Sanjiv Prakash vs Seema Kukreja on 6 April, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1979, AIRONLINE 2021 SC 195

Author: R.F. Nariman

Bench: Hrishikesh Roy, B.R. Gavai, Rohinton Fali Nariman

REPORTABL

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 975 OF 2021

SANJIV PRAKASH …APPELLANT

VERSUS

SEEMA KUKREJA AND ORS. …RESPONDENTS

WITH

CIVIL APPEAL NO. 976 OF 2021

JUDGMENT

R.F. Nariman, J Civil Appeal No. 975 of 2021

1. This appeal arises out of the dismissal of a petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“1996 Act”] filed before the High Court of Delhi. The Appellant, Sanjiv Prakash, is a member of a family which also consists of his sister, Seema Kukreja (Respondent No.1 herein), his mother, Daya Prakash (Respondent No.2 herein), and his father, Prem 17:16:59 IST Reason:

> Prakash (Respondent No.3 herein). The Appellant and Respondents are hereinafter collectively referred to as the “Prakash Family”.

2. The facts, briefly stated, are as follows:

> 2.1. A private company was incorporated on 09.12.1971 under the name and style of Asian Films Laboratories Private Limited [“the company”] by Prem Prakash, the entire amount of the paid-up capital being paid for by him from his personal funds. He then distributed shares to his family members without receiving any

consideration for the same. On 06.03.1997, the name of the company was altered to its present name – ANI Media Private Limited.

2.2. Owing to the extensive efforts of Sanjiv Prakash at a global level, Reuters Television Mauritius Limited (now Thomson Reuters Corporation), a company incorporated in Mauritius ["Reuters"], approached him for a long-

term equity investment and collaboration with the company on the condition that he would play an active role in the management of the company.

2.3. Pursuant to this understanding, a Memorandum of Understanding ["MoU"] was entered into sometime in 1996 between the four members of the Prakash Family. The MoU recorded that Sanjiv Prakash, supported by the guidance and vision of Prem Prakash, had been responsible for the tremendous growth of the company. The paid-up share capital of the company was held as follows:

	Rupees	Percentage held
Prem Prakash	2,80,000	27.99%
Daya Prakash	2,40,000	24.01%
Sanjiv Prakash	3,00,000	30.00%
Seema Kukreja	1,80,000	18.00%
	10,00,000	100.00%

The Prakash Family was to divest 49% of this shareholding in favour of Reuters or its affiliates, subject to necessary permission of the authorities, as follows:

"And whereas ANI for the past many years has been doing considerable business with Reuters Television (Reuters). The relationship between them has been close and cordial. In order to strengthen the relationship and make optimum use of the tremendous growth potential in the TV media sector, including to cater to the ever expanding news video demands of Reuters in its satellite transmissions to subscribers worldwide, it has been found expedient by the existing members of the company to divest 49% of their shareholding in favour of Reuters or its affiliates subject to necessary permission of authorities. This would cement the relationship built over the years between Reuters and the company." The MoU went on to record:

"1. The Prakash family will divest its 49% shareholding as under:

Prem Prakash	1372
Daya Prakash	1176
Sanjiv Prakash	1470

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2. That Prakash family recognises the leadership provided by S.P. and the role he has played in steering the company to new heights with the name ANI which is respected internationally.

3. D.P. has been the Managing Director of the company from the beginning and Prakash family recognises her role in bringing the company to a very sound financial base as a result of very ably handling the accounts and finances of the company.

She would continue to be Managing Director after Reuters' participation in equity.

4. The Prakash family would continue to own 51% shareholding in the company after Reuters becomes a 49% shareholder. As they would continue to have the controlling interest it is the intention and desire of the Prakash family members that their actions and voting must be in a manner so as to act in consensus and as one block.

5. S.P. would after divesting his about 15% share, continue to hold 15% equity in the company. Reuters has made it clear that they would like the management control of the company to vest with S.P.

6. In view of the fact that S.P. has been able to get Reuters to participate in Asian Films Laboratories Pvt. Ltd. The other shareholders of the Prakash family namely P.P., D.P. and S.K. agree to vote on all resolutions both in the directors and shareholders meeting in the manner instructed by S.P. To this effect, they are agreeable to cooperate and vote for amendment in the Articles to reflect the following:

(a) Any resolution in Board to have either affirmative vote of S.P. or his consent in writing to approve the same.

(b) Disproportionate voting rights irrespective of the number of the shares held by them as under:

Prem Prakash	1 vote
Daya Prakash	1 vote
Seema Kukreja	1 vote
Sanjiv Prakash	5097 votes
Reuters Television Mauritius Limited	4900 votes.

7. This MoU shall be binding on all the heirs, successors and assigns of P.P., D.P., S.P. and S.K. and they would act in the manner stated in this MoU.

8. That in the event P.P. or D.P. desire to sell and or bequeath his/her equity shares, the same shall be offered/bequeathed only to S.P. or his heirs and successors. Similarly, in the event of S.K. or her heirs/successors desire to sell their shares, the same shall be sold only to S.P. or his successors. The consideration paid shall be the

> net worth of shares on the last balance sheet date determined by the auditors of the company.

