M/S Eminent Colonizers Private Limited vs Rajasthan Housing Board on 4 February, 2026

2026 INSC 116 REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 753 OF 2026
(@ SLP (C) No.8299 OF 2021)

M/s Eminent Colonizers
Private Limited …Appellant

Versus

Rajasthan Housing Board and Ors. …Respondents

WITH

CIVIL APPEAL NO. 754 OF 2026
(@ SLP (C) No.8331 OF 2021)

JUDGMENT

K.V. Viswanathan, J.

1. Leave granted.

2. The issues that arise in both the appeals are common and they revolve around the interpretation of Clause 23 of the Contract Agreement and, more particularly, the question as to whether a dispute with regard to the existence and validity of the said clause could have been raised before the CHANDRESH Date: 2026.02.04 15:51:36 IST Reason:

arbitrator?

3. The Arbitration and Conciliation (Amendment) Act, 2015 did not apply to the arbitral proceedings concerned in these matters. This aspect of the matter has been dealt with in detail hereinbelow.

FACTS IN CIVIL APPEAL ARISING OUT OF SLP(C) NO.8299 OF 2021: -

4. The present appeal calls in question the correctness of the judgment and order dated 20.02.2020 of the High Court of Judicature for Rajasthan, Bench at Jaipur in D.B. Civil Miscellaneous Application No. 2435 of 2019.

5. On 08.07.2009, the appellant, a sole proprietorship concern, engaged in the supply and construction business was awarded the construction work for the structure of 40 HIG-1 houses

(High-Income Group) and 10 HIG-2 Flats (Stilt + 10 Storey) at Sector-29, Pratap Nagar, Jaipur, Rajasthan by the respondent. A contract agreement bearing No.11/2009- 10 for a total value of Rs. 5,27,00,070/- on a lump sum basis was entered into and the work was to be completed in 12 months' time. It is the claim of the appellant that the work was completed before the stipulated 12 months' deadline for a lower cost of Rs.4,67,72,922/-. The dispute pertained to non-payment of Rs.18,95,123/- towards escalation cost under Clause 45 of the agreement with regard to prices, of labour and material.

6. According to the appellant, since the respondents failed to pay the disputed amount or to alternatively constitute an empowered Standing Committee to adjudicate the dispute in accordance with Clause 23 of the agreement, despite the appellant's application and payment of fee, a Section 11 Application came to be filed in the High Court.

7. Clause 23 reads as under: -

> "Clause-23. Standing Committee for settlement of disputes: If any question, difference or objection, whatsoever shall arise in any way, in connection with or arising out of this instrument, or the meaning of operation of any part thereof, or the right duties or liabilities of either party then, save in so far as the decision of any such matter, as herein before provided has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated, or has been rightly terminated and as regards the rights or obligations of the parties as the result of such termination, shall be referred for decision to the empowered Standing Committee, which would consist of the followings:
>
> i) Administrative Secretary concerned
>
> ii) Finance Secretary or his nominee, not below the rank of Dy.Secretary and/or Chief Accounts Officer.
>
> iii) Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer.
>
> iv) Chief Engineer-cum-Additional Secretary of the concerned department.
>
> v) Chief Engineer concerned (Member Secretary) The Engineer-in-Charge on receipt of application alongwith non refundable prescribed fee, (the fee would be two percent of the amount in dispute, not exceeding Rs.One Lac) from the Contractor shall refer the disputes to the Committee within a period of one month from the date of receipt of application.

Procedure and Application for referring cases or settlement by the Standing Committee shall be as given in Form RPWA 90."

