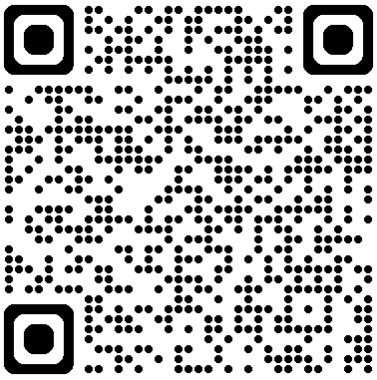
Arbitration Agreement Validity and Appointment

Case Name: Tata Capital Limited v. Priyanka Communications (India) Pvt. Ltd.

Citation: 2024:BHC-OS:16394

Act: Arbitration and Conciliation Act, 1996, SARFAESI Act, RDDB Act



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO.168 OF 2023

Tata Capital Limited .. Applicant

Versus

Priyanka Communications (India) Pvt. Ltd.
And Ors. .. Respondents

Mr.Rohan Savant a/w Mr.Sachin Chandarana a/w Mr.Aagam Mehta a/w Mr.Amol Rasal i/b M/s.Manilal Kher Ambalal & Co. Advocate for the Applicant.

Mr.Pankaj Sawant, Sr.Counsel a/w Mr.Jehaan Mehta, Mr.Rehmat Lokhandwala, Mr.Hrishikesh Nadkarni and Mr.Premlal Krishnan i/b M/s.PAN India Legal Services LLP, Advocate for the Respondents.

CORAM: FIRDOSH P. POONIWALLA, JJ.

RESERVED ON: SEPTEMBER 12, 2024
PRONOUNCED ON: OCTOBER 15, 2024

JUDGEMENT :

1. This Application is filed under the provisions of Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act") seeking appointment of an Arbitrator under the Arbitration Agreement contained in the Sanction Letter dated 19th August 2019 signed between the parties.

2. The case of the Applicant is as follows:

a) In 2015, Respondent No.1 approached the Applicant requesting it to grant financing facilities to Respondent No.1 to meet its daily business requirements. The Applicant and Respondent No.1 had a working business relationship and the Applicant had sanctioned in favour of Respondent No.1 various loans towards inventory funding and working capital requirements.

b) One such facility was a Working Capital Demand Loan for a sum of Rs.30 Crores ("WCDL") in respect of which the Applicant issued a Sanction Letter dated 17th May 2017. The said Sanction Letter was signed by the Respondents. Pursuant to the said sanction, Respondent No.1 and the Applicant executed WCDL Agreement dated 17th May 2017, which was renewed from time to time. Respondent Nos.2 and 3 furnished personal guarantees in terms of the WCDL facility.

c) Thereafter, a consortium arrangement was formed for loans extended to Respondent No.1 by lenders by executing a Working

Capital Consortium Agreement dated 31st August 2017 ("the Consortium Agreement"). The Consortium Agreement was executed between Union Bank of India (lead bank), Cosmos Co-operative Bank Ltd., Axis Bank Ltd., Indian Bank and PNB Investment Services Ltd. was appointed as the Trustee.

d) The sanctioned limits for the WCDL were modified from time to time. Thereafter, the Respondents issued a letter dated 29th January 2018 to the Applicant stating that all the terms and conditions in the WCDL Agreement would be binding on all of them despite such modification in limits. By a Deed of Accession dated 23rd February 2018, the Applicant was inducted into the Consortium Agreement.

e) A Supplemental Inter Se Agreement dated 30th May 2018 was executed between the Applicant and other lenders to the Consortium Agreement setting out the inter se rights between the lenders including the Applicant.

f) Thereafter, the sanctioned limits of the WCDL were modified and a renewed WCDL Agreement dated 2nd August 2018 was entered into between the Applicant and Respondent No.1. Respondent Nos.2

and 3 executed Personal Guarantees in respect of the same, which were continuing guarantees and provided liberty to the Applicant to proceed independently against Respondent Nos.2 and 3.

g) Indian Bank issued a "no dues" letter to the consortium and exited the Consortium Agreement. Resultantly, a new Deed of Accession dated 19th November 2018 was entered into between the lenders including the Applicant.

h) A letter dated 16th August 2019 was addressed by Respondent No.1 to the Applicant requesting grant of onetime ad-hoc facility of Rs.5,60,00,000/-, over and above the existing facility in respect of which the Loan Agreement existed. The Respondents confirmed that the new loan would be governed by the terms and conditions in the WCDL Agreement and the guarantees issued by Respondent Nos.2 and 3 would also cover the new loan.

i) The Applicant issued a letter dated 19th August 2019 sanctioning the one-time temporary Limit Finance for Rs.5,60,00,000/-. The said Sanction Letter was unconditionally signed by all the Respondents. Under the terms of the said Sanction Letter, the said

loan amount was to be repaid within 90 days from the date of disbursement i.e. on or before 19th November 2019. Clause (k) of the said Sanction Letter contained an Arbitration Agreement between the parties and reads as follows:

> *"(k) All disputes, differences or claims arising out of these presents or as to the construction, meaning or effect thereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof or any statute enacted for replacement thereof and shall be referred to the sole arbitration of a person to be appointed by us. In the event of death, refusal, neglect, inability or incapability of the person appointed to act as arbitrator, we may appoint another arbitrator. The award including interim award/s of the arbitrator shall be final and binding on all parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings in such manner, as he considers appropriate."*

j) On 21st August 2019, the disbursement under the said facility was made by the Applicant to Respondent No.1.

k) The Applicant addressed an email dated 12th February 2020 to Respondent No.3 calling upon him to make payments of all the due and overdue amounts urgently.

l) As no response was received from any of the Respondents, the Applicant, through its Advocate's letter dated 17th March 2020, addressed to all the Respondents recalled all loan facilities extended to the Respondents, including the one-time temporary limit facility,

and called upon them to jointly and severally pay Rs.37,61,45,284/- with interest which was due as on 4th February 2020. On 23rd May 2020, a Notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") was issued by the Applicant to the Respondent. On 20th July 2020, a reply was sent by the Respondents to the Applicant denying that its account was a non-performing asset.

