parties. Clause 37 on a plain reading, satisfies all ingredients of Section 7 of 1996 Act inasmuch as the agreement is in writing; it evidences the intention of the parties to refer the disputes arising from the Settlement Agreement to arbitration as dispute resolution mechanism and parties agreed to be bound by the decision of the Arbitrator. Therefore, tested on the touchstone of Section 7, Clause 37 is an arbitration agreement between Petitioner and Respondent No.1. ***[Ref.: In Re: Interplay (supra)]***.

29. According to the Petitioner, the disputes have purportedly arisen owing to the fact that the total carpet area on the 4th and 5th floors of the Mall is 2195 sq. mts. as against 1398.271 sq. meters represented by Respondent No.1 at the time of settlement and Respondent No.1 refuses to apportion the extra area of 800 sq. meters (approximately) as per the agreed shares. Petitioner asserts that disputes have also arisen since Respondent No.1 executed ante-dated Lease Deeds on 06.04.2022 and illegally leased all 16 units beyond the expiry of 6 months from the date of issue of Occupation Certificate. The disputes flagged by the Petitioner thus arise out of and are in relation to or under the Settlement Agreement and by virtue of Clause 37 are referrable to arbitration.

30. Coming to the next argument of the Respondents that no reference can be made to arbitration once the earlier arbitral proceedings have culminated into a Consent Award dated 08.04.2022, there can be no quarrel with the legal proposition that an arbitral award is enforceable as a decree of the Court. It is equally well settled that if a party is aggrieved by an arbitral award, the remedy is to challenge the same under Section 34 of 1996 Act. However, in the present case, the matter does not rest here inasmuch as the Consent Award also contains an arbitration agreement as follows:-

> *"QQ. An arbitral award hereby holding that in case of any dispute arising out of or in connection with the Settlement Agreement and/or Collaboration Agreement or in relation thereto then the Claimant and the Respondent shall try to resolve the same amicably failing which the same shall be decided through the arbitration by a sole arbitrator to be mutually appointed by them in accordance with law. The award passed by the sole arbitrator shall be in English. The seat and venue of the said arbitration proceedings shall be at New Delhi. The award passed by the Sole Arbitrator shall be binding on the Claimant and the Respondent."*

31. Clause QQ clearly provides that in case of any dispute arising out of or in connection with not only the Settlement Agreement but also

Collaboration Agreement or in relation thereto shall be resolved by the parties amicably, failing which the dispute will be decided through arbitration by the Sole Arbitrator to be mutually appointed by them in accordance with law and the award passed by the Sole Arbitrator shall be binding on them. Clearly, Clause QQ passes muster of Section 7 of 1996 Act and is an arbitration agreement. The incorporation of Clause QQ in the Consent Award is a reflection that parties envisaged that despite settlement and the Consent Award, disputes may arise in future and decided that they will be adjudicated through arbitration. As noted above, disputes have arisen between the parties *inter alia* with respect to the actual carpet area on 4th and 5th floors of the Mall as also alleged ante-dating of Lease Deeds dated 06.04.2022 by Respondent No.1. In fact the existence of Clauses 37 and QQ is the distinguishing feature of this case for which reason the judgements relied upon by Respondent No.1 in ***Dushyant Janbandhu (supra); HPCL Bio-Fuels (supra); ARSS Infrastructure (supra);*** and ***Jaiprakash Associates (supra)*** are inapplicable as none of these cases had arbitration clauses in the Settlement Agreements.

32. Much was argued between the parties with respect to the arbitrability of the disputes and bar of *res judicata.* Broadly understood, contention of the Respondents was that the alleged disputes, which are sought to be referred to arbitration by the Petitioner, stood settled and the Settlement Agreement merged in the Consent Award and reference of these disputes is barred by *res judicata* as also that the disputes arising out of Lease Deeds are non-arbitrable. It is trite that the question whether the disputes sought to be referred are arbitrable or not is to be determined and decided by the Arbitral Tribunal and is beyond the remit of a referral Court under Section