8. A learned Single Judge allowed the Section 11 Application and appointed a retired High Court Judge, Hon'ble Mr. Justice J.R. Goyal, as the sole arbitrator on the following reasoning:-

> "Counsel for applicant submits that although the non- applicants have constituted the Standing Committee but the same being not in terms of Cl.23 of the contract agreement, the applicant raised objections regarding constitution of the committee and that makes the applicant entitled to get the matter referred to the independent Arbitrator.
>
> Reply to the application has been filed and counsel for non-applicants submits that for resolving the dispute between the Contractor and Rajasthan Housing Board, a committee of five officers of Rajasthan Housing Board has been constituted in terms of Cl.23 of the contract agreement and, therefore, the application is not maintainable and deserves to be dismissed. Indisputably, the Committee constituted by Rajasthan Housing Boad, was not in terms of Cl.23 of the contract agreement executed between the parties and it is also not in dispute that this court has territorial jurisdiction to entertain the present application and that certainly seizes the power of the non-applicants and it is within the jurisdiction of this court and the Chief Justice or the Designated Judge to hold jurisdiction to consider the application for appointment of Arbitrator u/S.11(6) of the Act, 1996.
>
> Consequently, the instant application succeeds & is hereby allowed and this court considers it appropriate to appoint Hon'ble Mr. Justice J.R. Goyal (Retd.), T-1-10, Paliwal Park, New Sanghi Farm, Tonk Road, Jaipur as sole Arbitrator to resolve the arbitral dispute. The cost of arbitration & fee of Arbitrator shall be determined in terms of the arbitration manual." This order was accepted by the respondents and it attained finality. It is crucial to note that the order of the learned Single Judge was dated 23.05.2014 which is before the introduction of Section 11(6A) in the Arbitration and Conciliation Act, 1996.

9. Section 11(6) which governed the appointment procedure before the 23.10.2025 amendments and Section 11(6A) which was brought in by the 2015 amendment are both extracted hereinbelow:-

> "11 (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 Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment." w.e.f. 23.10.2015 11(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." (Emphasis supplied) AWARD: -

10. The learned Arbitrator entered upon the reference and, on 15.09.2015, allowed the claim of the appellant to the tune of Rs. 17,10,624.70/- along with interest @ 9% per annum from 13.09.2014 till the date of realization. Dealing with the objection with regard to the validity of the arbitration clause, the learned Arbitrator held that, since no appeal was filed against the order appointing the arbitrator, the objection was not sustainable. The Arbitrator relied upon the judgment of this Court in SBP & Co. vs. Patel Engineering Limited & Anr.1.

ORDER OF THE SECTION 34 COURT: -

11. The respondents filed a Section 34-Application before the Commercial Court No.3, Jaipur seeking to set aside the award. The challenge was pivoted on the point of the non-

existence of an arbitration clause, the argument being that Clause 23 of the Agreement did not have the character of an arbitration clause. The Commercial Court accepted the submission and on the finding that the order of the Section 11 Court does not have precedential value, held that the order (2005) 8 SCC 618 appointing arbitrator was not binding in nature. The Court further held that the order appointing the arbitrator did not pronounce any opinion on the availability or otherwise of the arbitration agreement in Clause 23 and as such it proceeded on the basis that the point had been kept open to be decided by the Arbitrator. It faulted the Arbitrator for not deciding the point of the existence of the arbitration agreement.

12. The Court relied on two judgments of the Rajasthan High Court in Mohammed Arif Contractor Vs. State of Rajasthan & Ors.2 and M/s Marudhar Construction Vs. Rajasthan Housing Board & Ors.3 to hold that Clause 23 of the agreement was not an arbitration clause. So holding, the Commercial Court set aside the award.

APPEAL BEFORE THE HIGH COURT: -

13. The appellant carried the matter in appeal to the High Court. The High Court, while upholding the order of the Commercial Court, maintained that Clause 23 was not an arbitration clause. Aggrieved, the appellant is before us.

S.B. Arbitration Application No.132/2014 CONTENTIONS OF THE PARTIES: -

14. We have heard Mr. Akshat Gupta, learned Counsel for the appellant and Mr. Kailash J. Kashyap, learned Counsel for the respondents, who ably presented their respective points of view. The learned counsel for the appellant contends that the arbitrator was appointed during the SBP and Co. (supra)

regime and before the incorporation of the legislative amendments which came into effect from 23.10.2015.

