Pravin Electricals Pvt. Ltd vs Galaxy Infra And Engineering Pvt. Ltd. on 8 March, 2021

Equivalent citations: AIRONLINE 2021 SC 149

Author: R.F. Nariman

Bench: Hrishikesh Roy, B.R. Gavai, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 825 OF 2021
(@ Special Leave Petition (Civil) No.8718 of 2020)

PRAVIN ELECTRICALS PVT. LTD. … APPELLANT

VERSUS

GALAXY INFRA AND ENGINEERING
PVT. LTD. … RESPONDENT

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. This appeal arises out of a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointment of a Sole Arbitrator for adjudication of disputes between the parties.

The Respondent, Galaxy Infra and Engineering Pvt. Ltd., is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Village Arra Gadh, Post Office Dharhara, Dist. Vaishali, P.S. Hajipur, Bihar and is in the business of providing consultancy services. The Appellant, Pravin Electricals Pvt. Ltd., operates in key industrial and commercial retail sectors and provides services for electrical supplies etc.

3. On 26th May, 2014, an online tender was invited by Chief Engineer, South Bihar Power Distribution Company Ltd.

(hereinafter referred to as “SBPDCL”) for appointment of implementing agencies for execution of a Scheme, on turnkey basis, for strengthening, improvement and augmentation of distribution systems capacities of 20 towns in Bihar. The Appellant submitted its technical and financial bid and

was declared the L1 bidder and was awarded the work on 22 nd September, 2014. It is the case of the Respondent that it had made substantial efforts under a Consultancy Agreement dated 7th July, 2014, to facilitate the Appellant in getting the aforesaid contract for which it was entitled to commission. It is then alleged that the Appellant sent an email dated 15 th July, 2014 to the Respondent with a draft agreement attached for comments and confirmation. On the same day, the Respondent sent its reply stating that certain terms were not acceptable. In emails that have surfaced for the first time in this Court dated 22 nd July, 2014 and 25th July, 2014, the Respondent argued that, in point of fact, all differences between the parties were ironed out and a Final Consultancy Agreement was agreed upon through correspondence between the parties.

4. The Respondent alleged that it had raised an invoice on 27 th September, 2014, for payment of Rs.28.09 lakhs as an advance for consultancy charges including service tax. It is important to note that the said invoice was addressed to one M/s Process Construction and Technical Services Pvt. Ltd. (hereinafter referred to as "Process") and makes reference to an agreement entered into between the Respondent and Process. Also, on 24th April, 2016, the Respondent alleged that it raised yet another invoice on the Appellant. This invoice was also addressed to Process and makes reference to an agreement between the Respondent and Process. Ledger accounts that were produced in the normal course of business by the Respondent reflects transactions with Process and not the Appellant. Finally, vide an email dated 30th June, 2017, the Respondent attached the final invoice to the Appellant claiming an amount of Rs.5.54 crores under the alleged Consultancy Agreement dated 7 th July, 2014.

This was followed up by a demand-cum-legal notice dated 9 th March, 2018, seeking payment of Rs.5,54,14,318/- from the Appellant as being due under the alleged Consultancy Agreement dated 7th July, 2014. Vide its reply dated 22 nd March, 2018, the Appellant recorded its surprise on receiving such demand notice and flatly denied that any agreement dated 7 th July, 2014, was ever entered into between the parties. The Appellant further requested the Respondent to provide a copy of the alleged Agreement dated 7th July, 2014 and payment details referred to in the legal notice.

5. On 26th April, 2018, the Respondent invoked Article 14 of the alleged Consultancy Agreement dated 7 th July, 2014, in which they nominated one Kameshwar Choudhary as Sole Arbitrator to adjudicate differences between the parties. On 3 rd May, 2018, the Appellant denied execution of the Agreement dated 7 th July, 2014 and, therefore, stated that the matter could not be referred to arbitration. We are informed that on 14 th May, 2018, the Respondent's Advocates finally supplied a copy of the alleged Agreement dated 7th July, 2014 to the Appellant.

