REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2402 OF 2019

VIDYA DROLIA AND OTHERS ..... APPELLANT(S)

VERSUS

DURGA TRADING CORPORATION ..... RESPONDENT(S)

W I T H

SPECIAL LEAVE PETITION (CIVIL) NOS. 5605-5606 OF 2019

AND

SPECIAL LEAVE PETITION NO. 11877 OF 2020

J U D G M E N T

SANJIV KHANNA, J.

This judgment decides the reference to three Judges made vide order dated 28th February, 2019 in Civil Appeal No. 2402 of 2019 titled ***Vidya Drolia and Others*** v. ***Durga Trading Corporation***,[1] as it doubts the legal ratio expressed in ***Himangni Enterprises*** v. ***Kamaljeet Singh Ahluwalia***[2] that landlord-tenant disputes governed by the provisions of the Transfer of Property

1 2019 SCC OnLine SC 358
2 (2017) 10 SCC 706

Act, 1882, are not arbitrable as this would be contrary to public policy.

2. A deeper consideration of the order of reference reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

(i) meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) the conundrum – "who decides" – whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short, the 'Arbitration Act').

3. We are not reproducing and examining the factual matrix, as we are only answering the legal issues raised. However, we would refer, in brief, to the legal reasoning and the ratio in ***Himangni***

Enterprises and the counter view expressed in the order of reference in ***Vidya Drolia***.

4. ***Himangni Enterprises*** upheld the decision of the High Court and the District Court rejecting the application filed by the defendant-tenant under Section 8 of the Arbitration Act in a civil suit seeking its eviction from a shop in a commercial complex in New Delhi. The suit was also for the recovery of arrears of rent and permanent injunction. The tenancy in question was not protected under the rent control legislation and the rights and obligations were governed by the Transfer of Property Act. Two Judges of this Court held that the issue of non-arbitrability is no longer *res integra* as it stood answered by decisions in ***Natraj Studios (P) Ltd.*** v. ***Navrang Studios***[3] and ***Booz Allen & Hamilton Inc.*** v. ***SBI Home Finance Ltd.***[4] In ***Natraj Studios (P) Ltd.***, wherein an application under Section 8 of the Arbitration Act, 1940 was dismissed as the tenancy was protected under the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947, it was observed that on broader consideration of public policy, the arbitrator lacked jurisdiction to decide the question whether the licensee-landlord was entitled to seek possession. The dispute could be exclusively

3 (1981) 1 SCC 523
4 (2011) 5 SCC 532: (2011) 2 SCC (Civ) 781

decided by the Court of Small Causes, which alone had jurisdiction. In ***Booz Allen & Hamilton Inc.***, it was held that in eviction or tenancy matters governed by special statutes and where the tenant enjoys statutory protection, only the specified court has been conferred jurisdiction. ***Himangni Enterprises*** relying on the said ratios holds that though the Delhi Rent Act is not applicable, it does not follow that the Arbitration Act would be applicable so as to confer jurisdiction on the arbitrator. Even in cases of tenancies governed by the Transfer of Property Act, the dispute would be triable by the civil court and not by the arbitrator. The exemption from the applicability of the Rent Act could be withdrawn and thereupon the rights would be governed by the rent control legislation.

5. In ***Vidya Drolia***, another division bench referring to Section 11(6-A) has observed that the referral stage requirement is to only examine 'existence of an arbitration agreement' and not validity of the arbitration agreement. 246th Report of the Law Commission of India had suggested twin examination whether the agreement 'exists' or is 'null and void', *albeit* the Section 11(6-A), as enacted, requires 'existence of an arbitration agreement', and the

