Ambience Projects And Infrastructure ... vs Neeraj Bindal on 22 November, 2021

Author: C. Hari Shankar

Bench: C. Hari Shankar

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ARB. A. (COMM.) 57/2021 & I.A.132
I.A.13299/2021

AMBIENCE PROJECTS AND INFRASTRUCTURE PVT. LTD. ..... Appellant
Through: Ms. Kittoo Bajaj, Adv.

versus

NEERAJ BINDAL ..... Respondent
Through: Mr.Adish Srivastava and Mr.Rohit Gandhi, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (ORAL)

% 22.11.2021

1. This appeal assails an order dated 6th September, 2021, passed by the learned Arbitral Tribunal in the dispute between the appellant and the respondent.

2. Ms. Bajaj, learned Counsel for the appellant, at the very outset, submits that she is restricting her challenge, to the validity of the impugned order, to a contention that the dispute was not arbitrable, in view of Sections 11(4)(a), 79 and 34(f) of the Real Estate (Regulation and Development) Act, 2016 ("RERA"). She also relies, in this context, on para 40 of the judgment of the Supreme Court in Vidya Drolia & Ors. v. Durga Trading Corpn1

3. Given the limited nature of the challenge, a brief recital of facts would suffice.

4. The appellant allotted a flat to the respondent under a Memorandum of Understanding (MOU) dated 11th August, 2016, for 3,17,86,251/-, against which the requisite initial payment of 29,76,378/-, constituting 9.95% of the price of the flat, was paid by the respondent to the appellant. The MOU entitled the respondent to surrender, on the expiry of 38 months and within a month thereof, the flat allotted to him. On such surrender, the appellant was required to refund, to the

respondent, 59,27,595/-, to foreclose the loan account under which the loan had been taken by the respondent with the bank and buy back the flat. The amount of 59,27,595/-, it may be noted, was in addition to the amount of 29,76,378/- initially paid by the respondent. The MOU also assured the respondent that the flat would continue to be financed by the bank (HDFC Bank) till all EMIs were paid by the appellant and the loan was, thereupon, foreclosed. The case of the respondent, as canvassed before the learned Arbitral Tribunal, was that the respondent had invested in the flat on these assurances.

5. On 15th October, 2016, a Home Loan Agreement was executed between the respondent and the HDFC Bank, whereunder the Bank extended a loan to the respondent towards financing the purchase of the flat.

6. Subsequent to allotment of the aforesaid flat to the respondent, a Tripartite Agreement was executed between the appellant on 15th October, 2016, the respondent and HDFC, whereunder, according to the respondent, the appellant assumed liability of making EMI payments under the Home Loan Agreement, on behalf of the respondent. It may be noted that under the Home Loan Agreement, the entire loan amount was disbursed by HDFC directly to the appellant.

7. Before the expiry of 30 months from the MOU, the respondent informed the appellant of his intention to surrender the flat and called upon the respondent to honour its obligation to buy back the flat and make payments to the respondent in view thereof. It was asserted, by the respondent, as the claimant before the learned arbitrator that, instead of honouring its buy back obligations under the MOU, the appellant stopped making payment of EMIs to the HDFC, as a result of which, on 15th April, 2020, the HDFC debited, from the bank account of the respondent, an amount of 1,60,899/-.

8. In these circumstances, the respondent requested the appellant to recommence payment of EMIs to the HDFC and also to honour its surrender and buy back obligations under the MOU.

9. HDFC addressed a communication to the respondent, stating that, if the EMIs were not paid, coercive action would ensue. This prompted the respondent to move this Court by way of OMP (I) (Comm) 420/2020, under Section 9 of the 1996 Act, for a direction to the HDFC not to take coercive action against the respondent and, in the alternative, for a direction to the appellant to continue to pay the EMIs to HDFC.

10. By order dated 15th December, 2020, this Court restrained the appellant from alienating its assets to the extent of 2,78,10,000/-.