11 of 1996 Act. This very question came up for consideration in ***In Re: Interplay (supra)***. It was held that the view taken in ***Vidya Drolia (supra)*** that exercise of power of judicial review to examine the existence of arbitration agreement also includes *inter alia* a *prima facie* view related to non-arbitrability of the disputes, is erroneous since omission of Section 11(6-A) has not been notified and continues to remain in full force and therefore, Courts must give true effect to the legislative intent i.e., the scope of jurisdiction under Section 11 of 1996 Act must be restricted to determination of existence of valid arbitration agreement between the parties. This issue also came up for consideration before the Supreme Court in ***Krish Spinning (supra)*** and the Supreme Court reemphasised and reiterated that the scope of examination under Section 11(6-A) is confined to existence of an arbitration agreement on the basis of Section 7 of 1996 Act and nothing else and after the judgment in ***In Re: Interplay (supra)***, it is difficult to hold that the observations in ***Vidya Drolia (supra)*** that the jurisdiction of the referral Court when dealing with issue of *"accord and satisfaction"* under Section 11 extends to weeding out *ex facie* non-arbitrable disputes. This judgment is also important and relevant for the present case since it specifically deals with the issue whether on a plea of 'full and final settlement' and *"accord and satisfaction"*, by a party contesting the appointment of the Arbitrator, reference can be refused. Negating this plea, the Supreme Court held that dispute regarding *"accord and satisfaction"* or full and final settlement of all disputes does not pertain to existence of arbitration agreement and can be adjudicated only by an Arbitral Tribunal.

33. More specifically, in the context of a plea of *res judicata*, I may

allude to the judgment in ***SPS Engineering (supra)***, where the Supreme Court held that the question whether a claim is barred by *res judicata* does not arise for consideration in a proceeding under Section 11 of 1996 Act. Such an issue will have to be examined by the Arbitral Tribunal since decision on *res judicata* requires consideration of pleadings as also claims and issues etc. and the limited scope of Section 11 does not permit such examination on facts or in law. Relevant passage is as follows:-

> *"**16.** The question whether a claim is barred by res judicata, does not arise for consideration in a proceeding under Section 11 of the Act. Such an issue will have to be examined by the Arbitral Tribunal. A decision on res judicata requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of Section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the Arbitral Tribunal to examine and decide whether the claim was barred by res judicata. There can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering an application under Section 11 of the Act."*

34. Relying on the aforesaid judgment of the Supreme Court, this Court in ***Dault Ram Dharam Bir Auto Private Limited and Others v. Pivotal Infrastructure Private Limited and Others, 2023 SCC OnLine Del 2363***, agreed with the contention of the Petitioner that the question whether the claim of 10% share in the built-up area stood settled in terms of past litigations between the parties was akin to a plea of *res judicata* and could not be decided in a petition under Section 11 of 1996 Act. This view was taken earlier by another Coordinate Bench of this Court in ***Parsvnath Developers Limited and Another v. Rail Land Development Authority, 2018 SCC OnLine Del 12399*** and it was held that the question whether reference to arbitration would be barred by principle of Order II Rule 2 CPC and/or principles of *res judicata* or estoppel cannot be decided by a referral

Court. Legislature has by way of 2015 Amendment Act inserted Section 11(6-A) restricting the scrutiny of the Court at this stage only to existence of arbitration agreement. This judgement was upheld by the Supreme Court. To the same effect is the judgement of this Court in ***Hindustan Construction (supra).*** Accordingly, the contention of the Respondents that this Court must first adjudicate on whether the disputes sought to be referred for arbitration by the Petitioner are barred by *res judicata* and are non-arbitrable, only deserves to be rejected. In ***Krish Spinning (supra),*** the Supreme Court held that it is not an absolute rule that disputes cannot be referred to arbitration if there is full and final settlement as disputes may still arise from the settlement and this judgement would apply with greater vigour in the present case since the parties themselves envisaged this situation and agreed to include an arbitration agreement not just in the Settlement Agreement but also in the Consent Award.