m) On 22nd September 2020, the Applicant filed Commercial Summary Suit (O.S.No.87 of 2022) in this Court for an amount of Rs.36,10,74,412.84. Further, on 7th December 2020, the consortium filed an Application under Section 14 of the SARFAESI Act.

n) The Applicant filed a Petition, being Commercial Arbitration Petition (L) No.3628 of 2020, under Section 9 of the Act for securing Rs.6,70,35,020.95 payable by the Respondents under the One-Time Temporary Limit Facility before this Court. By an Order dated 12th March 2021, this Court granted interim reliefs in favour of the Applicant whereby the Respondents were directed to deposit a sum of Rs.5,60,00,000/- and additionally were also directed to disclose their

assets. Further, Respondent No.1 was restrained from transferring, alienating, parting with possession or further encumbering any of its assets.

o) The Applicant, through its Advocates, addressed a letter dated 6th April 2021 to the Respondents invoking Arbitration under Clause (k) of the Sanction Letter dated 19th August 2019. The Applicant also suggested two names for appointment as Arbitrators. The said letter was duly served on all the Respondents. The Respondents replied to the said letter dated 6th April 2021 by their letter dated 20th April 2021 whereby the Respondents refused to appoint an Arbitrator.

p) On 8th June 2021, the present Application was filed for appointment of an Arbitrator.

q) On 4th August, 2021, this Court dismissed the Review Petition filed by the Respondents seeking a review of the Order dated 12th March 2021 passed in the Section 9 Petition filed by the Applicant.

r) On 19th August 2021, the Hon'ble Supreme Court passed an Order in the SLP filed challenging the said Order dated 4th August

2021 wherein it recorded that in view of the statement made by the learned counsel for the Applicant (Respondent in the SLP) that they would not press for the execution of the Order dated 12th March 2021 till the next date, no interim orders were required to be passed in the matter.

s) On these facts, Mr.Rohan Savant, the learned counsel appearing on behalf of the Applicant, submitted that there is a valid arbitration agreement between the parties as contained in Clause (k) of the Sanction Letter dated 19th August 2019, that disputes and differences have arisen between the parties and the Applicant has invoked the arbitration agreement between the parties by its Advocates letter dated 6th April 2021.

t) Mr.Rohan Savant further submitted that, in these circumstances, the present Application ought to be allowed and an Arbitrator be appointed in order to arbitrate upon all the disputes and differences arising between the parties under the said Sanction Letter dated 19th August 2019.

3. The Respondents have filed an Affidavit in Reply dated 11th September 2023 opposing the present Application. On the basis of this Affidavit in Reply, Mr.Pankaj Sawant, the learned Senior Counsel appearing on behalf of the Respondents, submitted that the disputes sought to be referred to Arbitration by the present application are non-arbitrable as the same are barred by the provisions of the SARFAESI Act and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDDB Act"). In this context, Mr.Pankaj Sawant submitted that the present Application was expressly barred under Section 34 of the SARFAESI Act. He submitted that the Applicant had already initiated proceedings under the SARFAESI Act, which provides a statutory remedy for secured creditors. Upon invoking the remedies under the special statute, the Applicant cannot now resort to private adjudication by making an artificial bifurcation of the loan amounts to suit its convenience. Further, Mr.Pankaj Sawant submitted that, as per Section 13(10) of the SARFAESI Act, a secured creditor must exhaust the statutory remedies available under the SARFAESI Act, and a secured creditor can only initiate civil proceedings for any margin left recoverable after exhausting the remedies under the SARFAESI Act. Therefore, it was not open for the Applicant to elect the remedies in any manner whatsoever.

4. Mr.Pankaj Sawant also submitted that the present Application is barred by RDDB Act. He submitted that Section 18 of the Act confers exclusive jurisdiction on the DRT for disputes involving debt recovery by the financial institutions. He submitted that the Applicant is a part of a consortium and qualifies as a financial institution under the RDDB Act. As a consortium member and a financial institution, the Applicant could have filed an Application in the DRT under Sections 17 to 19 of the RDDB Act. In support of his submissions, Mr.Pankaj Sawant relied upon the judgement of the Division Bench of this Court in ***Naresh J. Doshi and Others vs. Reserve Bank of India and Others***[1].

5. Mr.Pankaj Sawant further submitted that the cause of action in the Summary Suit filed by the Applicant and in the present Application is the same, and, by filing the Summary Suit, the Applicant had waived its right to arbitration and the same is barred.

6. In this context, Mr.Pankaj Sawant submitted that there is one loan agreement, namely the Working Capital Demand Loan Agreement dated 29th November 2018, one loan account and only one demand notice was issued by the Applicant. He submitted that the Sanction Letter dated 19th August 2019 refers to the WCDL Agreement dated 29th November 2018 which is also the

1 2021 SCC OnLine Bom 11655

subject matter of the Summary Suit and states that all securities provided under the loan agreements would stand as security for the repayment of One Time Temporary Limit Facility. Further, the Demand Notice is a composite demand issued for both facilities wherein a single amount of Rs.37,61,45,284/- is claimed and One-Time Temporary Limit Facility is also mentioned. He submitted that no bifurcation of the claim is made in the Demand Notice, demonstrating that the claims are identical and inseparable.

7. Mr.Pankaj Sawant further submitted that the conjoint reading of the averments in the Summary Suit and the Application filed by the Applicant under Order II Rule 2 of the Code of Civil Procedure, 1908, demonstrates that it is the Applicant's express case that the cause of action for the Summary Suit and the present Arbitration Application is the same.

8. By initiating that Suit based on the same cause of action, the Applicant has waived its right to arbitration. In this context, Mr.Pankaj Sawant relied upon the judgement of this Court in ***Onyx Musicabsolute com Pvt.Ltd. & Ors. vs. Yash Raj Films Pvt. Ltd. And Ors***[2].