6. On 7th September, 2018, the Respondent then filed a petition under Section 11(6) of the 1996 Act for appointment of a Sole Arbitrator on the basis of the alleged Agreement dated 7 th July, 2014. The Delhi High Court vide an order dated 28 th November, 2018, directed the Respondent to produce the original of the Consultancy Agreement dated 7th July, 2014. The Appellant was then directed to produce Mr. M.G. Stephen, Managing Director of the Appellant, before the Registrar (Judicial) on 7 th December, 2018, so that he can carry with him documents which bear his original signature at the contemporaneous time. The Registrar (Judicial) was also directed to obtain specimen signatures of Mr. M.G. Stephen. The original of the Agreement together with the aforesaid signatures of Mr. M.G.

Stephen was then to be sent to the CFSL for obtaining a report. The report was then received and by an order dated 20th September, 2019, the High Court directed that copies of the report be given to the learned counsel for the parties. Finally, on 30th September, 2019, the learned counsel for the Appellant submitted that he had instructions to contest the matter after which the impugned judgment dated 12 th May, 2020 was passed.

7. Vide the impugned judgment, the learned Single Judge of the Delhi High Court referred to the alleged Consultancy Agreement dated 7th July, 2014 and the correspondence between the parties, including the correspondence between SBPDCL and the Respondent herein. After going through the aforesaid, the learned Single Judge then held:

> "39. Learned counsel for the petitioner has drawn the attention of the Court to various emails which indicate that a Consultancy Agreement was executed between the parties on 07.07.2014. In the said agreement, the parties agreed on the percentage of fee that the petitioner would get in case the respondent succeeded in getting the tender from SBPDCL. On 15.07.2014 the respondent had sent an email with a soft copy of the agreement suggesting a certain percentage of the consultancy fee. Subsequent emails are also placed on record which show that payment terms were being discussed between the parties. Email dated 30.06.2017 is also on record by which a final invoice was sent by the petitioner clearly making a reference to the Agreement dated 07.07.2014. None of these documents have been denied by the respondent.

Learned counsel for the petitioner has also pointed out that the respondent even made payments in accordance with the terms of the Agreement. As per the payment terms, Rs.25 Lakhs was payable on receipt of LOI by the respondent from SBPDCL. Admittedly on 22.09.2014, LOI was awarded to the respondent and on the petitioner raising an invoice for Rs.25 Lakhs on 27.09.2014, respondent actually made payment on 29.09.2014. Counsel for the petitioner has also shown the email dated 27.09.2014 whereby the respondent had asked the petitioner to raise the invoice on its letterhead. These documents in my view clearly indicate that the parties had entered into an Agreement pursuant to which the parties had acted. The petitioner had assisted the respondent in the award of the LOI and the respondent had initially made payments in terms of the said agreement dated 07.07.2014. Learned counsel for the Petitioner is also right in submitting that on 15.07.2014, the respondent had itself sent an email containing a Draft Consultancy Agreement which contained Article 14, which was the Arbitration Clause. The parties were thus ad idem regarding submission of disputes to Arbitration.

40. The fact that there was an Agreement between the parties is also fortified by the fact that the information sent by the Department to the respondent regarding award of the Contract to the respondent was also sent to the petitioner vide email dated 22.09.2014. Draft letter of acceptance sent by the Department to the petitioner through email dated 25.09.2014 was sent by the petitioner to the respondent on the same day, by an email.

41. Learned counsel for the respondent in my view is not correct in its contention that since a draft agreement was emailed by the respondent, there was no executed agreement dated 07.07.2014. From the email dated 15.07.2014, it is apparent that the respondent had executed an Agreement prior to 15.07.2014. Petitioner had categorically stated in the email dated 15.07.2014 that the payment terms in the draft agreement were different and there is no document on record filed by the respondent evidencing denial of the contents of this email.