35. Respondents No.2 to 4 have contested reference to arbitration on the ground that they are non-signatories to the arbitration agreement, Collaboration Agreement, Settlement Agreement as also not privy to the Consent Award. Petitioner is right in contending that the question whether a non-signatory is bound by the arbitration agreement is completely independent of the question concerning the existence of an arbitration agreement and therefore, whether or not a non-signatory is a veritable party to the arbitration agreement should be left for determination by the Arbitral Tribunal. In ***ASF Buildtech Private Limited v. Shapoorji Pallonji and Company Private Limited, (2025) 9 SCC 76***, the Supreme Court referring to and relying on the judgment in ***Cox and Kings (supra)*** held that the entire exercise of determining whether a non-signatory is bound by an arbitration

agreement, necessitates a far more expansive enquiry, which transcends the limited question of mere existence of an arbitration agreement since it entails interpretation of the scope and contours of the principal agreement, an assessment of commercial understanding between the parties, examination of nature and purpose underlying the principal contract and character of transactions etc. It was thus held that by no stretch of imagination can the issue whether non-signatory is bound by the arbitration agreement be characterised as one that is either significant or *sine qua non* to the determination of existence of the arbitration agreement. The question involves a more nuanced determination and therefore, even if it is assumed that referral Court in its jurisdiction under Section 11 of 1996 Act has the discretion to examine this question, Court should not only refrain but rather loathe the exercise of such discretion and leave the same to the Arbitral Tribunal. In this context, I may also refer to the judgments of the Supreme Court in ***Adavya Projects Pvt. Ltd. v. Vishal structural Pvt. Ltd. and Others, 2025 SCC OnLine SC 806;*** and ***OPG Power Generation Private Limited v. Enexio Power Cooling Solutions India Private Limited and Another, (2025) 2 SCC 417.*** Relevant passages from the judgment in ***ASF Buildtech (supra)*** are as follows:-

> *"**74.** From above, it is manifest that the test for determining the applicability of the 'Group of Companies' doctrine is intrinsically factual in nature, necessitating a close and context-specific inquiry. However, Cox and Kings (I) (supra) did not merely stop at just establishing the factual nature of such an exercise, but further proceeded to expound, the extent and depth in which the aforementioned factual factors must be determined in the course of such exercise by laying down the threshold standards for determining the applicability of the said doctrine. Placing reliance on one another decision of this Court in Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, it held that the test for determining applicability of the 'Group of Companies' doctrine envisages a cumulative and holistic determination of the factual aspects such as the relationship between and among the legal entities within the*

corporate group structure, their underlying contractual obligations, the commonality of the subject matter and the composite nature of the transactions undertaken, and their overall participation in the project/subject-matter for achieving a common purpose. The relevant observations read as under:—

> *"110. In Discovery Enterprises (supra), this Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding whether a company within a group of companies is bound by the arbitration agreement:*
>
> *"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
>
> *(i) The mutual intent of the parties;*
>
> *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
>
> *(iii) The commonality of the subject-matter;*
>
> *(iv) The composite nature of the transactions; and*
>
> *(v) The performance of the contract."*

xxx *xxx* *xxx*

76. *Owing to the intrinsic character of the test — being one that entails a fact- intensive inquiry involving a mixed question of fact and law — and further, given the extensive standard it demands, requiring a comprehensive and holistic appraisal of all material facts and attendant circumstances, it may be safely concluded that the arbitral tribunal is the more appropriate and competent forum to adjudicate upon the issue of whether a non-signatory is bound by the arbitration agreement, as the arbitral as it has the innate advantage of going through all the relevant evidence and pleadings in greater depth and detail than the referral court at the pre-reference stage, and as such is uniquely positioned to undertake such a nuanced determination.*

II. Determining the "existence" viz-à-viz the intention of parties from "express words" of an Arbitration Agreement.

77. *In order to resolve the question whether the issue of a non-signatory being bound by an arbitration agreement could be said to be inextricably intertwined with the determination of the "existence" of the arbitration agreement, it is apposite to once again advert to Cox and Kings (I)* ***(supra), more particularly, as to the manner in which it envisages the identification and determination of the binding effect of an arbitration agreement upon a non-signatory, based on the factual aspects delineated by it, as mentioned in the foregoing paragraphs.***