Learned counsel submitted that the execution of the contract was on 08.07.2009 and the Section 11 order was dated 23.05.2014 and the arbitral award was passed on 15.09.2015.

Learned counsel, by relying on SBP and Co. (supra), submits that under the said regime, the Section 11 court was obliged to determine the "existence" as well as "validity" of an arbitration agreement before passing an order appointing the arbitrator. Learned counsel contrasted the situation with the introduction of Section 11(6A) w.e.f. 23.10.2015 where only the Section 11 court is obliged to determine the existence of arbitration agreement [Section 11(6A) though deleted, the deletion has not yet been notified].

15. Learned counsel submitted that when the Section 11 court appointed the arbitrator, proceeding on the basis that Clause 23 is an arbitration clause and when the said order was accepted by the respondents, the respondents have waived their right to object to the validity of the arbitration clause. Reliance was placed on Section 4 of the A&C Act, 1996.

16. In response, the learned counsel for the respondents contended by referring to the decision of the Commercial Court that an order under Section 11 could not have precedential value and in any event there is no decision on the existence and validity of the arbitration agreement in the order appointing the arbitrator and, hence, the said question was available to be decided by the arbitral tribunal.

17. We have carefully considered the submissions of the learned counsels for the parties and perused the written submissions.

QUESTION FOR CONSIDERATION:-

18. The question that arises for consideration is considering that the appointment of the arbitrator in this case was in SBP & Co. (supra) regime and before the legislative amendments which came into effect from 23.10.2015, were the courts below justified in setting aside the award by holding that the Clause 23 of the contract was not an arbitration agreement?

ANALYSIS AND CONCLUSION:-

19. In view of the categoric holding by the Seven-Judge Bench in SBP (supra), we have no hesitation in holding that the Section 34 court erred in going into the existence and validity of Clause 23. The appointment of the Arbitrator happened prior to the amendments to the Arbitration Act which came into effect from 23.10.2015. The introduction of Section 11(6A) brought a paradigm shift in the scope of jurisdiction of the Section 11 court. Post the amendment, the only enquiry is about the existence of the arbitration clause.

That is very well settled.

20. However, the present case arose during the SBP (supra) regime. It will be useful to extract relevant passages from SBP (supra) to understand the scope of the Section 11 court.

"8. We will first consider the question, as we see it. On a plain understanding of the relevant provisions of the Act, it is seen that in a case where there is an arbitration agreement, a dispute has arisen and one of the parties had invoked the agreed procedure for appointment of an arbitrator and the other party has not cooperated, the party seeking an arbitration, could approach the Chief Justice of the High Court if it is an internal arbitration or of the Supreme Court if it is an international arbitration to have an arbitrator or Arbitral Tribunal appointed. The Chief Justice, when so requested, could appoint an arbitrator or Arbitral Tribunal depending on the nature of the agreement between the parties and after satisfying himself that the conditions for appointment of an arbitrator under sub-section (6) of Section 11 do exist. The Chief Justice could designate another person or institution to take the necessary measures. The Chief Justice has also to have the qualification of the arbitrators in mind before choosing the arbitrator. An Arbitral Tribunal so constituted, in terms of Section 16 of the Act, has the right to decide whether it has jurisdiction to proceed with the arbitration, whether there was any agreement between the parties and the other matters referred to therein.