42. In so far as the argument that the invoices were raised on PCTSPL and not on the petitioner is concerned, petitioner is correct in its submission that PCTSPL was only a sub-contractor of the respondent.

Petitioner had not raised the invoice on its own will. Counsel for the petitioner has pointed out the email dated 24.09.2019 sent by PCTSPL to the respondent i.e. Mr. Manoj Panikar to Mr. Stephen whereby PCTSPL had emailed the draft invoice to the respondent and sought confirmation whether it could be sent to the petitioner and finally, the revised draft invoice was sent to the petitioner on 27.09.2019 by PCTSPL.

43. The contention of the respondent that it was PCTSPL which had made payments to the petitioner and this was on account of their own inter se business relationships has no merit. The invoice placed on record clearly shows that this was with respect to the contract awarded to the respondent by the Department with which admittedly PCTSPL had no direct relationship. This itself is indicative of the fact that dehors the addressee of the invoices, the same were with respect to the contract given by the department to the respondent and for which the petitioner was a consultant.

44. In so far as the contention of the respondent that the Consultancy Agreement dated 07.07.2014 did not have the signatures of Mr. M.G. Stephen and therefore, cannot be accepted as an agreement between the parties, is without merit. As mentioned in the earlier part of the judgment, it is not mandatory for an Arbitration Agreement that it must be signed by the parties. The Supreme Court in case of Caravel Shipping Services Pvt. Ltd. vs. M/s. Premier Sea Foods (2019) 11 SCC 461, has clearly held as under:

> "8. In addition, we may indicate that the law in this behalf, in Jugal Kishore Rameshwardas v. Goolbai Hormusji, AIR 1955 SC 812, is that an arbitration agreement needs to be in writing though it need not be signed. The fact that the arbitration agreement shall be in writing is continued in the 1996 Act in Section 7(3) thereof. Section 7(4) only further adds that an arbitration agreement would be found in the circumstances mentioned in the three sub-clauses that make up Section 7(4). This does not mean that in all cases an arbitration agreement needs to be signed. The only pre-requisite is that it be in writing, as has been pointed out in Section 7(3)."

45. In my view, the documents placed on record by the petitioner clearly evidence that there exists an Arbitration Agreement between the parties as contained in the draft agreement exchanged by email dated 07.07.2014. The present case squarely falls within the ambit of Section 7(4)(b) of the Act. The inevitable result is that the parties must be referred to Arbitration for adjudication of their

disputes." Accordingly, Justice G.S. Sistani, a former Judge of the Delhi High Court was appointed as the Sole Arbitrator to adjudicate the dispute between the parties.

8. Shri Shyam Divan, learned Senior Advocate, appearing on behalf of the Appellant, has argued that the alleged Consultancy Agreement dated 7th July, 2014 is a concocted document. This is clear from the CFSL report dated 29 th September, 2019, on which he relied very heavily. This being the case, since the alleged Consultancy Agreement itself had no existence, there was no arbitration agreement between the parties, as a result of which the High Court judgment fell to the ground. He also argued that this is the only case of its kind in which a formal signed agreement is alleged to have been entered into between the parties, after which negotiations take place and a draft agreement is referred to. The very fact that negotiations have taken place after such alleged agreement shows that such alleged agreement does not in fact exist. He also went on to argue that the agreement is notarized at Faridabad, Haryana, when the parties are from Mumbai and Bihar respectively. He has also produced documents to show that the so-called Notary's license had expired way before notarization allegedly took place on 7th July, 2014. He argued that once the case that is pleaded between the parties is found to be incorrect, the Respondent cannot now be allowed to rely upon documents produced here for the first time to show that even apart from the pleaded case namely, the Consultancy Agreement dated 7 th July, 2014, yet, an agreement is made out in correspondence between the parties after the said date. He attacked the Delhi High Court judgment arguing that the findings that were made qua invoices being raised and payments being made are wholly incorrect in that such invoices were raised and payments were made only by Process under a separate agreement entered into between the Respondent and Process. He also stated that if the pleadings of this case are perused, Process has been described by the Respondent as a Joint Venture partner with the Appellant in one place, then described as a private company who has common directors with the Appellant; and then finally described as a Sub-Contractor only in the written submissions filed before Delhi High Court, which last appellation has been accepted by the High Court completely wrongly. Even in the Counter Affidavit filed before this Court, yet another plea is taken that Process is the lead partner of the Appellant. For all these reasons, the learned Senior Advocate submits that the judgment under appeal ought to be set aside.