78. *Cox and Kings (I) (supra) observed that the "legal relationship of a*

non- signatory to a party which is a signatory to the agreement" must be analyzed in the context of the underlying substantive contract which contains the arbitration agreement. This may be ascertained either from the duty or relationship attributed to the non-signatory within the underlying contract or may be inferred from its conduct with respect to such contract. If the underlying contract forms basis for a subject-matter common to both the signatory and the non-signatory or any composite transaction by them, then it would be a positive indicum for inferring the consent of the non-signatory to arbitrate with respect to the subject-matter. Transactions by a non-signatory which are interlinked with the underlying contract in such manner, in the absence of which the performance of the contract may not be feasible, is one another instance for inferring this consent. Placing reliance on Chloro Controls (supra) it observed that factors such as "commonality of the subject- matter" or "composite transaction" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the intention of the parties and their conduct on the other. Amongst these, the participation of the non-signatory in the performance of the underlying contract is the most crucial factor to discern the intention of the parties.

> *"112. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. The legal relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the signatory and non-signatory parties with respect to such contract. […]*
>
> *115. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.*
>
> *116. In case of a composite transaction involving multiple*

agreements, it would be incumbent for the courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank (supra) observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.

117. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences "in connection with" the main agreement and also disputes "connected with" the subject- matter of the principal agreement In Chloro Controls (supra), this Court clarified that the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. […]"

118. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts and tribunals. The conduct of the non- signatory parties is an indicator of the intention of the non- signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 201698 provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages."

(Emphasis supplied)

***79.** What can be discerned from the above is that, the entire exercise of*

determining whether a non-signatory is bound by an arbitration agreement, in contradistinction to the narrow question of the "existence" of the arbitration agreement, necessitates a far more expansive inquiry. This inquiry transcends the limited question of the mere "existence" as it entails an interpretation of the scope and contours of the principal agreement, an assessment of the commercial understanding between the parties, examination of the nature and purpose underlying the principal contract, and the character of the transactions and conduct of the parties viz-à-viz the object and wisdom of the parties underlying contractual arrangement. Such an exercise mandates a detailed and comparative evaluation of the substantive provisions of both the principal and supplementary agreements, and not merely of the arbitration agreement or clause in isolation.

80. *The determination of the "existence" of an arbitration agreement, by contrast, is confined to examining the formal validity of the arbitration agreement or the arbitration clause itself, where only the arbitration agreement or clause, as the case may be has to be looked into. It does not require delving into the broader legal relationships emerging from the underlying contractual framework. Cox and Kings (I) (supra) specifically mandates a holistic appraisal of the principal and supplementary agreements in tandem with the parties' intention and conduct, thereby demanding an inquiry far more extensive than that required for the mere establishment of the existence of the arbitration agreement.*

81. *Thus, by no stretch of imagination can the issue of whether a non-signatory is bound by the arbitration agreement be characterized as one that is either significant or sine qua non to the determination of the arbitration agreement's "existence". The former necessitates a substantive examination of the entire contractual relationship, whereas the latter is a limited exercise directed only at confirming the formal validity of the arbitration agreement itself. Such a question is not one of "existence" of the arbitration agreement, but one of interpretation and scope of the principle agreement.*

xxx *xxx* *xxx*

84. *From the above exposition of law, it can be seen that this Court in Cox and Kings (I) (supra) recognized that there exists a fine but pertinent distinction between determining the "existence" of an arbitration agreement and determining the intention of the parties from the "express words" used in the arbitration agreement, when dealing with the question whether a non- signatory is bound by the arbitration agreement or not. The former only deals with determining whether an arbitration agreement exists and is present in the record of agreement or the written materials as delineated under Section 7 sub- section (4)(b) of the Act, 1996. The latter, in contrast, involves construction and interpretation of the "express words" that has been used in such material from the surrounding*

circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract, and how the arbitration agreement fits within the broader contractual framework.