9. Normally, any tribunal or authority conferred with a power to act under a statute, has the jurisdiction to satisfy itself that the conditions for the exercise of that power existed and that the case calls for the exercise of that power. Such an adjudication relating to its own jurisdiction which could be called a decision on jurisdictional facts, is not generally final, unless it is made so by the Act constituting the tribunal. Here, sub- section (7) of Section 11 has given a finality to the decisions taken by the Chief Justice or any person or institution designated by him in respect of matters falling under sub-sections (4), (5) and (6) of Section 11. Once a statute creates an authority, confers on it power to adjudicate and makes its decision final on matters to be decided by it, normally, that decision cannot be said to be a purely administrative decision. It is really a decision on its own jurisdiction for the exercise of the power conferred by the statute or to perform the duties imposed by the statute. Unless the authority satisfies itself that the conditions for exercise of its power exist, it could not accede to a request made to it for the exercise of the conferred power. While exercising the power or performing the duty under Section 11(6) of the Act, the Chief Justice has to consider whether the conditions laid down by the section for the exercise of that power or the performance of that duty exist. Therefore, unaided by authorities and going by general principles, it appears to us that while functioning under Section 11(6) of the Act, a Chief Justice or the person or institution designated by him, is bound to decide whether he has jurisdiction, whether there is an arbitration agreement, whether the applicant before him is a party, whether the conditions for exercise of the power have been fulfilled, and if an arbitrator is to be appointed, who is the fit person, in terms of the provision. Section 11(7) makes his decision on the matters entrusted to him, final.

12. ..... We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

20. ..... But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Rly. what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

25. ... ... While constituting an Arbitral Tribunal, on the scheme of the Act, the Chief Justice has to consider whether he as the Chief Justice has jurisdiction in relation to the contract, whether there was an arbitration agreement in terms of Section 7 of the Act and whether the person before him with the request, is a party to the arbitration agreement. On coming to a conclusion on these aspects, he has to enquire whether the conditions for exercise of his power under Section 11(6) of the Act exist in the case and only on being satisfied in that behalf, could he appoint an arbitrator or an Arbitral Tribunal on the basis of the request. It is difficult to say that when one of the parties raises an objection that there is no arbitration agreement, raises an objection that the person who has come forward with a request is not a party to the arbitration agreement, the Chief Justice can come to a conclusion on those objections without following an adjudicatory process. Can he constitute an Arbitral Tribunal, without considering these questions? If he can do so, why should such a function be entrusted to a high judicial authority like the Chief Justice. Similarly, when the party raises an objection that the conditions for exercise of the power under Section 11(6) of the Act are not fulfilled and the Chief Justice comes to the conclusion that they have been fulfilled, it is difficult to say that he was not adjudicating on a dispute between the parties and was merely passing an administrative order. It is also not correct to say that by the mere constitution of an Arbitral Tribunal the rights of the parties are not affected. Dragging a party to an arbitration when there existed no arbitration agreement or when there existed no arbitrable dispute, can certainly affect the right of that party, and, even on monetary terms, impose on him a serious liability for meeting the expenses of the arbitration, even if it be the preliminary expenses and his objection is upheld by the Arbitral Tribunal. Therefore, it is not possible to accept the position that no adjudication is involved in the constitution of an Arbitral Tribunal.

30. ... ... We also feel that adequate attention was not paid to the requirement of the Chief Justice having to decide that there is an arbitration agreement in terms of Section 7 of the Act before he could exercise his power under Section 11(6) of the Act and its implication. The aspect, whether

there was an arbitration agreement, was not merely a jurisdictional fact for commencing the arbitration itself, but it was also a jurisdictional fact for appointing an arbitrator on a motion under Section 11(6) of the Act, was not kept in view. A Chief Justice could appoint an arbitrator in exercise of his power only if there existed an arbitration agreement and without holding that there was an agreement, it would not be open to him to appoint an arbitrator saying that he was appointing an arbitrator since he has been moved in that behalf and the applicant before him asserts that there is an arbitration agreement. Acceptance of such an argument, with great respect, would reduce the high judicial authority entrusted with the power to appoint an arbitrator, an automaton and subservient to the Arbitral Tribunal which he himself brings into existence. .....

39. It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection..... 47 (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.