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11. This MoU embodies the entire understanding of the parties as to its subject matter and shall not be amended except in writing executed all the parties to the MoU.

12. All disputes, questions or differences etc., arising in connection with this MoU shall be referred to a single arbitrator in accordance with and subject to the provisions of the Arbitration Act, 1940, or any other enactment or statutory modification thereof for the time being in force." 2.4. A Shareholders' Agreement dated 12.04.1996 ["SHA"] was then executed between the Prakash Family and Reuters. So far as is relevant, the SHA referred to the Appellant and the Respondents collectively as the "Prakash Family Shareholders", and individually as a "Prakash Family Shareholder". It then set out the reason for entering into the SHA as follows:

> "WHEREAS (A) Pursuant to a share purchase agreement dated today between the Prakash Family Shareholders and Reuters (the Share Purchase Agreement), Reuters has agreed to purchase 4,900 Shares (as defined below) representing 49% of the issued share capital of Asian Films Laboratories (Pvt.) Ltd. (the Company). Following completion of the Share Purchase Agreement, each of the Prakash Family Shareholders will hold the numbers of Shares set opposite his or her name in schedule

3 hereto, with the aggregate number of Shares so held by the Prakash Family Shareholders representing 51% of the issued share capital of the Company.

(B) The Shareholders (as defined below) are entering into the Agreement to set out the terms governing their relationship as shareholders in the Company." In the definition section, "Artificial Deadlock" and "Management Deadlock" were defined as follows:

> "Artificial Deadlock means a Management Deadlock caused by virtue of the Prakash Family Shareholders or Reuters (or any appointee on the Board) voting against an issue or proposal in circumstances where the approval of the same is required to enable the Company to carry on the Business properly and effectively in accordance with the then current approved Business Plan and Budget;" xxx xxx xxx "Management Deadlock means a material management dispute (not being an Artificial Deadlock) between any or all of the Prakash Family Directors on the one hand and the Reuters directors on the other hand relating to the affairs of the Company which is not resolved within sixty (60) days of such dispute being referred for settlement to the Reuters Managing Director (as defined in clause 16.1) and the Chairman;" The expression "Prakash Family Directors" was defined as follows:

"Prakash Family Directors means the directors of the Company from time to time appointed by the Prakash Family Shareholders in accordance with the Articles;" The expression "Prakash Family Members or Interests" was defined as follows:

"Prakash Family Members or Interests means each of the Prakash Family Shareholders and each of their respective fathers, mothers, sons, daughters, brothers and sisters (the Prakash Family Relatives) and any company in which any such relation or any Prakash Family Shareholder has a controlling interest;" "Reuters Directors" was defined as follows:

"Reuters Directors means the directors of the Company from time to time appointed by Reuters in accordance with the Articles;" "Reuters Group" was defined as follows:

"Reuters Group means Reuters, its Holding Company and such Holding Company's Subsidiaries for the time being;" Transfer of shares and pre-emption was dealt with in clause 4 read with clauses 11, 12, and 14 and schedule 1 of the SHA.

Clause 7.2 is important and states as follows:

"7.2 Unless otherwise agreed by the Shareholders, the number of Directors shall be seven (7) of whom, for so long as the Percentage Interest of the Prakash Family Shareholders is in aggregate equal to or greater than fifty point zero one per cent. (50.01%), four (4) shall be Prakash Family Directors and three (3) shall be Reuters Directors in accordance with the Articles. If the Percentage Interest of the Prakash Family Shareholders falls below such level, the number of Prakash Family Directors and Reuters Directors shall be determined in accordance with the Articles." The quorum for holding meetings was then set out in clause 7.12, and matters requiring special majority were set out in clause 8.1.

Default events were set out in clause 11. Clause 11.2 is important and states as follows:

"11.2 If a Default Event exists in relation to any of the Shareholders (the Defaulting Shareholder), then the other Shareholder(s) comprising, in the case of a Default Event existing in relation to a Prakash Family Shareholder, Reuters and, in the case of a Default Event existing in relation to Reuters, the Prakash Family Shareholders (each of Reuters in the first case and the Prakash Family Shareholders in the second case being the Non-Defaulting Shareholder(s)) shall have the right, subject to the prior right of the Defaulting Shareholder to transfer its Shares as contemplated in paragraph 8 of Schedule 1 (all as provided in clause 11.3), to purchase or procure the purchase by a nominee or by a third party of all (but not some only) of the Shares held by the Defaulting Shareholder, provided that, in the case of a Default Event comprising a material breach of the kind contemplated by clause 11.1(c)(ii), the relevant breach has not been either cured to the reasonable satisfaction of the Non-Defaulting Shareholder(s) or waived by it or, as the case may be, others." Clause

12.1, under the heading "Changes in Circumstances: Illegality" then provided as follows:

"12.1 Where the introduction, imposition or variation of any law or any change in the interpretation or application of any law makes it unlawful or impractical without breaching such law for Reuters to continue to hold upto at least forty nine per cent. (49%) of the issued ordinary share capital of the Company or to carry out all or any of its obligations under this Agreement, upon Reuters notifying the other Shareholders:

(a) Reuters shall be entitled to require the other Shareholders to purchase its holding of Shares at a price determined in accordance with clause 11.4, which shall apply mutatis mutandis, and any such purchase shall be made by the other Shareholders in the proportions agreed between them or otherwise in the proportion each such other Shareholders holding of Shares bears to the aggregate number of Shares held by all of such Shareholders;

(b) Any amounts loaned or made available to the Company shall forthwith be repaid to Reuters; and

(c) Reuters shall upon the service of such notice cease to be bound by the provisions hereof save for the preceding provisions of this clause 12." The termination clause was set out as follows:

"14.1 This Agreement shall continue in full force and effect for so long as both (i) any of the Prakash Family Shareholders and

(ii) any member of the Reuters Group hold any Shares. If, as a result of any sale or disposal made in accordance with this Agreement, either (i) none of the Prakash Family shareholders or (ii) no member of the Reuters Group holds any Shares, then this Agreement shall terminate and cease to be of any effect, save that this shall not:

(a) relieve any Shareholder from any liability or obligation in respect of any matters, undertakings or conditions which shall not have been done, observed or performed by any such Shareholder prior to such termination;

(b) save for clause 14.2, affect the terms of any agreement entered into between any Prakash Family Shareholders and Reuters or any successor of either of them holding Shares, to replace this Agreement; or

(c) affect the terms of clause 15 (confidentiality) of this Agreement." The arbitration clause was set out in clause 16 which reads as follows:

"LEGAL DISPUTES 16.1 In the event of any dispute between the Shareholders arising in connection with this Agreement (a legal dispute), they shall use all reasonable

> endeavours to resolve the matter on an amicable basis. If any Shareholder serves formal written notice on any other Shareholder that a legal dispute has arisen and the relevant Shareholders are unable to resolve the dispute within a period of thirty (30) days from the service of such notice, then the dispute shall be referred to the managing director of the senior management company identified by Reuters as having responsibility for India (the Reuters Managing Director) and the Chairman of the Company. No recourse to arbitration under this Agreement shall take place unless and until such procedure has been followed. ARBITRATION 16.2 If the Reuters Managing Director and the Chairman of the Company shall have been unable to resolve any legal dispute referred to them under clause 16.1 within thirty (30) days, that dispute shall, at the request of any Shareholder, be referred to and finally settled by arbitration under and in accordance with the Rules of the London Court of International Arbitration by one or more arbitrators appointed in accordance with those Rules.

The place of arbitration shall be London and the terms of this clause 16.2 shall be governed by and construed in accordance with English law. The language of the arbitration proceedings shall be English." Clause 28, upon which a large part of the argument of both sides hinges, is set out as follows:

> "ENTIRE AGREEMENT 28.1 This Agreement, the Ancillary Agreements, and the Share Purchase Agreement constitute the entire agreement and understanding of the parties with respect to the subject matter thereof and none of the parties has entered into this agreement in reliance upon any representation, warranty or undertaking by or on behalf of the other parties which is not expressly set out herein or therein.
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> 28.2 Without prejudice to the generality of clause 28.1, the parties hereby agree that this Agreement supersedes any or all prior agreements, understanding, arrangements, promises, representations, warranties and/or contracts of any form or nature whatsoever, whether oral or in writing and whether explicit or implicit, which may have been entered into prior to the date hereof between the parties, other than the Ancillary Agreements and the Share Purchase Agreement." Clause 31 deals with governing law and jurisdiction and states as follows:
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> "31. This Agreement (save for clause 16.2, which shall be governed by and construed in accordance with the laws of England) is governed by and shall be construed in accordance with the laws of India." 2.5. On the same day, a Share Purchase Agreement dated 12.04.1996 ["SPA"] was entered into between the Prakash Family and Reuters. The SPA also contained an arbitration clause similar to that contained in clause 16 of the SHA, and also contained an "entire agreement clause" in clause 11, which is similar to clause 28 of the SHA. On the same date, various ancillary agreements were also entered into between the parties, referred to in the SHA. These ancillary agreements are as follows:

(i) Agreement for the Assignment of Copyright dated 12.04.1996 between Prem Prakash, Asian Films Laboratories Pvt. Ltd., and Reuters Television Mauritius Ltd.

(ii) Trade Clarification Agreement dated 12.04.1996 between Asian Films Laboratories Pvt. Ltd., Reuters Television Mauritius Ltd., and the partners of Ved & Co. (i.e., Prem Prakash, Daya Prakash, Sanjiv Prakash, and Seema Kukreja)

(iii) PIB Accreditation Agreement dated 12.04.1996 between Asian Films Laboratories Pvt. Ltd., Reuters Television Mauritius Ltd., and the partners of Ved & Co. (i.e., Prem Prakash, Daya Prakash, Sanjiv Prakash, and Seema Kukreja)

(iv) Facilities and Marketing Agreement dated 12.04.1996 between Asian Films Laboratories Pvt. Ltd. and Reuters Television (England) Ltd.

(v) Service Agreement dated 12.04.1996 between Asian Films Laboratories Pvt. Ltd. and Sanjiv Prakash

(vi) Deed of Tax Indemnity dated 12.04.1996 between Prem Prakash, Daya Prakash, Sanjiv Prakash, Seema Kukreja, Asian Films Laboratories Pvt. Ltd., and Reuters Television Mauritius Ltd.