85. *Once the referral court, identifies an arbitration agreement that satisfies the formal requirements of Section 7 of the Act, 1996, either from the record of agreement or the written materials under sub-section (4), the "existence" of the arbitration agreement is said to have been established, even though, its binding nature qua the non-signatory may not be established, as it is entirely possible for a referral court to arrive at finding that prima-facie there exists an arbitration agreement in terms of Section 7 of the Act, 1996 without resolving the question of whether a non-signatory is bound by such arbitration agreement or not, as it depends on additional factors beyond mere existence.*

86. *Once, the "existence" of the arbitration agreement is said to have been established, the condition stipulated in terms of Section 11 sub-section (6A) of the Act, 1996, is said to have been fulfilled, and the referral courts have no option but to refer the dispute to arbitration, notwithstanding whether the intention of a non-signatory as a veritable partly to such agreement is established or not. Apart from the pre-condition of examining the "existence" of an arbitration agreement, Section 11 of the Act, 1996 does not either contemplate or require determination of the "defined legal relationship" in terms of Section 7, nor does it mandate an assessment of the futuro intention of the parties, whether signatories or non-signatories, from the "express words" of the arbitration agreement. This limited inquiry does not extend to the substantive legal consequences or implications of such arbitration agreement. The question of whether a non-signatory is bound by the arbitration agreement is entirely separate from the question of its "existence." The latter is a relatively straightforward, procedural determination based on the formal presence of the agreement, whereas the former involves a substantive and contextual inquiry into the mutual intent of the parties, which may be examined by the arbitral tribunal.*

87. *What follows from this is that, the question whether a non-signatory is bound by the arbitration agreement is completely independent of the question concerning the "existence" of an arbitration agreement. The two inquiries — while related — are distinct in nature and function. The "existence" of an arbitration agreement pertains solely to its formal presence in the contractual documentation, as per the requirements under the Act, 1996 and once established, it obligates the referral of the dispute to arbitration. By contrast, the question of whether a non-signatory is bound by the arbitration agreement involves a more nuanced determination of the parties' intentions, contractual relationships, and the broader context of the agreement, which is not confined to the formal text of the arbitration clause alone.*

88. *Thus, even in the absence of the non-signatory being made a party to the proceedings before the referral court, and where the question of its impleadment has neither been raised nor addressed or left open to the arbitral tribunal by the referral court, the arbitral tribunal would be full empowered to examine this issue in the first instance and determine whether any non- signatory is bound by the arbitration agreement based on the factual circumstances of the case, and if necessary, implead such non-signatory to the arbitration proceedings.*

xxx *xxx* *xxx*

90. *This is further fortified from the fact that, Cox and Kings (I) (supra) in its subsequent paragraphs, more particularly paragraph No.164, while discussing the scope of Section 11 of the Act, 1996, distinctively refers to and treats the criterion of "existence of arbitration agreement" and "veritable party to the arbitration agreement", as two separate and independent inquiries, thereby underscoring that the determination of the existence of an arbitration agreement stands apart from the assessment of whether a non-signatory can be bound to it.*

xxx *xxx* *xxx*

92. *Thus, what has been conveyed in so many words by Ajay Madhusudan Patel (supra) is that the inquiry into whether a non-signatory is bound by an arbitration agreement is not, in its essence, an inquiry into the formal or juridical existence of the arbitration agreement itself. It is an exercise of determining the functional concept of consent within the existing arbitration agreement rather than the existence of the arbitration agreement itself. It is to cull out and discern the intention of various parties — whether signatories or otherwise — in relation to their willingness to be bound by the arbitration mechanism embedded in the contract.*

93. *Put differently, although notionally the exercise of determining 'existence of the arbitration agreement qua the non-signatory', may, on the surface appear to be concerned with the arbitration agreement or clause in question, yet one must be mindful that the actual focus of such exercise lies in determining the existence of consent of the parties through fact patterns to such arbitration agreement or clause and not vice-versa. It is the existence of mutual consent to arbitrate — not the formal existence of the arbitration agreement — that is the heart of this inquiry.*

94. *There runs no umbilical cord between the exercise of determining the "existence of the arbitration agreement" and determining its "existence qua the non-signatory". The latter is an independent and substantive determination that falls outside the narrow and circumscribed domain of the referral court's singular obligation under Section 11 sub-section (6A) of the Act, 1996 and as such cannot be conflated to be one pertaining to or*

attacking the "existence" of an arbitration.