(vii) Since an order passed by the Chief Justice of the High Court or by the designated Judge of that Court is a judicial order, an appeal will lie against that order only under Article 136 of the Constitution to the Supreme Court." (Emphasis supplied)

21. This principle was reiterated in State of West Bengal vs. Sarkar & Sarkar4.

"8. It was the vehement contention of the learned counsel for the appellant based on a series of judgments rendered by this Court that Clause 12 (extracted above) was not an arbitral clause and that the arbitrator as well as the High Court had erred in determining the same.

9. The learned counsel for the respondent Sarkar & Sarkar contested the claim of the appellant. It was submitted that the appellant could not be permitted even to raise the instant plea so as to assail the order passed either by the arbitrator (on 15-1-2004) or by the High Court (on 16-5- 2006). The instant submission of the learned counsel for the respondent was premised on the judgment

rendered by this Court in SBP & Co. v. Patel Engg. Ltd. Our pointed attention was drawn to the conclusions drawn by the Constitution Bench in the above judgment in para 20. Para 20 is reproduced below: (SCC pp. 649-50) "20. Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This (2018) 12 SCC 736 can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Railway what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act."

10. It was the submission of the learned counsel for the respondent that proceedings could not have been entertained by the arbitrator under Section 16 of the Arbitration Act in the present controversy because by the orders of the High Court dated 24-5-2002 and 26-9- 2002 (extracted above), the appointment of the arbitrator was made in exercise of the powers vested in the High Court under Section 11 of the Arbitration Act. The factual position depicted hereinabove as also the orders referred to hereinabove, leave no room for doubt that Justice (Retired) S.S. Ganguly was actually appointed as an arbitrator by the High Court in exercise of the powers vested in the High Court under Section 11 of the Arbitration Act. That being the position, the learned counsel for the respondent is fully justified in her submission that the said order could not be tested by the arbitrator while considering the claim raised by the appellant State of West Bengal under Section 16 of the Arbitration Act. Thus viewed, irrespective of whether Clause 12 extracted hereinabove postulated the adjudication of dispute between the parties through an arbitrator, it is now not open to the appellant before this Court to raise a challenge to the order passed by the High Court appointing an arbitrator." (emphasis supplied)

22. As held in SBP (supra), a Section 11 court was bound to decide whether there was an arbitration agreement and further that such a finding on the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceedings. The only exception being when the order appointing the Arbitrator is challenged before

this Court. The highlighted portion of SBP (supra), as extracted above, puts this matter beyond any controversy. In the present case, the order appointing the Arbitrator attained finality with no challenge being thrown. The respondents accepted the order and did not challenge the appointment in this Court. We have extracted the findings of the order appointing the Arbitrator. The parties proceeded on the basis that Clause 23 was an arbitration clause and in this scenario, the only conclusion possible is that though not very categoric there is an implied holding in the order appointing the Arbitrator about the existence and validity of the arbitration agreement. For if it were not so, the appointment could not have been and would not have been made. The fact that the respondents accepted the order and did not challenge it only puts the matter beyond any pale of controversy. The further finding of the Commercial Court in the Section 34 application that the order of the Section 11 court did not have any precedential value and hence the order will not be binding is in the teeth of the judgment in SBP (supra).

LEGAL POSITION FROM 23.10.2015: -

23. The scenario would have been totally different if the 2015 (Amendment) Act had applied to the arbitral proceedings. The scope of the inquiry has been clarified in In re Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 5, in the following terms : -

> "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.

(2024) 6 SCC 1 [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

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

Gangavaram Port Ltd., (2017) 9 SCC 729, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the

underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 in the context of Section 8 and Section 11 of the Arbitration Act.

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

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." [Emphasis supplied] The above is set out only to bring out the contrast.

Section 26 of the 2015 Amendment Act also made this very explicit.