9. Mr.Pankaj Sawant further submitted that the Applicant's attempt to pursue SARFAESI proceedings, the Summary Suit and the Arbitration

2 (2008) SCC OnLine Bom 636

constitutes impermissible forum shopping and would lead to multiplicity of proceedings, resulting in conflicting judgements from different forums on the same set of facts, which is against public policy and judicial propriety. He submitted that the Applicant, being part of the Consortium, cannot be permitted to bypass statutory remedies while others are following them as this creates an uneven playing field.

10. In response to these submissions, Mr.Rohan Savant submitted that none of the issues raised by the Respondents can be gone into by the Court under Section 11 of the Act as the scope of enquiry in an Application under Section 11 of the Act is expressly limited and narrow. He submitted that, in an Application under Section 11, the Court only deals with the examination of the existence of the Arbitration Agreement. This examination is also done only on prima facie basis. No other contentions or issues are considered by the Court at this stage. He submitted that even the issue concerning the validity of the arbitration agreement beyond formal validity, such as the agreement being in writing, cannot be dealt with by the Court while considering the Application under Section 11 of the Act.

11. Mr.Rohan Savant, further submitted that the test laid down by the Hon'ble Supreme Court in ***Vidya Drolia and Others vs. Durga Trading***

Corporation[3], such as deadwood, ex facie frivolous and / or the test laid down by the Supreme Court in ***NTPC Limited vs. SPML Infra Limited***[4], being the eye of the needle test, have now being rejected by the Hon'ble Supreme Court in view of the judgement of the 7 Judge Bench of the Hon'ble Supreme Court in the case of ***Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re***[5] and as explained by the Hon'ble Supreme Court in ***SBI General Insurance Co.Ltd. vs. Krish Spinning,***[6] which specifically considers the effect of the decision in the case of ***Interplay*** (Supra) on the scope of powers of the referral Court under Section 11 of the Act.

12. Without prejudice to this submission, as regards the contention of the Respondents with respect to the non-arbitrability of the dispute on account of the fact that the Applicant had been notified as a financial institution under Section 2(1) (m)(iv) of the SARFAESI Act, Mr. Rohan Savant submitted that, merely because the Applicant had been notified as a financial institution under the SARFAESI Act, would not result in the claim being made by the Applicant becoming non-arbitrable. This was in view of the provisions of the SARFAESI Act, and more particularly Sections 35 and 37 thereof. He

3 (2021) 2 SCC 1
4 (2023) 9 SCC 385
5 (2024) 6 SCC 1
6 (2024) SCC OnLine 1754

submitted that Section 37 of the SARFAESI Act, in no uncertain terms, provides that it is in addition to, and not in derogation of, other laws for the time being in force. Hence, the proceedings under the Act can be continued by a financial institution even when the financial institution institutes or is entitled institute proceedings under the SARFAESI Act.

13. Mr.Rohan Savant submitted that the issue of arbitrability and simultaneous institution of proceedings under the Act and proceedings under the SARFAESI Act by financial institutions have been dealt with by the Hon'ble Supreme Court in the cases of ***M.D.Frozen Foods Exports Pvt. Ltd.& Ors. vs. Hero Fincorp Ltd.***[7] and ***India Bulls Housing Finance Ltd. vs. Deccan Chronicle Holdings Ltd. & Ors.***[8] He further submitted that the aforesaid judgments had been considered by this Court in the case of ***Tata Motors Finance Solutions Ltd. vs. Naushad Khan***[9]***.***

14. Mr.Rohan Savant submitted that the said judgements clearly demonstrate that a financial institution is entitled to simultaneously proceed under the SARFAESI Act and the Act.

7 (2017) 16 SCC 41
8 (2018) 14 SCC 783
9 (2023) SCC OnLine BOM 2716

15. Mr.Rohan Savant further submitted that the Respondents have also sought to make reference to Transferred Original Application No.210 of 2023 filed under the provisions of the RDDB Act before the DRT, Mumbai against the Respondents to contend that, in light of the said Application, Arbitration Proceedings were not maintainable. Mr. Rohan Savant submitted that this contention again is erroneous. The said Original Application has been filed by Union Bank of India, Cosmos Co-operative Bank Limited, Axis Bank Ltd. and State Bank of India. The claim raised in the Original Application is in respect of the claim made by the said Banks. This is apparent from the particulars of claim at Annexure U of the Original Application. He further submitted that the Original Application specifically mentioned that the Applicant was only a proforma party. He submitted that the claims of the Applicant were not a part of the Original Application filed before the DRT, Mumbai.

16. Further, Mr. Rohan Savant submitted that it is undisputed that the Applicant cannot take action under the RDDB Act. This is because the Applicant, as a Non Banking Financial Institution, is not notified under the RDDB Act. The notification under the SARFAESI Act does not entitle the Applicant to file proceedings before the DRT under the RDDB Act.

17. Mr Rohan Savant further submitted that the next contention raised by the Respondents was that the Applicant had relinquished / waived the Arbitration Clause contained in the Sanction Letter dated 19th August 2019. Mr. Rohan Savant submitted that it is settled law that issues of waiver and acquiescence are issues on facts and such issues cannot be raised in an Application under Section 11 of the Act. Further, he submitted that the prior filing of the Commercial Summary Suit would not, in any manner, entitle a waiver or relinquishment of the Arbitration Clause in the present Application. He submitted that this was because firstly, on facts, the claim made in the said Commercial Summary Suit is distinct and separate from the claim raised in the Section 11 Application. He further submitted that, even in law, merely because a party has filed a prior suit, would not disentitle such a party from filing subsequent arbitration proceedings. In view of Section 8 of the Act, the Defendants in the Commercial Summary Suit are at liberty to file an Application for reference of the dispute to Arbitration. Equally, the Plaintiff was entitled to withdraw a Suit prior to the Defendants filing their first statement on the substance of the dispute. In support of this submission, Mr. Rohan Savant relied upon the judgement of this Court in ***Priya Rishi Bhuta and Another vs. Vardhaman Engineers and Builders and Others***[10] .