95. *Even if it is assumed for a moment that the referral court in its jurisdiction under Section 11 of the Act, 1996 has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of Cox and Kings (I) (supra), the referral court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it referral courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. Any determination even if prima-facie by a referral court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the referral courts opine that a non- signatory in question is not a veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the arbitral tribunal to decide, as such party can always take recourse to Section 16 of the Act, 1996 and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non- signatory is concerned be borne by the party who vexatiously impleaded it, but the arbitral tribunal would be well within its powers to also impose costs.*

III. Decision of Cox and Kings (II) and Ajay Madhusudan and the scope of Section 11 of the Act, 1996 for joinder of non-signatories to arbitration proceedings.

96. *The aforesaid may be looked at from one another angle. This Court in Cox and Kings (I) (supra) also discussed the role and scope of jurisdiction of the referral courts and arbitral tribunals under Section(s) 11 and 16 of the Act, 1996, particularly in the context of binding a non-signatory to the arbitration agreement. It reiterated that under Section 11, the referral court only has to determine the prima-facie existence of an arbitration agreement. Whereas, the issue of determining parties to an arbitration agreement is quite distinct from "existence" of the arbitration agreement, as such issue goes to the very root of the jurisdiction competence of the arbitral tribunal, and thus, empowered to decide the same under Section 16. Placing reliance on the decision of this Court in Shin-Etsu Chemical Co Ltd. v. Aksh Optifibre Ltd. reported in, (2005) 7 SCC 234, it held that the referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction for deciding such issues. The relevant observations read as under:—*

> *"157. When deciding the referral issue, the scope of reference*

under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the examination of an arbitration agreement.

158. Section 16 of the Arbitration Act enshrines the principle of competence competence in Indian arbitration law. The provision empowers the arbitral tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The doctrine of competence competence is intended to minimize judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.125, this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the tribunal […]"

(Emphasis supplied)

***97.** Cox and Kings (I) (supra) further observed that in case of joinder of non- signatory parties to an arbitration agreement, the referral court will be required to prima-facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration. However, it further clarified that, due to the inherent complexity in determining whether the non- signatory is indeed a veritable party, the referral court should leave this question for the arbitral tribunal to decide as it can delve into the factual and circumstantial evidence along with its legal aspects for deciding such an issue. The relevant observations read as under:—*

"163. […] Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral tribunal to decide whether the non signatory is bound by the arbitration agreement.

164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the arbitral tribunal to decide whether the non signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the arbitral tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by arbitral tribunal under Section 16."

(Emphasis supplied)

98. *Thus, even if it is assumed for a moment, that the question whether a non- signatory is a veritable party to the arbitration agreement is intrinsically connected with the issue of "existence" of arbitration agreement, the referral courts should still nevertheless, leave such questions for the determination of the arbitral tribunal to decide, as such an interpretation gives true effect to the doctrine of competence-competence enshrined under Section 16 of the Act, 1996.*

99. *This hands-off approach of referral courts in relation to the question of whether a non-signatory is a veritable party to the arbitration agreement or not was reiterated in Cox and Kings (II), wherein one of us, (J.B. Pardiwala J.), observed that once an arbitral tribunal stands constituted, it becomes automatically open to all parties to raise any preliminary objections, including preliminary objections touching upon the jurisdiction of such tribunal, and to seek an early determination thereof. Consequently, the issue of impleadment of a non-signatory was deliberately left for the arbitral tribunal to decide, after taking into consideration the evidence adduced before it by the parties and the principles enunciated under Cox and Kings (I) (supra).*

100. *Similarly, in Ajay Madhusudan (supra) it was held that since a detailed examination of numerous disputed questions of fact was required for determining whether the non-signatory is a veritable party to the*

arbitration agreement, the same cannot be examined in the limited jurisdiction under Section 11 of the Act, 1996 as it would tantamount to a mini trial. Accordingly, the arbitral tribunal was found to be the appropriate forum for deciding the said issue on the basis of the evidence that may be adduced by the parties.