prerequisite that the arbitration agreement should not be 'null and void' was deliberately omitted. The wording of Section 11(6-A) was contrasted with Section 16(1) to draw distinction between 'validity of an arbitration agreement' and 'existence of an arbitration agreement'. Reference was made to observations of Kurian Joseph, J. in ***Duro Felguera, S.A*** v. ***Gangavaram Port Limited***,[5] to the effect that the scope of Section 11(6-A) is limited, only to see whether an arbitration agreement exists – nothing more, nothing less. The legislative policy and purpose are to essentially minimize judicial intervention at the appointment stage. Referring to Sections 111, 114 and 114A of the Transfer of Property Act, it is observed that there is nothing in this Act and law to show that a dispute relating to the determination of lease, arrears of rent etc. cannot be decided by an arbitrator. The grounds predicated on public policy could be raised before the arbitrator as they could be raised before the court. The arbitrator could well abide by the provisions of Sections 114 and 114A, and apply the public policy considerations for the protection of tenants as a class. Referring to ***Booz Allen & Hamilton Inc.***, it was observed that the right *in rem* is a right exercisable against the world at large and is not amenable to

5 (2017) 9 SCC 729

arbitration, whereas in case of rights in *personam* an interest is protected against a specific individual, and is referable to arbitration. Further, subordinate rights in *personam* arising from rights *in rem* have always been considered to be arbitrable. Decision in ***Natraj Studios (P) Ltd.*** was distinguishable, as the rent control legislation being applicable, the tenancy disputes were to be exclusively decided by the small cause court in Bombay. The legislation had provided that no other court would have jurisdiction to entertain any suit, proceedings or deal with such claim or questions. The exception in the form of non-arbitrable landlord-tenant disputes, as per ***Booz Allen & Hamilton Inc.***, was confined only to those cases/matters governed by: (i) special statues, (ii) where the tenant enjoys statutory protection and (iii) where only specific courts are conferred jurisdiction to decide disputes. Transfer of Property Act does not negate arbitrability. In ***Olympus Superstructures Pvt. Ltd.*** v. ***Meena Vijay Khetan and Others***,[6] it was held that there is no prohibition in the Specific Relief Act, 1963 for referring disputes relating to specific performance of contracts to arbitration. Equally, the discretion to refuse or grant specific performance would not militate against arbitrability. Reference was

6 (1999) 5 SCC 651

made to ***Vimal Kishor Shah and Others*** v. ***Jayesh Dinesh Shah and Other***,[7] which had referred to ***Dhulabhai Etc.*** v. ***State of Madhya Pradesh and Another***,[8] in the context of whether the disputes under the Indian Trusts Act, 1882 were arbitrable. The disputes under the Trusts Act were held to be non-arbitrable by necessary implication, as the Trusts Act had conferred specific powers on the principal judge of the civil court, which powers an arbitrator could not exercise. The judgment in ***Vimal Kishor Shah*** was followed by another Division Bench in ***Emaar MGF Land Limited*** v. ***Aftab Singh***,[9] a case relating to the Consumer Protection Act, 1986. Reasoning that the exemption from rent control legislation can be withdrawn and thereupon Arbitration Act would not apply, it was observed, was not a valid justification and ground to hold that the subject matter was not arbitrable.

6. Learned counsel for the parties have primarily relied upon the reasoning given in ***Himangni Enterprises*** and ***Vidya Drolia*** and have referred to other case law which we would subsequently examine. To avoid prolixity and repetition, we are not reproducing the respective contentions and arguments, as the same would be

7 (2016) 8 SCC 788
8 (1968) 3 SCR 662
9 (2019) 12 SCC 751

dealt with and appreciated during the course of our reasoning. However, we acknowledge that the oral submissions and compilations have been of immense help. Similarly, scholarly writings in books and articles expressing diverse views on non-arbitrability and *Who Decides Non-arbitrability* have facilitated us unclog the legal and jurisprudential nuances and contradictions to try and resolve the issues in the context of domestic law of arbitration in India.

7. At the outset we begin with the caveat that this judgment does not examine and interpret the transnational provisions of arbitration in Part II of the Arbitration Act.