"26. Act not to apply to pending arbitral proceedings.– Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act"
PRECEDENT AND RES JUDICATA – DISTINCTION: -

> 24. There is a clear conceptual distinction between precedent and res judicata. Salmond on Jurisprudence P.J. Fitzgerald (12th Edition) page 141 states "a judicial precedent speaks in England with authority; it is not merely evidence of the law but a source of it, and the courts are bound to follow the law that is so established". A

decision between two parties which sets out a principle of law will operate as a precedent for disputes between two other parties too. A precedent operates in rem. In contrast, a res judicata operates in personam between the same parties either in the later stage of the same litigation between them or in a different litigation between them. That is the essential distinction between the two.

25. This Court in State of Rajasthan vs. Nemi Chand Mahela and Others6, held as under:-

"11. The learned counsel for the petitioners had drawn our attention to para 22 of the decision in Manmohan Sharma case [Manmohan Sharma v. State of Rajasthan, (2014) 5 SCC 782 which refers to the case of one Danveer Singh whose writ petition had been allowed [Danveer Singh v. Rural Development & Panchyati Raj Deptt., WP (C) No. 2200 of 2000 sub nom Jayanti Sharma v. Rural Development & Panchyati Raj Deptt., WP (C) No. 1646 of 2000, order dated 26-2-2001 (Raj)] and the order had attained finality as it was not challenged before the Division Bench or before the Supreme Court. Termination of services in the case of Danveer Singh, it was accordingly held, was not justified and in accordance with law. The reasoning given in paras 22 and 23 in Manmohan Sharma case [Manmohan Sharma v. State of Rajasthan, (2014) 5 SCC 782 relating to the case of Danveer Singh would reflect the difference between the doctrine of res judicata and law of precedent. Res judicata operates in personam i.e. the matter in issue between the same parties in the former litigation, while law of precedent operates in rem i.e. the law once settled is binding on all (2019) 14 SCC 179 under the jurisdiction of the High Court and the Supreme Court. Res judicata binds the parties to the proceedings for the reason that there should be an end to the litigation and therefore, subsequent proceeding inter se parties to the litigation is barred. Therefore, law of res judicata concerns the same matter, while law of precedent concerns application of law in a similar issue. In res judicata, the correctness of the decision is normally immaterial and it does not matter whether the previous decision was right or wrong, unless the erroneous determination relates to the jurisdictional matter of that body. [See Makhija Construction & Engg. (P) Ltd. v. Indore Development Authority, (2005) 6 SCC 304]]"

26. The Commercial Court to hold against the appellant relied on two judgments of the Rajasthan High Court, namely, Mohammed Arif Contractor (supra) and M/s Marudhar Construction (supra). The finding of the Commercial Court was that in Mohammed Arif (supra) (judgment dated 08.04.2015) a learned single judge, while adjudicating a Section 11 Application, held an identical Clause 23 to be not an arbitration clause. M/s Marudhar Construction (supra) was a short order dated 06.05.2016 in a Section 11 Application which followed Mohammed Arif (supra).

27. The said judgments will not enure to the support of the respondents. In the present case, while adjudicating a Section 11 Application a learned single judge, who had jurisdiction, interpreted the

contractual document and appointed an arbitrator. We have already held hereinabove that in the said order though the finding is not categoric, there is an implied holding about the existence and validity of the arbitration agreement. As held in Nemi Chand (supra) the correctness of the decision is immaterial and it did not matter whether the previous decision was right or wrong unless their erroneous determination relates to the jurisdiction of the body.

28. In an erudite judgment, speaking for this Court Rohinton Fali Nariman, J. in Canara Bank vs. N.G. Subbaraya Setty and Another7, summarised the principles thus:-

> "34. Given the conspectus of authorities that have been referred to by us hereinabove, the law on the subject may be stated as follows:
>
> 34.1. The general rule is that all issues that arise directly and substantially in a former suit or proceeding between the same parties are res judicata in a subsequent suit or (2018) 16 SCC 228 proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law.