101. *This approach is necessitated by the inherent complexity involved in determining whether a non-signatory qualifies as a veritable party to the arbitration agreement, a determination that hinges upon a multiplicity of factual aspects and demands a high threshold of satisfaction based on a cumulative and holistic evaluation of the entire factual matrix. Such an intricate and evidence-driven exercise makes the arbitral tribunal the most appropriate forum to adjudicate the matter, as it possesses the institutional advantage of conducting a comprehensive scrutiny of all evidences and materials adduced by the parties.*

102. *Furthermore, the legislative intent underlying Section 11 of the Act, 1996 — particularly sub-section (6A) — is to ensure the expeditious disposal of applications for the appointment of arbitrators. This legislative objective militates against referral courts undertaking any elaborate or detailed factual inquiry, which would inevitably delay proceedings. Prudence thus dictates that the referral courts confine themselves to a prima-facie examination of the existence of the arbitration agreement and leave substantive determinations, such as the binding nature of non-signatories, to the arbitral tribunal. An additional and equally compelling consideration is that the power exercised by the referral courts under Section 11 of the Act, 1996 is judicial in nature. Consequently, referral courts must refrain from embarking upon an intricate evidentiary inquiry or making final determinations on matters that are within the jurisdiction of the arbitral tribunal. Any premature adjudication or opinion by the referral court would not only usurp the tribunal's role as the forum of first instance for dispute resolution but could also cause irremediable prejudice. In particular, if the referral court were to refuse impleadment of a non-signatory, there would be no statutory right of appeal available to challenge such a refusal. In contrast, determinations made by the arbitral tribunal — including on issues of jurisdiction and impleadment — are amenable to challenge under Section 16 of the Act, 1996 and, thereafter, under Section 37. Accordingly, the better course of action is for referral courts to refrain altogether from delving, into the issue of whether a non-signatory is a veritable party to the arbitration agreement, and to leave such matters for the arbitral tribunal to decide in the first instance."*

36. It is thus luminously clear that the question whether Respondents No.2 to 4 being non-signatories are veritable parties to the arbitration agreement will have to be left to be decided by the Arbitral Tribunal and

cannot be subject matter of adjudication in the present petition. Accordingly, Respondents No.2 to 4 are deleted from the array of parties in the present petition with liberty to the Petitioner to seek their impleadment during the arbitral proceedings and as and when an application is filed by the Petitioner, the same shall be decided by the Arbitral Tribunal in accordance with law.

37. In light of the existence of valid arbitration agreement between the Petitioner and Respondent No.1, this Court finds no impediment in appointing a Sole Arbitrator to adjudicate the disputes arising between the parties. Accordingly, Ms. Justice Mukta Gupta (Mobile No. 9650788600), former judge of this Court is appointed as Sole Arbitrator to adjudicate the disputes between the parties. Fees of the learned Arbitrator will be fixed as per Fourth Schedule of the 1996 Act.

38. Learned Arbitrator shall give disclosure under Section 12 of the 1996 Act before entering upon reference.

39. It is made clear that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the parties are left open.

40. Petition is disposed of in the aforesaid terms along with pending application.

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41. This petition is filed by the Petitioner under Section 9 of 1996 Act *inter alia* for restraining Respondent No.1 from dealing with third parties in respect of any portion of the demised premises and more particularly, dealing with the 4th and 5th floors as also Respondents No.1, 3 and 4 from interfering with peaceful possession and enjoyment of commercial shop Nos.1 and 2 on the Upper Ground Floor and commercial shop No.1 on the

3rd Floor. By judgment dated 22.05.2023, Court restrained Respondent No.1 from dealing with Petitioner's share in the subject Mall and the interim order has continued till date.

42. Since an Arbitrator has been appointed in the petition under Section 11 of 1996 Act, it is directed that this petition will be treated as an application under Section 17 of 1996 Act by the learned Arbitrator and decided in accordance with law. Interim order dated 22.05.2023 shall continue till the application is taken up for consideration by the learned Arbitrator, whereafter it will be open to the Arbitrator to continue, vacate, modify or vary the order as per law. Copy of this petition shall be forwarded to the Arbitrator digitally within two weeks from today.

43. It is made clear that Court has not expressed any opinion on the merits of the petition and all rights and contentions of the parties are left open.

44. Petition is disposed of in the aforesaid terms along with pending application.

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45. List on 22.12.2025.

JYOTI SINGH, J

DECEMBER 04, 2025/*YA/S.Sharma*