11. The respondent also filed Arb P 163/2021 before this Court under Section 11 of the 1996 Act for appointment of an arbitrator. Vide order dated 29th January, 2021, this Court appointed a Sole Arbitrator, who has passed the order under challenge in the present case, to arbitrate on the disputes. Para 9 of the said order merits reproduction, and reads thus:

> "9. In view of the above, the present petition is allowed and Ms. Bimla Makin, District & Sessions Judge, (Retired) (Mobile No.9910384624) is appointed as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in connection with the MoU dated 11.08.2016. This is subject to the learned Arbitrator making a necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act."

12. OMP (I) (Comm) 420/2020, in which the ex parte order against alienation of assets had been passed on 15th December, 2020, came up on the same day, before another Bench of this Court which noting the fact that an Arbitrator had already been appointed, directing the learned Arbitrator to decide OMP (I) (Comm) 420/2020 treating it as an application under Section 17 of the 1996 Act. The interim order dated 15th December, 2020 was continued till a decision was taken by the learned Arbitrator on OMP (I) (Comm) 420/2020.

13. Before the learned Arbitrator, an additional Section 17 application was preferred by the respondent, seeking additional interim protection. Side by side, the appellant also moved an application under Section 17, for vacation of the order dated 15 th December, 2020, passed by this Court in OMP (I) (Comm) 420/2020.

14. The orders dated 6th September, 2021, whereby the learned arbitrator decided these applications, are under challenge in this appeal.

15. The appellant's application for vacating the order dated 15th December, 2020 was rejected, and the order was confirmed till 31 st March, 2022. The respondent's Section 17 application was allowed by issuing a direction to the appellant to deposit all balance EMIs, with the HDFC, within a week and thereafter, to continue to pay EMI every month on or before the date fixed in that regard, till 31st March, 2022.

16. Both these orders have been assailed, by the appellant, in the present appeal.

17. As I have noted at the commencement of this order, Ms. Kittoo Bajaj, learned Counsel for the appellant restricted her challenge to a contention that the dispute before the Arbitral Tribunal was not, in fact, arbitrable, as it was exclusively amenable to adjudication under the provisions of the RERA.

18. A written note of argument has also been filed by Ms. Bajaj in this regard.

19. I have heard Ms. Bajaj, learned Counsel for the appellant on her objection to the arbitrability of the disputes before the learned Arbitrator as well as Mr. Adish Srivastava, learned Counsel for the respondent who responded to the said objection.

20. Ms. Bajaj has drawn my attention to Sections 11(4)(a), 34(f), 79 and 89 of the RERA, whereas Mr. Srivastava relied on Section 88. These provisions, therefore, are reproduced thus:

"11. Functions and duties of promoter.

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(4) The promoter shall--

(a) be responsible for all obli

responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub- section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

34. Functions of Authority.

The functions of the Authority shall include--

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(f) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;

79. Bar of jurisdiction No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

89. Application of other laws not barred.

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

89. Act to have overriding effect.

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

21. Though the written submissions filed by the appellant contend that Section 11(4)(a) of the RERA provides the respondent with a remedy, to agitate the cause pleaded before the learned Arbitrator, prima facie, this contention cannot be accepted. Section 11(4)(a) is not a provision entitling any party to any remedy. It merely sets out the responsibilities of the promoter under the RERA.

22. "Promoter", is defined, in Section 2(zk) of the RERA, thus:

> "2(zk) "promoter" means,--
>
> (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
>
> (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
>
> (iii) any development authority or any other public body in respect of allottees of--
>
> (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
>
> (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or
>
> (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or
>
> (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
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> (vi) such other person who constructs any building or apartment for sale to the general public.
>
> Explanation.--For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;"

23. Ms. Bajaj submits that, given the amplitude of the definition of "promoter" under the RERA, her client, as a builder of flats, one of which was sold to the respondent, would also qualify as a "promoter" under the RERA. She submits that, under Section 11(4)(a), the promoter is liable for all obligations, responsibilities and functions to, inter alia, allottees, as per the agreement for sale. The obligations of her client towards the respondent too, therefore, according to Ms. Bajaj, come within the province of Section 11(4)(a). In view thereof, Ms. Bajaj submits that the function of ensuring compliance of obligations cast on promoters, which would include any obligations cast on her client under the RERA, or under any all rules and regulations made thereunder, would vest with the "authority", i.e. the Real Estate Regulatory Authority established under the RERA ("the authority", hereinafter). That being so, the jurisdiction of Civil Courts, to deal with any matter, the determination of which was within the scope of jurisdiction of the Authority, would stand excluded under Section 79.