2.6. The Articles of Association of the company were amended on 14.05.1996 to reflect certain decisions that were taken in the MoU. Thus, clause 11(f) was amended so as to read as follows:

> "11. Transfer of Shares xxx xxx xxx
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> (f) If the Continuing Shareholder(s) comprise Prakash Family Shareholders and purchases are to be made by them under Article 11(e), SP Shall have the right (but not the obligation) to purchase all (but not some only) of the Seller's Shares. If SP shall fail to purchase all of the Seller's Shares within the time period set out in Article 11(e) the Shares subject to such Purchases shall be acquired by each Prakash Family Shareholder in the proportion such Shareholder's holding of Shares bears to the aggregate number of Shares held by all of the Prakash Family Shareholders who have become bound to make such purchases." Likewise, clause 11(i)(i) was inserted, in which it was stated:
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> "11. Transfer of Shares xxx xxx xxx
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> (i) xxx xxx xxx
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> (i) SP shall have the right (but not the obligation) upon serving notice in writing to each remaining Prakash Family Shareholder to purchase all (but not some only) of such Shares in preference to any other Prakash Family shareholder;" Clause 16(b) of the Articles of Association also incorporated clause 6(b) of the MoU as follows:

> "16. xxx xxx xxx
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> (b) If a poll is demanded in accordance with the provisions of section 179 of the Companies Act 1956:
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> (i) SP shall so long as he holds Shares be able to vote such number of Shares as is equal to the number of Shares held by all the Prakash Family Shareholders less the numbers of Prakash Family Shareholders other than SP (the other Prakash Family Shareholders). The remaining votes attributable to Shares hold by Prakash Family Shareholders shall be divided equally between the other Prakash Family shareholders; and
>
> (ii) The provisions of Article 16(b)(i) shall cease to be valid and effective upon the occurrence of any of the events in relation to SP." We are informed that this position continued up to the year 2012 after which, by mutual agreement, the Articles of Association were again amended so that the amendments incorporated in 1996 no longer continued.

2.7. Divestment of 49% of the share capital took place as was set out in the MoU as well as the SPA and the SHA, consequent upon which Daya Prakash resigned as the Managing Director and Sanjiv Prakash took over as the Managing Director of the company in 1996 itself.

2.8. Disputes between the parties arose when Prem Prakash decided to transfer his shareholding to be held jointly between Sanjiv Prakash and himself, and Daya Prakash did likewise to transfer her shareholding to be held jointly between Seema Kukreja and herself. A notice invoking the arbitration clause contained in the MoU was then served by Sanjiv Prakash on 23.11.2019 upon the three Respondents, alleging that his pre-emptive right to purchase Daya Prakash's shares, as was set out in clause 8 of the MoU, had been breached, as a result of which disputes had arisen between the parties and Justice Deepak Verma (retired Judge of this Court), was nominated to be the sole arbitrator. The reply filed by Seema Kukreja and Daya Prakash, dated 20.12.2019, pointed out that the MoU ceased to exist on and from the date of the SHA, i.e. 12.04.1996, which superseded the aforesaid MoU and novated the same in view of clause 28.2 thereof.

Therefore, they denied that there was any arbitration clause between the parties as the MoU itself had been superseded and did not exist after 12.04.1996. In view of this, Sanjiv Prakash moved the Delhi High Court under Section 11 of the 1996 Act by a petition dated 06.01.2020. In the said petition, an interim order was passed on 09.01.2020 as follows:

> "All the parties agree to defer Agenda Nos. 4 and 8 circulated in the notice dated 31st December, 2019 in the Board Meeting scheduled to be held on 15th January, 2020 for a date beyond the next date of hearing fixed in this matter." 2.9. By the impugned judgment dated 22.10.2020, the Delhi High Court set out what according to it was the issue that had to be decided in paragraph 79 follows:

"79. In this petition, I am of the view, the initial issue which arises for consideration is, whether at the stage of considering the request of the petitioner for the appointment of an Arbitrator, it is only the existence of an Arbitration Agreement that needs to be seen, leaving it to the Arbitrator to decide the issue of validity of the Agreement, including the plea of novation of MoU." After referring to both the MoU and the SHA, the learned Single Judge of the Delhi High Court held:

"88. In so far as Clause 1.1 is concerned, the same defines 'artificial deadlock' as a management deadlock caused by virtue of the Prakash Family Shareholders or Reuters voting against an issue or proposal in circumstances where the approval of the same is required for the functioning of the Company as per approved plans. No doubt, Mr. Kathpalia, Mr. Nayar and Mr. Sethi may be right in contending that there exist a contemplation of groups viz. Prakash Family Members and Reuters under the SHA, but the same is in a particular fact situation of deadlock then the Prakash Family Members and Reuters act as 'blocks', which does not mean that SHA does not recognise Prakash Family Shareholders in their individual capacity. More so, as per the opening paragraph, the term 'parties' envisages Prakash Family Shareholders both individually as well as collectively." xxx xxx xxx "90. A conjoint reading of the Clause 28.2 with the opening paragraph of SHA therefore necessarily means that any kind of agreement as detailed in Clause 28.2, 'between the parties' shall stand superseded as per Clause 28.2. So, it follows the shareholders of Prakash Family having being individually recognised under the SHA as parties, the MoU, an agreement, as relied upon by the petitioner which governs the inter-se rights and obligations of the Prakash Family stands superseded. It is not the case of the Ld. Counsel for the petitioner that the SHA does not deal with inter-se rights of the members / shareholders of the Prakash Family. The plea of Mr. Nayar that MoU was entered by Prakash Family to define their family arrangement before the Reuters came in by purchasing the shares and hence cannot be overridden by the SHA is not appealing. Nothing precluded the members of the Prakash Family to include a stipulation in the SHA, that the SHA, shall not supersede the MoU, as has been specially stated in Clause 28.2 with regard to ancillary agreements and share purchase agreement. The plea of Mr. Nayar, that the present dispute between the parties being in respect of shares in an Indian company to be resolved by London Court of International Arbitration as per English law, contracting out of Indian Law is opposed to public policy is also not appealing as such an issue doesn't arise in these proceedings which have been filed by invoking the MoU. Nor such a plea would revive the MoU, which stands novated by the SHA." After then setting out Section 62 of the Indian Contract Act, 1872 ["Contract Act"] and this Court's judgments in Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 ["Kishorilal Gupta"], Damodar Valley Corporation v. K.K. Kar, (1974) 1 SCC 141 ["Damodar Valley Corporation"], and Young Achievers v. IMS Learning Resources (P) Ltd., (2013) 10 SCC 535 ["Young Achievers"], the learned Single Judge then concluded:

> "98. It is clear from a reading of the above judgments that the law relating to the effect of novation of contract containing an arbitration agreement/clause is well-settled. An arbitration agreement being a creation of an agreement may be destroyed by agreement. That is to say, if the contract is superseded by another, the arbitration clause, being a component/part of the earlier contract, falls with it or if the original contract in entirety is put to an end, the arbitration clause, which is a part of it, also perishes along with it. Hence, the arbitration clause of the MoU, being Clause 12, having perished with the MoU, owing to novation, the invocation of arbitration under the MoU is belied/not justified.
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> 99. In view of my conclusion above, the plea of doctrine of 'kompetenz-kompetenz' and the reliance placed on Section 11(6A) of the Act are untenable. I have also considered the judgments relied upon by the counsels for the petitioners viz.

Duro Felguera S.A. [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729], Mayavati Trading Pvt. Ltd. [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714], Zostel Hospitality [Zostel Hospitality Pvt. Ltd. v. Oravel Stays Pvt. Ltd., Arb. Pet. 28/2018], Oriental Insurance Company Ltd. [Oriental Insurance Company Ltd. v. Narbheram Power and Steel Pvt. Ltd., (2018) 6 SCC 534], Vodafone [Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613], Uttarakhand Purv Sainik [Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Ltd., (2020) 2 SCC 455], Russell [Russell v. Northern Bank Development Corpn. Ltd., (1992) B.C.C. 578] and Anderson [Catherine Anderson v. Ashwani Bhatia, (2019) 11 SCC 299], and the same are not applicable to the case in hand."

3. Shri K.V. Viswanathan, learned Senior Advocate appearing on behalf of the Appellant, relied strongly upon the MoU between the Prakash Family and stressed the fact that it was a family settlement or arrangement which raised a special equity between the parties and could not be treated as a mere contractual arrangement, having to be enforced in accordance with several judgments of this Court. For this purpose, he relied strongly upon the observations contained in paragraph 9 of Kale v. Deputy Director of Consolidation, (1976) 3 SCC 119 ["Kale"], as followed in Reliance Natural Resources Ltd. v. Reliance Industries Ltd., (2010) 7 SCC 1 (at paragraphs 49 and 50). In particular, he relied upon the fact that it was the Appellant who was responsible for the tremendous growth of the company, and it is by his efforts that Reuters infused a huge amount of capital by purchasing 49% of the share capital of the company. It is for this reason that the MoU made it clear vide clause 8 that in case any of the three Respondents wished to sell or bequeath their equity shares in the company, their shares may be offered/sold/bequeathed only to the Appellant or to his heirs and successors. The arbitration clause contained in the MoU would therefore be applicable, the 1996 Act being the Act under which the arbitration would have to be effected. He then read out various clauses of the SHA and relied strongly upon clause 12.1(a), in which it was agreed that if Reuters would have to divest any part of its shares in the company, it shall be entitled to require the other shareholders to purchase its holding of shares in such proportions as was "agreed between them or otherwise", thereby making it clear that the MoU between the Prakash Family was expressly referred to and preserved by the aforesaid clause. He also stressed upon the absurdity of disputes arising between members of a family residing and working only in India to