10 2022 SCC OnLine BOM 1136

18. Mr. Rohan Savant further submitted that, even on facts, the case of waiver set up by the Respondents was completely misconceived and erroneous. The claim made in the Commercial Summary Suit No.87 of 2022 against the Respondents pertained to a separate facility, i.e. the Working Capital Demand Loan Facility for a sum of Rs.30 crores. The said Suit does not include the claim which would be made by the Applicant in the Arbitration proceedings before the Arbitrator, which solely relates to the Sanction Letter dated 19th August 2019. He submitted that this is apparent from a bare perusal of the Plaint. He further submitted that the contents of the Plaint in the said Suit make it apparent that the claim made in the said Suit is distinct and separate from the claim made in the present Arbitration Application.

19. In response to the submissions of Mr.Rohan Savant, Mr.Pankaj Sawant, on behalf of the Respondents, submitted that this Court had the jurisdiction to decide on the objection of non-arbitrability of claims at the stage of hearing of the Section 11 Application. In support of his submissions, he relied upon the judgements of the Hon'ble Supreme Court in ***Vidya Drolia and Others*** (Supra) ***and M.Hemalata Devi and Others vs. B. Udayasri.***[11] Mr.Pankaj Sawant further submitted that the Applicant's reliance on the judgements of the Hon'ble Supreme Court in ***Interplay*** (Supra) and ***SBI***

11 (2024) 4 SCC 255

General Insurance Co.Ltd. (Supra) was misplaced as the said judgments were based on different facts.

20. Mr. Pankaj Sawant further submitted that the Applicant's reliance on the judgment of ***Tata Motors Finance Solutions Ltd.*** (Supra) was misplaced as the said judgement was a judgement of a Single Judge of this Court and did not take into consideration the judgement of the Division Bench of this Court in ***Naresh J. Doshi and Others*** (Supra)[12]. He further submitted that, even otherwise,the judgement was distinguishable as, in the facts of that case, there was no pending suit or consortium, as in the present case, and it was not clear whether SARFAESI action was adopted. Further, Mr.Pankaj Sawant also submitted that, similarly, the reliance by the Applicant on ***Indiabulls Housing Finance Ltd.*** (Supra) was misplaced as the issue in that case was entirely different and, in that case, the action under the SARFAESI Act was challenged because of arbitration proceedings. He submitted that a distinction must be drawn between cases where arbitration proceedings were initiated first, followed by actions under the SARFAESI Act by the banks, and cases where SARFAESI proceedings were initiated prior to arbitration. He submitted that, whilst there was no bar under the Arbitration Act against the application of the SARFAESI Act or any other statute, Section 34 of the SARFAESI Act expressly barred the initiation of other proceedings, including

12 (2021) SCC OnLine BOM 11655

those before any Court or Tribunal in respect of matters which DRT is empowered to determine under the Act. Therefore, once proceedings under the SARFAESI Act had been initiated, the jurisdiction of the Civil Courts and Arbitral Tribunal is ousted and the dispute must be adjudicated exclusively by the forum designated under the SARFAESI Act. Mr.Pankaj Sawant further submitted that, whilst the Applicant relied on the judgement in the case of ***M.D.Frozen Food Exports Pvt. Ltd. & Ors.*** *(Supra)* to argue that SARFAESI proceedings can continue alongside arbitration, the Hon'ble Supreme Court, in ***Vidya Drolia and Others*** (Supra), clarified that ***M. D. Frozen Food Exports Pvt. Ltd.*** (Supra) does not apply to the issue of non-arbitrability under the SARFAESI Act. The Hon'ble Supreme Court held that statutory remedies under SARFAESI are non-arbitrable and that continuing arbitration alongside SARFAESI proceedings would undermine the specific rights conferred under the SARFAESI Act.

21. Further, as far as the judgement in ***Priya Rishi Bhuta and Another*** (Supra) relied upon by the Applicant was concerned, Mr. Pankaj Sawant submitted that, in that case, the cause of action in the civil proceedings and the arbitral proceedings were different, whilst, in the present case, the cause of action and relief sought were inseparable and the same.

Analysis and Findings

22. I have heard the learned Counsel for the parties and perused the documents on record.

23. The issue that needs consideration first is whether this Court, in an Application under Section 11 of the Act, can go into the objections raised by the Respondents.

24. To consider this issue, Section 11(6A) of the Act is relevant and reads as under:

> "(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."

25. It is pertinent to note that sub-section 6(A) of Section 11 was omitted by Section 3(v) of the Arbitration and Conciliation (Amendment) Act, 2019. However, the same has not been notified, and, therefore, subsection 6(A) of Section 11 continues to remain in force.

26. Further, to consider this issue, the judgements relied upon by the parties, in the context of this issue, would have to be considered. The

judgments relied upon by the parties and the relevant paragraphs are set out here under:

a) Paragraph No.154 of the judgement of the Hon'ble Supreme Court in ***Vidya Drolia and Others*** (Supra) is relevant and is set out here under:

> **"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.
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> **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.
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> **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.
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> **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."

b) Paragraph Nos.92 and 93 of the judgement of the Hon'ble Supreme Court in ***Indian Oil Corporation Limited vs. NCC Limited***[13] are relevant and are set out here under:

> **"92.** However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of sub-section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand.
>
> **93.** We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to "accord and satisfaction" of the claims."

c) Paragraph Nos.15 to 17 and 44 to 51 of the judgement of the Hon'ble Supreme Court in ***M.Hemalata Devi and Others*** (Supra) are relevant and are set out here under:

> **"15.** Now before this Court, there is a long line of decisions, including the decision which had come up post amendment to sub-section (1) of Section 8 and post insertion of sub-section (6-A) to Section 11 of the Arbitration Act, 1996, where it has been held that in spite of sub-section (1) to Section 8 the Court has to find out not only whether there is an arbitration clause in the agreement but whether the dispute is arbitrable or not.
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> **16.** All disputes are not capable of being referred to arbitration ["Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an Arbitral Tribunal is empowered