24. The sequitur, Ms. Bajaj submits, would be that the dispute would also be rendered non-arbitrable, in view of para 40 of Vidya Drolia1, which reproduces the following passages from the earlier judgment of the Supreme Court in A. Ayyasamy v. A. Paramasivam2:

> (2016) 10 SCC 386 By:SUNIL SINGH NEGI Signing Date:24.11.2021 18:25:50 "35. ..This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals...

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38. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration."

25. A conjoint appreciation of the aforesaid legal position, submits Ms. Bajaj, would reveal that the dispute sought to be raised by the respondent before the learned Arbitral Tribunal was, in fact, not arbitrable at all. As such, she submits that the learned Arbitral Tribunal could not have passed the impugned order under Section 17.

26. Answering these contentions, Mr. Srivastava, learned Counsel for the respondent, submits that Vidya Drolia1 had earlier been pressed into service by the present appellant against the present respondent, in CM(M) 525/2021 (Ambience Projects and Infrastructure Pvt. Ltd. v. Neeraj Bindal) which was directed against an earlier interim order dated 23rd June, 2021 passed by the learned

Arbitrator. This petition, he submits, was disposed of by a coordinate Bench of this Court on 13th August, 2021 as not maintainable. Para 15 of the said decision reads thus:

> "15. The learned Sole Arbitrator has appreciated the submissions made by the petitioner and taken into account the ratio of Vidya Drolia (supra) relied upon by the petitioner in reaching her conclusion. In my view, the learned Sole Arbitrator has duly considered the matter and passed a well- reasoned order holding the present dispute is arbitrable and the Arbitral Tribunal has the jurisdiction to deal with the same. There is no perversity in the order passed by the Sole Arbitrator so as to call for interference by this Court in its jurisdiction under Article 226 or 227 of the Constitution of India."

27. In this view of the matter, Mr. Srivastava submits that the petitioner is foreclosed from re-agitating the aspect of non-arbitrability of the dispute, having earlier agitated the same issue and failed in its challenge before this Court.

28. Mr. Srivastava, secondly, places reliance on Section 80 of the RERA, to contend that the applicability of other enactments stood saved by the said provision and that the RERA could not be read in derogation of other enactments. This, he submits, would save the applicability of the 1996 Act and consequently, the arbitrability of the dispute.

29. The third submission of Mr. Srivastava, in response to the objection of Ms. Bajaj, is that the dispute emanated not from the Home Loan Agreement, but from the MOU dated 11th August, 2016.

As such, he submits, the dispute was not amenable to adjudication under the RERA.

30. In response to the aforesaid submissions of Mr. Srivastava, Ms. Bajaj submits that the objection relating to Section 88 of the RERA stands answered by Section 89 thereof. She also relies on the decision of this Court in Lion Engineering Consultants v. State of Madhya Pradesh3 to contend that the objection raised by her could be agitated by her at any time, being an objection relating to jurisdiction. She submits that, though Vidya Drolia1 was pressed into service by the respondent in CM(M) 525/2021, the contention with respect to applicability of the RERA was never agitated in the said proceedings. The right of the respondent to agitate the said issue cannot, she submits, be foreclosed.

31. I have heard learned Counsel for the parties and, having considered the law laid down in Vidya Drolia1, I am of the opinion that the contention of Ms. Bajaj, regarding non-arbitrability of the dispute, cannot be accepted at this stage, so as to nullify, on that sole basis, the impugned order. No other contention has been advanced by Ms. Bajaj. Accordingly, I do not propose to consider the issue of validity of the impugned order on any ground save and except the applicability of the RERA.