have to be referred to arbitration in accordance with the rules of the London Court of International Arbitration, which would be the result if the SHA were to supersede the MoU. He was also at pains to point out that clause 28 of the SHA has to be read as a whole, and clause 28.1 made it clear that the entire agreement and understanding between the parties which was contained in the SHA, the SPA, and the ancillary agreements was only "with respect to the subject matter thereof", the subject matter of these Agreements being the relationship between the Prakash Family and Reuters, which was completely different from the subject matter of the MoU, which was only between the members of the Prakash Family, Reuters not being a party thereto. For this purpose, he relied strongly upon the judgments contained in Barclays Bank Plc v. Unicredit Bank Ag and Anor, [2014] EWCA Civ 302 (at paragraphs 27 and 28), The Federal Republic of Nigeria v. JP Morgan Chase Bank, NA, [2019] EWHC 347 (Comm) (at paragraph 37), and Kinsella and Anor v. Emasan AG and Anor, [2019] EWHC 3196 (Ch) (at paragraphs 64 to 71). A reading of these judgments would, according to the learned Senior Advocate, show that "entire agreement" clauses are to be construed strictly, the idea being to obviate having to refer to negotiations that had taken place between the parties pertaining to the subject matter of the agreement before the agreement was formally entered into. He then assailed the learned Single Judge's judgment dated 22.10.2020, arguing that the impugned judgment, instead of following Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 ["Duro Felguera"] and Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 ["Mayavati Trading"], was in the teeth of the principles laid down in the aforesaid two judgments. He also argued that whether or not novation had taken place is, at the very least, an arguable point of considerable complexity which would depend upon a finding based upon various clauses of the MoU and the SHA, when construed in accordance with the surrounding circumstances. He also argued that what was missed by the learned Single Judge was the fact that a family settlement had been acted upon, resulting in an amendment of the Articles of Association of the company soon after the MoU was entered into. He also relied upon three recent judgments of this Court, which made it clear that unless an ex facie case had been made out that no arbitration agreement existed between the parties, a Section 11 court would be duty-bound to refer the parties to arbitration and leave complex questions of fact and law relating to novation of a contract under Section 62 of the Contract Act to be decided by an arbitral tribunal.

4. Shri Mukul Rohatgi, learned Senior Advocate appearing on behalf of Respondent No.3, supported the arguments of Shri Viswanathan. He referred us to the MoU, the SPA, and the SHA, and strongly relied upon the observations in Kale (supra) which were followed in Ravinder Kaur Grewal v. Manjit Kaur, (2020) 9 SCC 706 (at paragraphs 25 to 28). He argued that not only were the parties to the MoU different from those to the SHA, but that the MoU itself contemplated that the Prakash Family would enter into a separate agreement with Reuters so as to effectuate the purchase of 49% shareholding in the company by Reuters, showing thereby that the MoU and the Agreements entered into with Reuters were separate contracts.

5. Shri Avishkar Singhvi and Shri Manik Dogra, learned counsel appearing on behalf of Respondents No. 1 and 2, relied heavily on the fact that the MoU was superseded immediately, inasmuch as it no longer existed after some of its material clauses were put into the Articles of Association of the company on 14.05.1996. They also argued that the MoU was never given effect to as Daya Prakash, who was the Managing Director of the company, did not continue as such but handed over the

management to Sanjiv Prakash, who then became the Managing Director of the company soon after the SHA was entered into. They then pointed out that, in any case, after 2012, even this did not remain as the Articles of Association were then amended with the consent of Sanjiv Prakash to no longer incorporate what had earlier been contained in the Articles post the amendment of 1996. They also pointed out that on the same day, i.e. on 05.10.2019, just as Prem Prakash sought to divest his shareholding in the company to be jointly held by Sanjiv Prakash and himself, Daya Prakash did likewise, and sought to divest her shareholding in the company to be jointly held by Seema Kukreja and herself. The first reaction of Sanjiv Prakash then was not to rely upon a novated MoU, but to take up the plea that the document being unstamped, ought not to be taken in evidence. It is only as an afterthought that clause 8 of the MoU was then relied upon. Both the learned counsel strongly relied upon clause 11.2 of the SHA which made it clear beyond doubt that the MoU stood superseded. They then relied upon the judgments in Kishorilal Gupta (supra) (at paragraph 9), Damodar Valley Corporation (supra) (at paragraphs 7 and 8), Young Achievers (supra) (at paragraphs 5 and 8), Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd., (2016) 10 SCC 813 (at paragraph

23), and Larsen & Toubro Ltd. v. Mohan Lal Harbans Lal Bhayana, (2015) 2 SCC 461 (at paragraph 15) in favour of the proposition that the MoU stood novated as a result of the SHA. They also relied upon V.B. Rangaraj v. V.B. Gopalakrishnan, (1992) 1 SCC 160 (at paragraphs 1, 2, 7 and 8) and Pushpa Katoch v. Manu Maharani Hotels Ltd., 2005 SCC OnLine Del 702 : (2005) 83 DRJ 246 (at paragraphs 5, 7 and 8), for the proposition that the MoU would be unenforceable in law as any restriction on transfer of shares of a private company, without incorporating the aforesaid in its Articles, would be invalid as a result of which the Articles of Association alone would have to be looked at. This being the case, the arbitration clause contained in an agreement which is void obviously cannot be looked at. They then referred to certain recent judgments of this Court for the proposition that the present case being an open and shut one, the learned Singe Judge of the Delhi High Court was right in dismissing the Section 11 petition filed by the Appellant.