9. Shri Dhruv Mehta, learned Senior Advocate appearing on behalf of the Respondent, has taken us through all the correspondence again in order to show that even if the Consultancy Agreement dated 7th July, 2014 is not relied upon, yet, an arbitration clause exists in that the draft agreement that was exchanged between the parties culminated in a final agreement on 25 th July, 2014. In any case, if the correspondence between SBPDCL and the Respondent is to be seen with CCs being marked to the Appellant, it is clear that the Respondent acted as a go-between and successfully obtained the bid for the Appellant having earned its commission thereon. He argued that the judgment under appeal does not require interference in that the CFSL report was also inconclusive and that the correspondence referred to by the learned Single Judge of the High Court would clearly show that the dramatis personae in this case interacted with each other and that, but for the efforts of his client, Pravin Electricals Pvt. Ltd. would never have got the bid. He relied upon a number of judgments of this Court to buttress his submissions.

10. Having heard learned counsel for both the parties, it is important to first set out the relevant provisions of the Arbitration and Conciliation Act, 1996:

> 8. Power to refer parties to arbitration where there is an arbitration agreement. — (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

11. Appointment of arbitrators. — xxxx (6) Where, under an appointment procedure agreed upon by the parties, —

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

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

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

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

xxxx (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to 3 the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.

11. Sections 8 and 11 were amended pursuant to a detailed Law Commission Report being the 246 th Law Commission Report on Arbitration. The history of the law prior to 2015 is set out in the aforesaid Report and the changes made therein are reflected by this Court in its judgment in Mayavati Trading (P) Ltd. v.

Pradyuat Deb Burman, (2019) 8 SCC 714 as under:

> “9. The 246th Law Commission Report dealt with some of these judgments and felt that at the stage of a Section 11(6) application, only “existence” of an arbitration agreement ought to be looked at and not other preliminary issues. In a recent judgment of this Court, namely, Garware Wall Ropes Ltd. v. Coastal Marine

Constructions & Engg. Ltd., (2019) 9 SCC 209, this Court adverted to the said Law Commission Report and held:

"8. The case law under Section 11(6) of the Arbitration Act, as it stood prior to the Amendment Act, 2015, has had a chequered history.

9. In Konkan Railway Corpn. Ltd. v. Mehul Construction Co., (2000) 7 SCC 201 (Konkan Railway 1), it was held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388 (Konkan Railway 2).

10. However, in SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618, a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section 11 is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in para 47 of the aforesaid judgment. We are concerned directly with sub-paras

(i), (iv) and (xii), which read as follows: (SCC pp.

663-64) '(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power. ***

(iv) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

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(xii) The decision in Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd., (2002) 2 SCC 388 is overruled.'

11. This position was further clarified in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 as follows: (SCC p. 283, para 22) '22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co.

(supra) This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide. 22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.
(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a)Whether the claim is a dead (long-

barred) claim or a live claim.

(b)Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.'

12. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator under Section 16 of the 1996 Act. As a result, the Law Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as SBP & Co. (supra) and Boghara Polyfab (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-

section, namely, sub-section (6-A) in Section

11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6- A) are as follows:

> '28. The Act recognises situations where the intervention of the Court is envisaged at the pre-arbitral stage i.e. prior to the constitution of the Arbitral Tribunal, which includes Sections 8, 9, 11 in the case of Part I arbitrations and Section 45 in the case of Part II arbitrations. Sections 8, 45 and also Section 11 relating to "reference to arbitration" and "appointment of the Tribunal", directly affect the constitution of the Tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.
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> 29. The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power — which obfuscates the real issue underlying such nomenclature/description as to
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> - the scope of such powers — i.e. the scope of arguments which a court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not — i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable, etc.; and which of these it should leave for decision of the Arbitral Tribunal.

- the nature of such intervention — i.e. would the court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the Arbitral Tribunal.

30. After a series of cases culminating in the decision in SBP & Co. v. Patel Engg.

Ltd. (supra), the Supreme Court held that the power to appoint an arbitrator under Section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by Raveendran, J. in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. (supra), where the Supreme Court laid down as follows: (SCC p. 283, para 22) '22.1. The issues (first category) which Chief Justice/his designate will have to decide are:

> (a) Whether the party making the application has approached the appropriate High Court?
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> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide are:

> (a) Whether the claim is a dead (long barred) claim or a live claim?
>
> (b)Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

> (a) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?
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> (b) Merits of any claim involved in the arbitration."
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> 31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act — since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.
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> 32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in Shin-

Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234, (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there

shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator.'

13. Pursuant to the Law Commission recommendations, Section 11(6-A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

> 'Statement of Objects and Reasons ***
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> 6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—
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> (i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the Arbitral Tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of Arbitral Tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast-track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and leads to expeditious disposal of cases.'

14. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in Patel Engg. Ltd., (supra) and Boghara Polyfab (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

12. The need for reference to any other case law is obviated by a recent Three-Judge Bench judgment in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1. This Three-Judge Bench judgment arose out of a reference made to 3 learned Judges in Vidya Drolia v. Durga Trading Corporation, (2019) 20 SCC

406. Sanjiv Khanna, J. speaking for the Court set out the question that arose before the Court as follows:

> "1. This judgment decides the reference to three Judges made vide order dated 28-2-2019 in Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406, as it doubts the legal ratio expressed in Himangni Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706 that landlord-tenant disputes governed by the provisions of the Transfer of Property Act, 1882, are not arbitrable as this would be contrary to public policy.
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> 2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:
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> 2.1. (i) Meaning of non-arbitrability and when the subject-matter of the dispute is not capable of being resolved through arbitration.
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> 2.2. (ii) The conundrum — "who decides" — whether the court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.
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> 2.3. The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short "the

Arbitration Act").

13. The Bench then went into the Law Commission's 246 th Report as follows:

124. In order to appreciate the effect of the amendments made by Act 3 of 2016, it would be appropriate to refer to the Law Commission's 246th Report which had given reasons for amendments to Sections 8 and 11 of the Arbitration Act, including insertion of sub-section (6-A) to Section 11. The said reasons read as under:

"24. Two further sets of amendments have been proposed in this context. First, it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under Section 11 are kept pending for many years. In this context, the Commission has proposed a few amendments. The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalise the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialised, external persons or institutions. The Commission has further recommended an amendment to Section 11(7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been appointed, and as such are non-appealable. The Commission further proposes the addition of Section 11(13) which requires the Court to make an endeavour to dispose of the matter within sixty days from the service of notice on the opposite party.

*** The Law Commission's Report specifically refers to the decision of this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234, a decision relating to transnational arbitration covered by the New York Convention.

14. Dealing with "prima facie" examination under Section 8, as amended, the Court then held:

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. are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.

15. 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. 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.

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.

16. 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.

147. We would proceed to elaborate and give further reasons:

> 147.1. In Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209, 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 United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co.

Ltd., (2018) 17 SCC 607 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, 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. 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, (2014) 8 SCC 470, 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, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729, 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., (2009) 7 SCC 696 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 SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 and National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 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 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. and Boghara Polyfab (P) Ltd.