32. I may first advert to the submission of Mr. Srivastava with respect to the earlier CM(M) 525/2021 filed by the appellant, against the respondent, assailing an earlier interim order passed by the learned (2018) 16 SCC 758 By:SUNIL SINGH NEGI Signing Date:24.11.2021 18:25:50

arbitrator. A reading of the order dated 13th August, 2021, passed by this Court in the said proceedings reveals that Vidya Drolia1 was specifically pressed into service, by the appellant, to contest, again specifically, the arbitrability of the dispute of which the Arbitrator is in seisin. What Ms. Bajaj would seek to contend is that it was open to the respondent to press Vidya Drolia1 qua one aspect of the challenge to the arbitrability of the dispute in that proceeding and to again press Vidya Drolia1 qua another aspect of the challenge to the arbitrabitily of the dispute in the present proceedings, having chosen not to raise the issue in the earlier proceedings. I have serious reservations on this. While a challenge to jurisdiction can, no doubt, be taken at any stage of any legal proceeding, it seems a trifle incongruous to hold that the appellant could compartmentalise the grounds of challenge, seeking not to urge the RERA issue in CM(M) 525/2021, though Vidya Drolia1 was pressed into service, and reserve the RERA contention for being urged in the present case. This would create a situation of complete confusion, and would also be against the very ethos of the 1996 Act, and the principle regarding non-interference with arbitral proceedings. To my mind, the objection regarding the RERA, as an objection, ought to have been raised in CM(M) 525/2021, especially as the challenge in that case was also predicated on Vidya Drolia1, to contest the amenability of the dispute to arbitration. Having demurred from doing so, it appears, to me, to be extremely arguable at the very least, as to whether such a challenge ought to permitted to be raised in the present proceedings.

33. I may note, in this regard, that no such challenge was raised before the learned Arbitral Tribunal either. The situation that emerges, therefore, that the appellant never chose to contest the arbitrability of the dispute either in OMP (I) (Comm) 420/2020, or in Arb P 163/2021, or before the learned Arbitrator during the proceedings, or even before this Court in CM(M) 525/2021. This objection appears to have been reserved for being raised in the present proceedings. The permissibility of such a course of action is, according to me, extremely suspect. Nonetheless, as I have examined the contention on merits, I say no more.

34. Vidya Drolia1, undoubtedly, states that an action which can statutorily, be raised before an authority which is conferred exclusive jurisdiction in that regard, would be non-arbitrable. At the same time, Vidya Drolia1 also states that a Court ought to hold a dispute not to be arbitrable only where it is, ex facie, non-arbitrable. Where the issue of arbitability is disputable, that issue ought to be left for determination by the Arbitral Tribunal, especially in view of Section 16, which empowers the Arbitral Tribunal to rule on its own jurisdiction. A separate section of the judgment of the Supreme Court in Vidya Drolia1 is exclusively assigned to the issue of the authority as to the appropriate authority to decide on the issue of non-arbitrability. After exhaustively going through the statutory provision and the various precedents in that regard, the Supreme Court, in para 138, has summarised the conclusion thus:

> "138. In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab Private Limited. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional

> cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statue(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non- arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide."

These conclusions also stand reiterated, in para 244 of the report, which reads thus:

> "244. Before we part, the conclusions reached, with respect to question no. 1, are:
>
> 244.1 Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.
>
> 244.2 Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.
>
> 244.3 The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
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> 244.4. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above, i.e., 'when in doubt, do refer'.
>
> 244.5. The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:
>
> 244.5.1. Whether the arbitration agreement was in writing? or 244.5.2. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
>
> 244.5.3. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
>
> 244.5.4 On rare occasions, whether the subject-matter of dispute is arbitrable?"

Significantly, the Supreme Court has held that the Court should treat a dispute as non-arbitrable only where the subject matter of the dispute is clearly not open to resolution by arbitration and that

such a decision should be taken only to "cut the deadwood to preserve the efficacy of the arbitral process".