6. By virtue of the Arbitration and Conciliation (Amendment) Act, 2015 [“2015 Amendment Act”], by which Section 11(6A) was introduced, the earlier position as to the scope of the powers of a court under Section 11, while appointing an arbitrator, are now narrowed to viewing whether an arbitration agreement exists between parties. In a gradual evolution of the law on the subject, the judgments in Duro Felguera (supra) and Mayavati Trading (supra) were explained in some detail in a three-Judge Bench decision in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1 [“Vidya Drolia”]. So far as the facts of the present case are concerned, it is important to extract paragraphs 127 to 130 of Vidya Drolia (supra), which deal with the judgments in Kishorilal Gupta (supra) and Damodar Valley Corporation (supra), both of which have been heavily relied upon by the learned Single Judge in the impugned judgment, as follows:

> “127. An interesting and relevant exposition, when assertions claiming repudiation, rescission or “accord and satisfaction” are made by a party opposing reference, is to be found in Damodar Valley Corpn. v. K.K. Kar [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141], which had referred to an earlier judgment of this Court in Union of India v. Kishorilal Gupta & Bros. [Union of India v. Kishorilal Gupta & Bros., AIR

1959 SC 1362] to observe:

> (Damodar Valley Corpn. case [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141] , SCC pp. 147-48, para 11) "11. After a review of the relevant case law, Subba Rao, J., as he then was, speaking for the majority enunciated the following principles: (Kishorilal Gupta & Bros. case [Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362], AIR p. 1370, para 10) '(1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation;

it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories "of disputes in connection with a contract, such as the question of repudiation, frustration, breach, etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.' In those cases, as we have stated earlier, it is the performance of the contract that has come to an end but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. We think as the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

128. Reference in Damodar Valley Corpn. case [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141] was also made to the minority judgment of Sarkar, J. in Kishorilal Gupta & Bros. [Union of India v. Kishorilal Gupta & Bros., AIR 1959 SC 1362] to observe that he had only disagreed with the majority on the effect of settlement on the arbitration clause, as he had held that arbitration clause did survive to settle the dispute as to whether there was or was not an "accord and satisfaction". It was further observed that this principle laid down by Sarkar, J. that "accord and satisfaction" does not put an end to the arbitration clause, was not disagreed to by the majority. On the other hand, proposition (6) seems to be laying the weight on to the views of Sarkar, J. These decisions were under the Arbitration Act, 1940. The Arbitration Act specifically incorporates principles of separation and competence-competence and empowers the Arbitral Tribunal to rule on its own jurisdiction.

129. Principles of competence-competence have positive and negative connotations. As a positive implication, the Arbitral Tribunals are declared competent and authorised by law to rule as to their jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the Arbitral Tribunal to rule

as to their jurisdiction and decide non-arbitrability questions. As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability. Such prioritisation of the Arbitral Tribunal over the courts can be partial and limited when the legislation provides for some or restricted scrutiny at the "first look" referral stage. We would, therefore, examine the principles of competence-competence with reference to the legislation, that is, the Arbitration Act.

130. Section 16(1) of the Arbitration Act accepts and empowers the Arbitral Tribunal to rule on its own jurisdiction including a ruling on the objections, with respect to all aspects of non- arbitrability including validity of the arbitration agreement. A party opposing arbitration, as per sub-section (2), should raise the objection to jurisdiction of the tribunal before the Arbitral Tribunal, not later than the submission of statement of defence. However, participation in the appointment procedure or appointing an arbitrator would not preclude and prejudice any party from raising an objection to the jurisdiction. Obviously, the intent is to curtail delay and expedite appointment of the Arbitral Tribunal. The clause also indirectly accepts that appointment of an arbitrator is different from the issue and question of jurisdiction and non-arbitrability. As per sub-section (3), any objection that the Arbitral Tribunal is exceeding the scope of its authority should be raised as soon as the matter arises. However, the Arbitral Tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-sections (2) and (3) if it considers that the delay is justified. As per the mandate of sub-section (5) when objections to the jurisdiction under sub-sections (2) and (3) are rejected, the Arbitral Tribunal can continue with the proceedings and pass the arbitration award. A party aggrieved is at liberty to file an application for setting aside such arbitral award under Section 34 of the Arbitration Act. Sub-section (3) to Section 8 in specific terms permits an Arbitral Tribunal to continue with the arbitration proceeding and make an award, even when an application under sub-section (1) to Section 8 is pending consideration of the court/forum. Therefore, pendency of the judicial proceedings even before the court is not by itself a bar for the Arbitral Tribunal to proceed and make an award. Whether the court should stay arbitral proceedings or appropriate deference by the Arbitral Tribunal are distinctly different aspects and not for us to elaborate in the present reference." Again, insofar as the facts of the present case are concerned, paragraph 148 of the aforesaid judgment is apposite and states as follows:

> "148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section
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> 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-

claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)], it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen." (emphasis supplied)

7. A recent judgment, Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd., 2021 SCC OnLine SC 190, referred in detail to Vidya Drolia (supra) in paragraphs 15 to 18 as follows:

> "15. Dealing with "prima facie" examination under Section 8, as amended, the Court then held [Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1]:
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> "134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in Shin-Etsu Chemical Co. Ltd. [Shin- Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.