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, this Court in Narbheram Power & Steel (P) Ltd. [Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534] and Hyundai Engg. & Construction Co. Ltd. [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] , 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] , 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.

17. 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.

154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. 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.

18. Ramana, J. in a separate concurring opinion, after referring to the case law, summed up his conclusions as follows:

244. Before we part, the conclusions reached, with respect to Question 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 Section 8 or 11 of the Act, unless it is 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.

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?

19. The 246th Law Commission Report not only discussed the changes that are to be made bearing in mind the difficulties that arose earlier, but also provided for amendments that were to be made to Sections 8 and 11. This was provided as follows:

"Amendment of Section 8

5. In section 8 of the Act,

(i) In sub-section (1), after the words "substance of the dispute, refer" add "to arbitration, such of" and after the words "the parties to" add "the action who are parties to the" and after the word "arbitration" add the word "agreement".

(ii) after sub-section (1), add "Provided that no such reference shall be made only in cases where –

(i) the parties to the action who are not parties to the arbitration agreement, are necessary parties to the action;

(ii) the judicial authority finds that the arbitration agreement does not exist or is null and void.

Explanation 1: If the judicial authority is prima facie satisfied about the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall

decide the same as a preliminary issue;

Explanation 2: Any pleading filed in relation to any interim application which has been filed before the judicial authority shall not be treated to be a statement on the substance of the dispute for the purpose of this section." [NOTE: The words "such of the parties... to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr., (2003) 5 SCC 531, – in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action – and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be 44 final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.]"

(iii) In sub-section (2), after the words "duly certified copy thereof" add "or a copy accompanied by an affidavit calling upon the other party to produce the original arbitration agreement or duly certified copy thereof in a circumstance where the original arbitration agreement or duly certified copy is retained only by the other party." xxx Amendment of Section 11

7. In section 11,

(i) In sub-section (4), sub-clause (b), after the words "by the" delete "Chief Justice" and add words "High Court" and after the words "designated by" delete the word "him" and add the word "it".

(ii) In sub-section (5), after the words "by the" delete "Chief Justice" and add words "High Court" and after the words "designated by" delete the word "him" and add the word "it".

(iii) In sub-section (6), sub-clause (c), after the words "may request the" delete "Chief Justice" and add words "High Court" and after the words "designated by" delete the word "him" and add the word "it".

(iv) after sub-section (6), insert sub-section "(6A) An appointment by the High Court or the person or institution designated by it under sub-section (4) or sub-section (5) or sub-section (6) shall not be made only if the High Court finds that the arbitration agreement does not exist or is null and void, Explanation 1: If the High Court is prima facie satisfied regarding the existence of an arbitration agreement, it shall refer the parties to arbitration and leave the final determination of the existence of the arbitration agreement to the arbitral tribunal in accordance with section 16, which shall

decide the same as a preliminary issue.

Explanation 2: For the removal of any doubt, it is clarified that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power.

Explanation 3: The High Court may take steps to encourage the parties to refer the disputes to institutionalised arbitration by a professional Indian or International Arbitral Institute.

[NOTE: The proposed section 11 (6A) envisages the same process of determination as is reflected in the proposed amendment to section 8. Explanation 2 envisages that reference by the High Court to any person or institution designated by it shall not be regarded as a delegation of judicial power. Explanation 3 has been inserted with the hope and expectation that High Courts would encourage the parties to refer the disputes to institutionalize arbitration by a professional Indian or international arbitral institute.]