13 (2023) 2 SCC 539

to give." [*Russel on Arbitration* (22nd Edn.)]] . The nature of certain disputes may be such that they should never be sent near an arbitration table. To give an illustration, there would be certain types of criminal matters, matters involving public corruption, etc. This aspect has been well considered by this Court in *Booz Allen & Hamilton Inc.* v. *SBI Home Finance Ltd.* and it has been held as under : (SCC pp. 546-47, paras 35-36)

> "*35*. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.
>
> *36*. The well-recognised examples of non-arbitrable disputes are : (*i*) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (*ii*) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (*iii*) guardianship matters; (*iv*) insolvency and winding-up matters; (*v*) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

17. The exclusion of a dispute from arbitration may be express or implied, depending again upon the nature of the dispute, and a party to a dispute cannot be compelled to resort to arbitration merely for the reason that it has been provided in the contract, to which it is a signatory. The arbitrability of a dispute has to be examined when one of the parties seeks redressal under a welfare legislation, in spite of being a signatory to an arbitration agreement. "The Consumer Protection Act" is definitely a piece of welfare legislation with the primary purpose of protecting the interest of a consumer. Consumer disputes are assigned by the legislature to public fora, as a measure of public policy. Therefore, by necessary implication such disputes will fall in the category of non-arbitrable disputes, and these disputes should be kept away from a private fora such as "arbitration", unless both the parties willingly opt for arbitration over the remedy before public fora.

44. What were then the factors which necessitated an amendment, inter alia, in Sections 8 and 11 of the Arbitration Act, 1996 and what was the purpose behind these amendments? This aspect again has been examined in detail in *Emaar-3*. Such amendments were recommended by the Law Commission in its 246th Report, para 33 of the 246th Report of the Law Commission stated as under:

> "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."

45. The Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2015 reads as under:

"2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act.

* * *

6. (*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;"

Notes on the Clauses on amendment in Section 8 read as follows:

"Clause 4 of the Bill seeks to amend Section 8 of the principal Act to specify that the judicial authority shall refer the parties to arbitration unless it finds

that prima facie no valid arbitration agreement exists. A proviso below sub-section (2) is inserted to provide that where the original arbitration agreement or certified copy thereof is not available with the party who apply under sub-section (1), and is retained by the other party, such party shall file a copy of the arbitration agreement along with application under sub-section (1) praying to the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the court."

On amendment to Section 11 by inserting sub-section (6-A), the following was stated:

"Clause 6 of the Bill seeks to amend Section 11 of the principal Act to provide that appointment of arbitrator shall be made by the Supreme Court or the High Court, as the case may be, instead of the Chief Justice of India or the Chief Justice of the High Court. Sub-section (6-A) is inserted to provide that the Supreme Court or the High Court while considering application under sub-sections (4) to (6) shall confine to the examination of an arbitration agreement."

46. The amendment which was made in Section 8 of the Arbitration Act, 1996 came up for consideration before this Court in *Ameet Lalchand Shah* v. *Rishabh Enterprises* [*Ameet Lalchand Shah* v. *Rishabh Enterprises*, where in paras 28 and 30, it was stated as under : (SCC pp. 697-98)

"*28*. 'Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments — (*i*) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/amplified to include persons claiming "through or under" such a party to the arbitration agreement; (*ii*) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis; (*iii*) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (*iv*) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same.' [Ref. : *Justice R.S. Bachawat's Law of Arbitration and Conciliation*, Sixth Edn., Vol. I (Sections 1 to 34) at p. 695 published by Lexis Nexis.]

30. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other court. The High Court laid emphasis upon the word '... unless it finds that prima facie no valid agreement exists'. The High Court observed that there is no arbitration agreement between Astonfield and Rishabh. After referring to

Sukanya Holdings [*Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531] and the amended Section 8 and Section 45 of the Act, the High Court pointed out the difference in language of Section 8 and Section 45 of the Act. The High Court distinguished between *Sukanya Holdings* [*Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531] and *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and observed that *Sukanya Holdings* [*Sukanya Holdings (P) Ltd.* v. *Jayesh H. Pandya*, (2003) 5 SCC 531] was not overruled by *Chloro Controls* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] "

47. This Court ultimately held that the main purpose of bringing an amendment inter alia in Sections 8 and 11 of the Arbitration Act, 1996 was to minimise the scope of judicial authority, which was to refuse reference to arbitration only on the ground when it *prima facie* finds that there was no valid arbitration agreement. The legislative intent for the amendment was confined to limiting judicial intervention, and once the Court finds that there is a valid arbitration agreement, it has no option but to refer the matter for arbitration. But this would not mean that where the matter itself is non-arbitrable, or is covered by a special legislation such as the Consumer Protection Act, it still has to be referred for arbitration. In para 59 of *Emaar-3*, it was stated as under : (SCC pp. 781-82)

"*59*. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in *National Seeds Corpn.* [*National Seeds Corpn. Ltd.* v. *M. Madhusudhan Reddy*, (2012) 2 SCC 506 : (2012) 1 SCC (Civ) 908] is no more a good law cannot be accepted. The words 'notwithstanding any judgment, decree or order of the Supreme Court or any court' were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall be entitled to look into various facets of the arbitration agreement, subject-matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning."

Emaar-3 though ends with a caveat, where it leaves the option with the party who may have an option to choose between a public or private forum, may consciously choose to go for private fora. This is what it says : (SCC p. 783, para 63)

> "*63*. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration."

48. Thus, in our considered opinion in the case at hand, the Telangana High Court had adopted the right approach in its two impugned orders, where it declined to interfere in the matter and appoint an arbitrator.

49. True in *Emaar-3* this Court had examined the scope of sub-section (1) to Section 8 and not of sub-section (6-A) to Section 11 of the Arbitration Act, 1996. All the same, the reasoning given in the above judgment would be equally applicable to Section 11 application before the High Court. Both the provisions incorporated in Section 8 and Section 11 of the Arbitration Act, 1996 [i.e. sub-section (1) and sub-section (6-A) respectively], seemingly restrict the scope of the examination by the courts concerned, in their reference to arbitration, or appointment of arbitrator, as the case might be, and the language being common, "notwithstanding any judgment, decree or order" places a similar question before the two courts.