16. The parameters of review under Sections 8 and 11 were then laid down thus:

> "138. In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] 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 centralised 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 statute(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.
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> 139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court.

There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non- arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes."

17. The Court then examined the meaning of the expression "existence" which occurs in Section 11(6A) and summed up its discussion as follows:

> "146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an

arbitration agreement and validity of an arbitration agreement.

> Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.
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> 147. We would proceed to elaborate and give further reasons:
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> 147.1. In Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg.

Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324], this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof:

> (SCC p. 238) "29. This judgment in Hyundai Engg. Case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-

contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case [United India Insurance

Co. Ltd. v. Hyundai Engg. & Construction Co.

Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , as followed by us." Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. "Examination", as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam- Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Stavros Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]. The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, "existence of an arbitration agreement".

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage. 147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment

of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India [Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 : (2014) 3 SCC (Cri) 712] , this Court has observed: (SCC p. 642, para 191) "191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault?

The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"." 147.9. Even in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764], Kurian Joseph, J., in para 52, had referred to Section 7(5) and thereafter in para 53 referred to a judgment of this Court in M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] to observe that the analysis in the said case supports the final conclusion that the memorandum of understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] to observe that the legislative policy is essential to minimise court's interference at the pre- arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 :

> (2009) 1 SCC (Civ) 117] was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Ltd. case [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court in Narbheram Power & Steel (P) Ltd. [Oriental Insurance Co.

Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] and Hyundai Engg. & Construction Co. Ltd. [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in Vulcan Insurance Co. Ltd. [Vulcan Insurance Co. Ltd. v. Maharaj Singh, (1976) 1 SCC 943] Similarly, in PSA Mumbai Investments Pte. Ltd. [PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage."

18. The Bench finally concluded:

> "153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.
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> 154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:
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> 154.1. Ratio of the decision in Patel Engg. Ltd. [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.

> 154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted. 154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-

arbitrability post the award in terms of sub-clauses (i),

(ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non- existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered." The Court then concluded, on the facts of that case, that it would be unsafe to conclude one way or the other that an arbitration agreement exists between the parties on a prima facie review of facts of that case, and that a deeper consideration must be left to an arbitrator, who is to examine the documentary and oral evidence and then arrive at a conclusion.

8. Likewise, in Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd., 2021 SCC OnLine SC 207, another Division Bench of this Court referred to Vidya Drolia (supra) and concluded:

> "39. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1] is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714], which continue to hold the field. It must be understood clearly that Vidya Drolia [Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1] has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618].

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time- barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to

arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

9. Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12.04.1996 requires a detailed consideration of the clauses of the two Agreements, together with the surrounding circumstances in which these Agreements were entered into, and a full consideration of the law on the subject. None of this can be done given the limited jurisdiction of a court under Section 11 of the 1996 Act. As has been held in paragraph 148 of Vidya Drolia (supra), detailed arguments on whether an agreement which contains an arbitration clause has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Also, this case does not fall within the category of cases which ousts arbitration altogether, such as matters which are in rem proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract. There is nothing vexatious or frivolous in the plea taken by the Appellant. On the contrary, a Section 11 court would refer the matter when contentions relating to non-arbitrability are plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal.

10. The impugned judgment was wholly incorrect in deciding that the plea of doctrine of kompetenz-kompetenz and reliance on Section 11(6A) of the 1996 Act, as expounded in Duro Felguera (supra) and Mayavati Trading (supra) were not applicable to the case in hand. Apart from going into a detailed consideration of the MoU and the SHA, which is exclusively within the jurisdiction of the arbitral tribunal, the learned Single Judge, while considering clause 28 of the SHA to arrive at the finding that any kind of agreement as detailed in clause 28.2 between the parties shall stand superseded, does not even refer to clause 28.1. No consideration has been given to the separate and distinct subject matter of the MoU and the SHA.

Also, Kishorilal Gupta (supra) and Damodar Valley Corporation (supra) are judgments which deal with novation in the context of the Arbitration Act, 1940, which had a scheme completely different from the scheme contained in Section 16 read with Section 11(6A) of the 1996 Act.

11. For all these reasons, we set aside the judgment of the High Court and refer the parties to the arbitration of a sole arbitrator, being Justice Aftab Alam (retired Judge of this Court), who will decide the dispute between the parties without reference to any observations made by this Court, which are only prima facie in nature.

12. It is made clear that Agenda Nos. 4 and 8, circulated in the notice dated 31.12.2019, for the Board Meeting scheduled to be held on 15.01.2020, will continue to remain deferred until the learned sole arbitrator passes interim orders varying or setting aside this order, or until a final Award is delivered, depending upon whether a party applies under Section 17 of 1996 Act. Civil Appeal No. 975 of 2021 is allowed in the aforesaid terms.

13. Consequently, in light of the directions in paragraphs 11 and 12 hereinabove, Civil Appeal No. 976 of 2021 is accordingly disposed of.

.....J. [ROHINTON FALI NARIMAN] .....J. [B.R. GAVAI] .....J. [HRISHIKESH ROY] New Delhi;

April 06, 2021.