(v) In sub-section (7), after the words "or sub-section (6)" add the words "or subsection (6A)" and after the words "to the" delete the words "Chief Justice or the" and add the words "High Court is final where an arbitral tribunal has been appointed or a" and after the words "person or institution" add the words "has been" and after the words "designated by" delete the words "him is final" and insert the words "the High Court, and no appeal, including letters patent appeal, shall lie against such order." [NOTE: This amendment ensures that

a) an affirmative judicial finding regarding the existence of the arbitration agreement; and (b) the administrative act of appointing the arbitrator are final and non- appealabe.] Section 37, which is the appeal provision, was also sought to be amended as follows:

> Amendment of Section 37
>
> 20. In section 37,
>
> (i) In sub-section (1), renumber sub-clause "(a)" as sub-clause "(b)" and insert sub-clause "(a)refusing to refer the parties to arbitration under section 8;"
>
> (ii) In sub-section (1), renumber sub-clause "(b)" as sub-clause "(d)" and insert sub-clause "(c) refusing to appoint an arbitrator or refusing to refer such appointment to a person or institution designated by it under section 11, in the case of an arbitration other than an international commercial arbitration".

[NOTE: Sub-sections (a) and (c) have been added to provide for appeal in cases of orders refusing to refer parties to arbitration under section 8 (mirroring the existing provision in section 50) and to provide an appeal where the High Court refuses to appoint an arbitrator respectively.]

(iii) In sub-section (3), after the words "No second appeal" add the words ", including letters patent appeal," [NOTE: This amendment is clarificatory and reduces the scope of the party to file an LPA.]

20. It will be seen that when Parliament enacted the 2015 amendment pursuant to the Law Commission Report, it followed the Scheme of the Law Commission's Report qua Section 8 and Section 37 by enacting the words "….. unless it finds that prima facie no valid arbitration agreement exists……" in Section 8(1) and the insertion of sub-clause (a) in Section 37(1) providing an appeal in an order made under Section 8, which refuses to refer parties to arbitration. However, so far as Section 11(6) and Section 11(6A) are concerned, what was recommended by the Law Commission was not incorporated. Section 11(6A) merely confines examination of the Court to the existence of an arbitration agreement. Section 11(7) was retained, by which no appeal could be filed under an order made under Section 11(6) read with Section 11(6A), whether the Court's determination led to a finding that the arbitration agreement existed or did not exist on the facts of a given case. Concomitantly, no amendment was made to Section 37(1), as recommended by the Law Commission.

21. However, by a process of judicial interpretation, Vidya Drolia (supra) has now read the "prima facie test" into Section 11(6A) so as to bring the provisions of Sections 8(1) and 11(6) r/w 11(6A) on par. Considering that Section 11(7) and Section 37 have not been amended, an anomaly thus arises. Whereas in cases decided under Section 8, a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 is not appealable. In the light of what has been decided in Vidya Drolia (supra), Parliament may need to have a re-look at Section 11(7) and Section 37 so that orders made under Sections 8 and 11 are brought on par qua appealability as well.

22. We now come to the facts of the present case. It is first important to set out the CFSL report dated 29 th September, 2019, in which the CFSL found:

> "Result of Examination:
>
> It has not been possible to express any opinion regarding the authorship of questioned signatures marked A-1 to A-6 in comparison with the standard signatures marked A-1 to A-11 and S-1 to S-16 attributed to M.G. Stephen, due to the reason that the model of both the sets of signatures are different, hence, technically not comparable."

23. Since, the CFSL did not express an opinion either way, it became incumbent upon the learned Single Judge to determine as to whether the Agreement dated 7th July, 2014 could have been entered into given the surrounding circumstances of the case. As Shri Divan rightly points out, there are no negotiations which lead upto the 7th July, 2014 Agreement that are on record.

Secondly, negotiations that take place take place only after 7 th July, 2014 in which a draft agreement is deliberated upon between the same parties. It would stretch incredulity to state that on the same subject matter negotiations and a draft agreement would be spoken about after a final signed agreement has been agreed upon between the parties.

Secondly, he rightly points out that the Agreement is notarized in Faridabad, Haryana, with no explanation worth the name when a contract is to be executed in Bihar by one of the parties whose registered office is in Bihar and the other party whose registered office is in Mumbai. Thirdly, the Notary who is said to have notarized the Agreement was not licensed to do so the same, his license having expired earlier, a fact that is accepted even by the Respondents.