50. More importantly, when the Principal Civil Court or a judicial authority such as consumer redressal forum can have powers to dismiss a Section 8 application on the ground of arbitrability of a dispute, will such powers not be available with the High Courts? In *SBP & Co.* v. *Patel Engg. Ltd.*, it was decided by this Court that both Section 8 and Section 11 of the Arbitration Act, 1996 are complementary provisions. This position has been reiterated, in the post-amendment context, in *Vidya Drolia* v. *Durga Trading Corpn.* [*Vidya Drolia* v. *Durga Trading Corpn.*

51. The application under Section 11 of the Arbitration Act, 1996 for appointment of an arbitrator, was not maintainable in the present case, and consequently we uphold the impugned orders dated 19-5-2022 and 25-11-2022, which held this position. We refrain from saying anything further on the matter as the dispute is still *sub judice* before the State Consumer Forum (appellate authority). The appeals are hereby dismissed. No order as to costs."

d) Paragraphs Nos.24 to 28 of the judgement of the Hon'ble Supreme Court in ***NTPC Limited*** (Supra) are relevant and are set out hereunder:

"24. Following the *general rule and the principle* laid down in *Vidya Drolia*, this Court has consistently been holding that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals (P) Ltd.* v. *Galaxy Infra & Engg. (P) Ltd.*, *Sanjiv Prakash* v. *Seema Kukreja*, and *Indian Oil Corpn. Ltd.* v. *NCC Ltd.*, the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the *exception to the general principle* that the Court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in *BSNL* v. *Nortel Networks (India) (P) Ltd.* (hereinafter "*Nortel Networks*") and *Secunderabad Cantonment Board* v. *B. Ramachandraiah & Sons*, arbitration was refused as the claims of the parties were demonstrably time-barred.

Eye of the needle

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable. Explaining this position, flowing from the principles laid down in Vidya Drolia, this Court in a subsequent decision in Nortel Networks held : (Nortel Networks case, SCC p. 764, para 45)

> *"45. … 45.1. … While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute."*

27. The standard of scrutiny to examine the non-arbitrability of a claim is only *prima facie*. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a *primary first review* and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is *bona fide* or not. The *prima facie* scrutiny of the facts must lead to a clear conclusion that there is *not even a vestige of doubt that the claim is non-arbitrable*. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

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

e) Paragraph Nos.150 to 169, 219, 220 and 222 of the judgement of the 7 Judge Bench of the Hon'ble Supreme Court in ***Interplay*** (Supra) are relevant and are set out hereunder:

> **"150.** Section 11 of the Arbitration Act deals with the appointment of arbitrators. It recognises the autonomy of the parties to agree upon a procedure for appointment of an arbitrator or arbitrators. Section 11 requires the intervention of the Court only when there is a deadlock or failure of the parties to follow the appointment procedure. In the process, Section 11 is meant to give effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an arbitrator or arbitrators. In an arbitration with three arbitrators, each party is required to appoint one arbitrator each, and subsequently the two arbitrators will appoint the third arbitrator. Section 11(6) confers powers on the Supreme Court and the High Court, as the case may be, on the failure of the parties to comply with the agreed arbitration procedure. Section 11(6) enlists three possible defects in the appointment procedure, namely : first, a party fails to act as required by the agreed procedure; second, the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure; or third, a person, including an institution, fails to perform any function entrusted to them or under the agreed procedure.
>
> **151.** Section 11(6) has had a long and chequered history before this Court, particularly in respect of the nature of function of the Chief Justice or his designate in the appointment of an arbitrator. In *SBP & Co.* v. *Patel Engg. Ltd.*, a seven-Judge Bench of this Court held that the power exercised by the Chief Justice of India or a Chief Justice of the High Court under Section 11(6) is a judicial power. In the process, this Court analysed the scope of the powers and authority of the Referral Court under Section 11(6). Moreover, this Court noted that Sections 8 and 11 are complementary in nature. Consequently, if the

judicial authority acting under Section 8 has to mandatorily decide the issue of jurisdiction before referring the parties to arbitration, the same standard of scrutiny was also held to be applicable to the reference under Section 11. In conclusion, it was held that the Chief Justice or their designate at the referral stage under Section 11(6) had the right to determine all preliminary issues : (SCC pp. 663-664, para 74)

> "*47*. ... (*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."

152. The extent of judicial interference at the referral stage was scrutinised by a Bench of two Judges of this Court in *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.* This Court held that when the intervention of the Court is sought under Section 11 of the Arbitration Act, the following categories of issues will arise before the Referral Court:

152.1. The issues which the Chief Justice or his designate is bound to decide. These issues were : first, whether the party making the application has approached the appropriate High Court; and second, whether there is a valid arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement;

152.2. The issues which the Chief Justice or his designate may choose to decide or leave them to the decision of the Arbitral Tribunal. These issues were : first, whether the claim is a dead (long-barred) claim or a live claim; and second, whether the parties have concluded the contract/transaction by recording the satisfaction of their mutual rights and obligations or by receiving the final payment without objection; and

152.3. The issues which the Chief Justice or their designate should leave exclusively to the Arbitral Tribunal. These issues were : first, whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration); and second, merits or any claim involved in the arbitration.

153. The decisions of this Court in *Patel Engg.* and *Boghara Polyfab* allowed for greater judicial interference at the pre-arbitral stage. In effect, the Referral Courts were encouraged to conduct mini trials instead of summarily dealing with the preliminary issues. This was also noted by the Law Commission of India, which observed that judicial intervention in the arbitral proceedings is a pervasive problem in India leading to significant delays in the arbitration process. The Law Commission recognised that one of the problems plaguing

implementation of the Arbitration Act was that Section 11 applications were kept pending for years by the Courts. To remedy the situation, the Law Commission proposed changing the then existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court". It also clarified that the power of appointment of arbitrators ought not to be regarded as a judicial act.