34.2. To this general proposition of law, there are certain exceptions when it comes to issues of law:

> 34.2.1. Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the court, an erroneous decision in the former suit or proceeding is not res judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a court competent to try such suit. When read with Explanation I to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier. An erroneous decision as to the jurisdiction of a court cannot clothe that court with jurisdiction where it has none. Obviously, a civil court cannot send a person to jail for an offence committed under the Penal Code. If it does so, such a judgment would not bind a Magistrate and/or Sessions Court in a subsequent proceeding between the same parties, where the Magistrate sentences the same person for the same offence under the Penal Code.

Equally, a civil court cannot decide a suit between a landlord and a tenant arising out of the rights claimed under a Rent Act, where the Rent Act clothes a special court with jurisdiction to decide such suits. As an example, under Section 28 of the Bombay Rent Act, 1947, the Small Cause Court has exclusive jurisdiction to hear and decide proceedings between a landlord and a tenant in respect of rights which arise out of the Bombay Rent Act, and no other court has jurisdiction to embark upon the same. In this case, even though the civil court, in the absence of the statutory bar created by the Rent Act, would have jurisdiction to decide such suits, it is the statutory bar created by the Rent Act that must be given effect to as a matter of public policy. [See, Natraj Studios (P) Ltd. v. Navrang

Studios at SCR p. 482]. An erroneous decision clothing the civil court with jurisdiction to embark upon a suit filed by a landlord against a tenant, in respect of rights claimed under the Bombay Rent Act, would, therefore, not operate as res judicata in a subsequent suit filed before the Small Cause Court between the same parties in respect of the same matter directly and substantially in issue in the former suit.

34.2.2. An issue of law which arises between the same parties in a subsequent suit or proceeding is not res judicata if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter partes), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. We have seen how, in Natraj Studios, it is the public policy of the statutory prohibition contained in Section 28 of the Bombay Rent Act that has to be given effect to. Likewise, the public policy contained in other statutory prohibitions, which need not necessarily go to jurisdiction of a court, must equally be given effect to, as otherwise special principles of law are fastened upon parties when special considerations relating to public policy mandate that this cannot be done.

34.3. Another exception to this general rule follows from the matter in issue being an issue of law different from that in the previous suit or proceeding. This can happen when the issue of law in the second suit or proceeding is based on different facts from the matter directly and substantially in issue in the first suit or proceeding. Equally, where the law is altered by a competent authority since the earlier decision, the matter in issue in the subsequent suit or proceeding is not the same as in the previous suit or proceeding, because the law to be interpreted is different."

29. The learned single judge, in the present case, when he entertained a Section 11 Application and interpreted a contractual document had jurisdiction to do so under Section 11. Right or wrong, that decision should bind. The respondents did not carry the order appointing an arbitrator in appeal. In view of the same, the holding in SBP (supra), squarely applies and on the present facts the respondents could not have challenged the existence and validity of the arbitration clause before the arbitrator. For the very same reason, the judgments in Mohammed Arif Contractor (supra) and M/s Marudhar Construction (supra) can have no application to the present facts.

30. In the present case, the order appointing the Arbitrator read with the law laid down in SBP (supra), clearly operates as a res judicata, insofar as the existence of and validity of the arbitration agreement between the parties is concerned.

In the SBP (supra) regime, this was the legal position.

31. SBP (supra) also puts the matter beyond any controversy by holding that not only will the parties be bound before the Arbitrator with regard to the finding on existence and validity of the arbitration agreement they will also be bound during the subsequent stages of the proceedings which will

include the Section 34 application stage, the Section 37 appeal stage and before this Court. The Commercial Court had missed the conceptual distinction between “Precedent” and “Res judicata” and consequently fell into an error.

CONCLUSION AND DIRECTIONS: -

32. In view of what we have held hereinabove, the Commercial Court and the High Court clearly erred in going into the existence and validity of Clause 23 and pronouncing that the said clause was not an arbitration clause. We, accordingly, set aside the judgment of the High Court dated 20.02.2020 in D.B. Civil Miscellaneous Appeal No. 2435 of 2019. The appeal stands allowed. The result will be that the proceedings before the Commercial Court in Arbitration Case No. 221 of 2018 will stand set aside and the matter is remitted to the Commercial Court, Judge No.3, Jaipur for hearing Arbitration Case No. 221 of 2018 on grounds other than what has been concluded hereinabove. We say so for the reason that while allowing the Section 34 application on the ground that Section 23 was not an arbitration clause, the Commercial Court recorded that the other objections were not considered. It is only fair that the matter should be remitted for consideration of the other objections.