24. Even otherwise, some of the learned Single Judge's conclusions are plainly incorrect and against the record. The learned Single Judge holds:

> "39. ..... Admittedly on 22.09.2014, LOI was awarded to the respondent and on the petitioner raising an invoice for Rs.25 Lakhs on 27.09.2014, respondent actually made payment on 29.09.2014. Counsel for the petitioner has also shown the email dated 27.09.2014 whereby the respondent had asked the petitioner to raise the invoice on its letter head....."

25. This is plainly incorrect in view of the correspondence and pleadings between the parties, as an invoice was raised on Process, Process making payment on 29th September, 2014 and not the Appellant. Equally, the finding that a draft Consultancy Agreement was sent on 15th July, 2014 containing an arbitration clause, parties being ad idem regarding submission of the disputes to arbitration is also plainly incorrect in view of the fact that on the same day, an email was sent back in which various terms were disputed, there being no concluded contract between the parties. Also, the finding that Process was a sub-contractor of the Respondent, is contrary to the pleadings between the parties which, as we have seen, had ranged from Process being a joint venture partner of the Appellant to Process having common Directors with the Appellant, and to Process thereafter being described as the lead partner. Sub-contractor-ship is not pleaded at all by the Respondent, the aforesaid arising only from written submissions made before the learned Single Judge.

26. The allegation that the Consultancy Agreement of 7 th July, 2014 had a signature that may not be that of Mr. M.G. Stephen was brushed aside stating that an arbitration agreement need not be signed by the parties. That is entirely besides the point. Mr. M.G. Stephen has sworn to an affidavit filed before the High Court that the signatures appearing on the 7 th July, 2014 agreement are not his signatures, as a result of which the Appellant cannot be said to have entered into an agreement at all on 7th July, 2014.

Again, in paragraph 45, the learned Single Judge's finding that there exists an arbitration agreement between the parties as contained in the "draft agreement" exchanged by email dated 7 th July, 2014, is incorrect for two reasons. The draft agreement sent by email was exchanged on 15th July, 2014 and not on 7th July, 2014. Secondly, the email in reply to the email of 15 th July, 2014 shows that there was no concluded contract between the parties. Also, the pleading with which the parties went to Court was that there was a concluded contract between the parties on 7th July, 2014. There was no pleading worthy of the name that on 15th July, 2014, a draft agreement was exchanged between the parties, as a result of which a concluded contract emanated therefrom.

27. The facts of this case remind one of Alice in Wonderland. In Chapter II of Lewis Caroll's classic, after little Alice had gone down the Rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Caroll states "(she was so much surprised, that for the moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to out between the parties through documentary evidence and cross-examination.

Large pieces of the jigsaw puzzle that forms the documentary evidence between the parties in this case remained unfilled. The emails dated 22nd July, 2014 and 25th July, 2014 produced here for the first time as well as certain correspondence between SBPDCL and the Respondent do show that there is some dealing between the Appellant and the Respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. The prima facie review spoken of in Vidya Dhrolia (supra) can lead to only one conclusion on the facts of this case - that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an Arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same. For all these reasons, we set aside the impugned judgment of the Delhi High Court in so far as it conclusively finds that there is an Arbitration Agreement between the parties. However, we uphold the ultimate order appointing Justice G.S. Sistani, a retired Delhi High Court Judge as a Sole Arbitrator. The learned Judge will first determine as a preliminary issue as to whether an Arbitration Agreement exists between the parties, and go on to decide the merits of the case only if it is first found that such an agreement exists. It is clarified that all issues will be decided without being influenced by the observations made by this court which are only prima facie in nature. The appeal is allowed in the aforesaid terms.

..... J.

(R.F. Nariman) ..... J.

(B.R. Gavai) ..... J.

(Hrishikesh Roy) New Delhi.

March 08, 2021.