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

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

156. The effect and impact of the 2015 Amendment Act was subsequently clarified by this Court. In *Duro Felguera, S.A.* v. *Gangavaram Port Ltd.* Kurien Joseph, J. noted that the intention of the legislature in incorporating Section 11(6-A) was to limit the scope of the Referral Court's jurisdiction to only one aspect — the existence of an arbitration agreement. To determine the existence of an arbitration agreement, the Court only needs to examine whether the underlying contract contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. This Court further held that Section 11(6-A) incorporates the principle of minimal judicial intervention : (SCC p. 765, para 59)

"*59.* The scope of the power under Section 11(6) of the 1996 Act was

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

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

158. In *Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman* , a three-Judge Bench of this Court affirmed the reasoning in *Duro Felguera* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] by observing that the examination under Section 11(6-A) is "confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense". Moreover, it held that the position of law prior to the 2015 Amendment Act, as set forth by the decisions of this Court in *Patel Engg.* and *Boghara Polyfab*, has been legislatively overruled. Thus, this Court gave effect to the intention of the legislature in minimising the role of the Courts at the pre-arbitral stage to the bare minimum.

159. Thereafter, in *Vidya Drolia* , another three-Judge Bench of this Court, affirmed the ruling in *Mayavati Trading* that *Patel Engg.* has been legislatively overruled. In *Vidya Drolia*, one of the issues before this Court was whether the Court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability. This Court began its analysis by holding that an arbitration agreement has to satisfy the mandate of the Contract Act, in addition to satisfying the requirements stipulated under Section 7 of the Arbitration Act to qualify as an agreement.

160. In the course of the decision, one of the questions before this Court in *Vidya Drolia* was the interpretation of the word "existence" as appearing in Section 11. It was held that existence and validity are intertwined. Further, it was observed that an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Therefore, this Court read the

mandate of valid arbitration agreement contained in Section 8 into the mandate of Section 11, that is, "existence of an arbitration agreement".

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

"*145.* Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the duty of an arbitral institution for reference to the Arbitral Tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in *Patel Engg.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] would become applicable."

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

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

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

164. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the Referral Court to look into the *prima facie* existence of a *valid* arbitration agreement, Section 11 confines the Court's jurisdiction to the examination of the *existence* of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the Referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an

Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of *Patel Engg.* where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In *Duro Felguera*, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in *Vidya Drolia* in the context of Section 8 and Section 11 of the Arbitration Act.

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

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

Optifibre Ltd.

168. In *Shin-Etsu* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234] , this Court was called upon to determine the nature of adjudication contemplated by unamended Section 45 of the Arbitration Act when the objection with regards to the arbitration agreement being "null and void, inoperative or incapable of being performed" is raised before a judicial authority. Writing for the majority, B.N. Srikrishna, J. held that Section 45 does not require the judicial authority to give a final determination. The Court observed that : (SCC p. 267, para 74)

> "*74*. There are distinct advantages in veering to the view that Section 45 does not require a final determinative finding by the Court. First, under the Rules of Arbitration of the International Chamber of Commerce (as in force with effect from 1-1-1998), as in the present case, invariably the Arbitral Tribunal is vested with the power to rule upon its own jurisdiction. Even if the Court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration. Since the arbitrator's finding would not be an enforceable award, there is no need to take recourse to the judicial intercession available under Section 48(1)(*a*) of the Act."

169. When the Referral Court renders a prima facie opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award will be bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the Arbitral Tribunal to examine the issue in depth. Such a legal approach will help the Referral Court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the Arbitral Tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement.

219. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:

> "**6. (*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."

> **220.** The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and *not other issues*". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the Referral Court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a time-bound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. Therefore, even though the Law Commission of India Report or the Statement of Objects and Reasons of the 2015 Amendment Act do not specifically refer to *SMS Tea Estates*, it nevertheless does not make any difference to the position of law as has been set out above.

> **222.** The scope of authority of an Arbitral Tribunal under Section 16 is wide because it can deal with issues pertaining to the existence and validity of an arbitration agreement. In his dissenting opinion in *N.N. Global (2)*, Roy, J. correctly observes that since "[s]ection 16 specifically deals with both existence and validity whereas Section 11 only deals with existence, the former should be given more weight." This observation comports with the stated goal of the Arbitration Act to minimise the supervisory role of Courts in the arbitral process. Post the 2015 Amendment Act the Referral Courts are only required to prima facie determine the existence or validity of an arbitration agreement. The basis for such prima facie determination lies in the fact that the Arbitral Tribunal will later have the competence to rule on the issue of existence and validity of the arbitration agreement. Therefore, the separability presumption applies at the referral stage.

f) Paragraph Nos.110 to 114, 117, 118, 122 to 125 of the judgement of the Hon'ble Supreme Court in ***SBI General Insurance Co.Ltd.*** (Supra) are relevant and are set out hereunder:

> **"110.** The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

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

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re : Interplay* (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

> "209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]"
>
> (Emphasis supplied)

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

117. By referring disputes to arbitration and appointing an arbitrator by exercise

of the powers under Section 11, the referral court upholds and gives effect to the original understanding of the contracting parties that the specified disputes shall be resolved by arbitration. Mere appointment of the arbitral tribunal doesn't in any way mean that the referral court is diluting the sanctity of "accord and satisfaction" or is allowing the claimant to walk back on its contractual undertaking. On the contrary, it ensures that the principal of arbitral autonomy is upheld and the legislative intent of minimum judicial interference in arbitral proceedings is given full effect. Once the arbitral tribunal is constituted, it is always open for the defendant to raise the issue of "accord and satisfaction" before it, and only after such an objection is rejected by the arbitral tribunal, that the claims raised by the claimant can be adjudicated.