35. The matter being in seisin before the learned Arbitral Tribunal, the law laid down in Vidya Drolia1 would ordinarily require the Arbitral Tribunal to rule thereon exercising its jurisdiction under Section 16, and for this Court to proscribe from pronouncing on this issue, especially as this issue has never been raised before the Arbitral Tribunal. It is only where, therefore, the dispute is ex facie non-

arbitrable that this Court can uproot the proceedings from the Arbitral Tribunal, where they continue at present.

36. A clear case of non-arbitrability, in my view, cannot be said to be made out on the basis of the submissions of Ms. Bajaj.

37. Section 79 of the RERA has two components. It excludes the jurisdiction of the Civil Court either where the matter is one "which the authority or the adjudicating officer or the appellate tribunal is empowered by or under this Act to determine". It further proscribes grant of injunction by any Civil Court "in respect of any action taken or to be taken in pursuance of any power conferred by or under the RERA". The second part of Section 79, obviously does not apply, as it is nobody's case that any action was being taken or was proposed to be taken under the RERA, of which an injunction was sought. Ms. Bajaj presses into service the first part of Section 79, read with Section 34(f) and Section 11(4)(a) of the RERA. The first part of Section 79 applies where the proceeding is one which the authority or adjudicating officer or the appellate tribunal is empowered to determine under the RERA. Section 34(f) includes, among the functions of the authority under the RERA, ensuring of compliance of obligations cast upon promoters, "under this Act and the rules and regulations made thereunder". Not every obligation of a promoter towards an allottee, is therefore, covered by Section 34(f). Only such obligations which emanate from the RERA or from the rules and regulations made under the RERA, would be covered by the said provision.

38. Before treating the issue as amenable to adjudication by the authorities under the RERA, therefore the Court, or arbitrator, would have to examine whether the obligation of the promoter, which is being sought to be enforced, emanates from the RERA or from the rules/regulations framed thereunder.

39. Significantly, Mr. Srivastava submits that, between the appellant and the respondent, there were, separately a Home Loan Agreement dated 15th October, 2016 and an MOU dated 11th August, 2016. The MOU pre-dated the Home Loan Agreement. The obligation of the respondent, to pay EMIs to the Bank, he submits, emanates from the MOU and not from the Home Loan Agreement. Obligations under the MOU according to Mr. Srivastava, are clearly arbitrable in nature, and cannot be treated as exclusively within the province of the authorities under the RERA, so as to render them non-arbitrable, by operation of Section 79 of the RERA read with the judgment in Vidya Drolia1.

40. At the very least, in my view, the issue of arbitrability of the dispute is, therefore, highly disputable.

41. Tested on the Vidya Drolia1 touchstone, I am of the opinion that Ms. Bajaj has not been able to make out a case of ex facie non- arbitrability. Any such decision, by this Court, at this stage, would amount to completely nullifying the arbitral process, which was set in motion by this Court vide its order dated 29th January, 2021, by which the Arbitrator was appointed. The objection regarding non- arbitrability of the dispute, in view of the provisions of the RERA, has not been raised before the learned Arbitrator. The learned Arbitrator has not, therefore, had any occasion to pronounce on this issue. In the first instance, Vidya Drolia1, too, advices that this issue should be taken up before the Arbitrator, rather than a verdict being returned by the court on that aspect.

42. Ms. Bajaj having raised no other issue to challenge the impugned order, and the sole issue raised by her not having found favour with this Court, the inevitable consequence is that this appeal must fail. It is accordingly dismissed, with no order as to costs.

43. At this stage, Ms. Bajaj requests that it be clarified that the plea of non-arbitrability predicated on the RERA, would be open to agitation before the learned Arbitrator. Not only do I do so, I further clarify that, in case the appellant is aggrieved by any decision of the learned Arbitrator on this issue, it would be open to the appellant to re-approach this Court by way of appropriate proceedings.

44. The findings recorded in this order only intend to dispose of the present appeal and shall not interfere with the Arbitrator into examining any aspect including the arbitrability of the disputes.

C. HARI SHANKAR, J NOVEMBER 22, 2021/kr