Considering the fact that the Award is of the year 2015, we direct the Commercial Court No. 3 to dispose of Arbitration Case No. 221 of 2018 within a period of three months from the date of receipt of this judgment. Parties to bear their own costs.

FACTS IN CIVIL APPEAL ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 8331 of 2021:-

33. Leave granted.

34. On 11.10.2007, the appellant was awarded work by the respondents for construction of the structure of 180 LIG skeleton flats (stilt + 10 storey) at Sector 29, Pratap Nagar, Sanganer, Jaipur, Rajasthan and entered into a contract agreement bearing No. 207/2007-08. The contract was for a lump sum value of Rs.4,58,05,217.45. The date of commencement was agreed to be 20.10.2007 and completion was 19.07.2008. Additional work to the tune of Rs.

64,01,689/- was awarded. The appellant raised an Escalation Bill amounting to Rs.55,77,080/- under Clause 45 of the Agreement in order to recover the prices of labour and material which had arisen during the period of completion of the construction work. Since the Escalation Bill was not paid and also penalty levied of Rs.2.5 lakhs was not refunded and claiming that the respondents failed to constitute an empowered Standing Committee under Clause 23 of the Agreement, a Section 11 application came to be filed. By an order of 23.05.2014, a learned Single Judge held that since indisputably the Committee constituted was not in terms of Clause 23, appointed Mr. Justice Anoop Chand Goyal (Retd.) as the sole Arbitrator. The sole Arbitrator entered upon the reference and passed an Award on 25.02.2016 directing refund of Rs. 2.50 lakhs as penalty and awarding escalation charge to the tune of Rs.5,09,468/-. Further interest @ 10% from 13.08.2010 was

awarded. Even though the Award was passed on 25.02.2016, the arbitral proceedings commenced before the commencement of the Amendment Act of 2015.

Before the Arbitrator, the respondents contended that Clause 23 of the Agreement was not an arbitration clause. The arbitrator held that since the Section 11 application stood allowed, the Arbitral Tribunal cannot sit over the order of the High Court.

35. The respondents filed a Section 34 application challenging the award. The Commercial Court, by relying on the judgments of the Rajasthan High Court in Mohd. Arif Contractor (Supra) and Marudhar Construction (Supra) held that Clause 23 was not an arbitration clause. In appeal before the High Court, the findings of the Commercial Court were confirmed.

36. Our reasoning and conclusion in Civil Appeal arising out of Special Leave Petition (C) No. 8299 of 2021 fully applies to the present set of facts. Appling the same reasoning, the appeal would stand allowed. The order of the High Court dated 20.02.2020 in D.B. Civil Miscellaneous Appeal No. 796 of 2019 stands set aside. The consequence will be that the matter will stand remitted to the Commercial Court, Judge No.3, Jaipur in hearing Arbitration Case No. 114 of 2018 on grounds other than what has been concluded hereinabove. We say so for the reason that while allowing the Section 34 application on the ground that Section 23 was not an arbitration clause, the Commercial Court recorded that the other objections are not considered. In view of our holding hereinabove, it is only fair that the matter should be remitted for consideration of other objections. Considering the fact that the Award is of the year 2016, we direct the Commercial Court No.3 to dispose of Arbitration Case No. 114 of 2018 within a period of three months from the date of receipt of this judgment. Parties to bear their own costs.

37. Both the appeals are disposed of in the above terms.

.....J. [J.B. PARDIWALA] .....J. [K. V. VISWANATHAN] New Delhi;

4th February, 2026