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

122. Once an arbitration agreement exists between parties, then the option of approaching the civil court becomes unavailable to them. In such a scenario, if the parties seek to raise a dispute, they necessarily have to do so before the arbitral tribunal. The arbitral tribunal, in turn, can only be constituted as per the procedure agreed upon between the parties. However, if there is a failure of the agreed upon procedure, then the duty of appointing the arbitral tribunal falls upon the referral court under Section 11 of the Act, 1996. If the referral court, at this stage, goes beyond the scope of enquiry as provided under the section and examines the issue of "accord and satisfaction", then it would amount to usurpation of the power which the parties had intended to be exercisable by the arbitral tribunal alone and not by the national courts. Such a scenario would impeach arbitral autonomy and would not fit well with the scheme of the Act, 1996.

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

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also

> directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to "accord and satisfaction" and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

27. A perusal of these judgements shows that, prior to the judgement of the Hon'ble Supreme Court in ***Interplay*** (Supra), the scope of interference by the Court in proceedings under Section 11 of the Act was slightly wider. However, the judgement of the Hon'ble Supreme Court in ***Interplay*** (Supra) has narrowed down the scope. In ***Interplay*** (Supra), the Hon'ble Supreme Court has held that the scope of examination under section 11 (6A) should be confined to the existence of an arbitration agreement on the basis of Section 7 of the Act. Similarly, the validity of an arbitration agreement, in view of Section 7 of the Act, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. The Hon'ble Supreme Court has held that this interpretation gives true effect to the doctrine of competence - competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by the Arbitral Tribunal under Section 16 of the Act. The Hon'ble Supreme Court in ***Interplay*** (Supra) accordingly clarified the position of law laid down in ***Vidya Drolia and Others*** (Supra) in the context of Section 8 and Section 11 of the Act in the aforesaid terms. Further, in ***Interplay*** (Supra), the Hon'ble Supreme Court held that, in jurisdictions such as India, which accept the

doctrine of competence - competence, only *prima facie* proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Hon'ble Supreme Court held that the Referral Court is not the appropriate forum to conduct a mini trial by allowing the parties to adduce evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.

28. Further, in ***Interplay*** (Supra), the Hon'ble Supreme Court held that Section 11 (6A) uses the expression "examination of the existence of an arbitration agreement". The purpose of using the word "examination" connotes that the legislature intended that the Referral Court had to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provided that the Arbitral Tribunal can 'rule' on its jurisdiction, including the existence and validity of the arbitration agreement. The Hon'ble Supreme Court further held that a 'ruling' connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court was only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction,

including the issues pertaining to the existence and validity of an arbitration agreement.

29. The aforesaid position in law laid down by ***Interplay*** (Supra) has been confirmed by the subsequent decision of the Hon'ble Supreme Court in ***SBI General Insurance Co.Ltd.*** (Supra) referred to hereinabove.

30. In my view, in the light of the aforesaid position in law laid down by the Hon'ble Supreme Court in ***Interplay*** (Supra), the objections raised by the Respondents cannot be gone into by this Court in the present Application under Section 11 of the Arbitration Act.

31. The objections of the Respondents, namely (i) that the disputes raised by the Applicant are not non-arbitrable as they are barred by the provisions of the SARFAESI Act and the RDDB Act, (ii) that the Applicant had waived its right to arbitration by filing a Summary Suit in this Court and (iii) that allowing of this Application would lead to multiplicity of proceedings, are not objections regarding the existence of an arbitration agreement, on the basis of Section 7 of the Act nor are they objections regarding the validity of the arbitration agreement. In view of Section 7 of the Act, objections as to validity should be restricted to the requirements of

formal validity such as the requirement that the agreement be in writing. Therefore on the basis of the law laid down by the Hon'ble Supreme Court in ***Interplay*** (Supra), I hold that the objections raised by the Respondents cannot be gone into by this Court in this Application under Section 11 of the Act.

32. As laid down by the Hon'ble Supreme Court in ***Interplay*** (Supra), in an Application under Section 11 of the Act, this Court has only to *prima facie* determine whether an Arbitration Agreement exists as required by the provisions of Section 7 of the Act. In the present case, there exists an Arbitration Agreement between the parties as contained in clause (k) of the Sanction Letter dated 19th August 2019. The correspondence between the parties shows that disputes and differences have arisen between the parties. The Applicant has invoked the arbitration agreement contained in the said Sanction Letter dated 19th August 2019 by its Advocate's letter dated 6 April 2021. In these circumstances, I hold that an arbitration agreement exists between the parties and an Arbitrator would have to be appointed in order to arbitrate upon all disputes and differences arising between the parties under the said Sanction Letter dated 19th August 2019. Needless to add, that the Respondents will be at liberty to raise the objections raised by them to the present Application before the Arbitrator.

33. In light of the aforesaid discussion, and for the aforesaid reasons, the following order is passed:

(a) Mr. Shanay Shah, an Advocate practising in this Court, is appointed as the Arbitrator to arbitrate upon all the disputes and differences between the parties under the said Sanction letter dated 19th August 2019. Details of Mr. Shanay Shah, who is appointed as an Arbitrator, are as under:-

Name	:-	Mr. Shanay Shah (Advocate)
Mobile No.	:-	9987483450
Email	:-	shahshanay@hotmail.com
Address	:-	Office No.17-A, 4th Floor, Surya Mahal, Burjorji Bharucha Marg, Fort, Mumbai 400 023.

(b) The Advocates for the Applicant shall intimate the Arbitrator about his appointment within a period of one week from the date of uploading of this order;

(c) In addition, the Office of the Prothonotary and Senior Master of this Court shall also intimate the Arbitrator about his appointment within a period of one week from the date of uploading of this order.

(d) The Arbitrator so appointed to make the disclosure as required under the provisions of the Act within a period of one week from the date of intimation of his appointment;

(e) The Arbitrator shall charge fees as per the Rules framed by this Court in that regard;

34. The Arbitration Application is accordingly disposed of.

35. It is made clear that the Respondents will be at liberty to raise the objections raised by them to the present Application before the arbitrator.

[FIRDOSH P. POONIWALLA, J.]

Case Brief & MCQs on "Tata Capital Limited v. Priyanka Communications (India) Pvt. Ltd." (2024:BHC-OS:16394) is available in the eBook:

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