Non-Arbitrability

8. Non-arbitrability is basic for arbitration as it relates to the very jurisdiction of the arbitral tribunal. An arbitral tribunal may lack jurisdiction for several reasons. Non-arbitrability has multiple meanings. ***Booz Allen & Hamilton Inc.*** refers to three facets of non-arbitrability, namely: -

> "(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

> (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.
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> (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such a joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

John J. Barcelo III, in his paper titled *'Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective'*,[10] in the context of transnational commercial transactions, has divided facets relating to non-arbitrability into seven categories:

> "Stage 1# is crucial concerning whether arbitration is allowed to go forward efficaciously or is obstructed by court intervention. At Stage 1, a party opposing arbitration may raise any of a series of legal issues requiring court, rather than arbitrator, decision. These may include any or all of the following claims: (1) the container contract is invalid (for a reason that would not directly invalidate the arbitration clause); (2) no arbitration agreement came into existence between the parties; (3) an existing arbitration agreement is either

10 Vanderbilt Journal of Transnational Law, vol. 36, no.4, October 2003, p. 1115-1136

> formally invalid (for example, not in writing) or materially invalid (for example, violative of mandatory law); (4) a disputed issue is not within the scope of the arbitration agreement; (5) mandatory law prohibits a disputed issue, though within the scope of the parties' arbitration agreement, to be arbitrated (a special type of material invalidity respecting a specific issue fraught with public policy concerns, such as (formerly) antitrust or securities fraud); (6) some precondition for permissible arbitration has not been met (for example, a time-limit on initiating arbitration); (7) the party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right."
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> **(#Stage 1** is the referral stage**.)**

9. Validity of the legal ratio in ***Himangni Enterprises*** cannot be decided without examining when a subject matter or dispute is non-arbitrable. Understanding of the different facets of non-arbitrability is important as it would help us appreciate the consequences. This would assist in deciding whether the court or the arbitral tribunal has the jurisdiction to decide the particular facet of non-arbitrability. The jurisdiction could well depend on the nature and type of the non-arbitrability alleged. The order of reference in ***Vidya Drolia*** draws distinction for the purpose of exercise of jurisdiction between non-arbitrability on account of existence and non-arbitrability on account of the validity of an arbitration agreement.

10. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum. Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The expression 'arbitration agreement' has been defined in clause (d) of sub-section (2) to mean an agreement as defined in Section 7 of the Arbitration Act. Section 7 of the Arbitration Act reads:

> "**7. Arbitration agreement. —** (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
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> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
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> (3) An arbitration agreement shall be in writing.
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> (4) An arbitration agreement is in writing if it is contained in—
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> (a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defense in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

11. The term 'agreement' is not defined in the Arbitration Act, *albeit* it is defined in Section 10 of the Indian Contract Act, 1872 (for short, the 'Contract Act'),[11] as contracts made by free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not thereby expressly declared to be void. Section 10 of the Contract Act also stipulates that aforesaid requirements shall not affect any law in force in India (and not expressly repealed) by which a contract is required to be made in writing, in presence of witnesses or any law relating to registration of documents. Thus, an arbitration agreement should satisfy the mandate of Section 10 of the Contract Act, in addition to satisfying

11 **10. What agreements are contracts. —** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

other requirements stipulated in the Section 7 of the Arbitration Act. Sections 12 to 18 of the Contract Act state when a person can be said to be of a sound mind for the purpose of contracting and define the expressions ‘consent’, ‘free consent’, ‘coercion’, ‘undue influence’, ‘fraud’ and ‘misrepresentation’. Sections 19 to 23 relate to voidability of agreements, the power to set aside contracts induced by undue influence, when both the parties are under mistake as to a matter of fact, effect of a mistake as to the law, effect of a mistake by one party as to a matter of fact and what considerations and objects are lawful and unlawful. Sections 24 to 30 relate to void contracts and Sections 26 and 27 therein state that agreements in restraint of marriage and agreements in restraint of trade, respectively are void, *albeit* Explanation (1) to Section 27 saves agreements for not carrying out the business of which goodwill is sold. Section 28 of the Contract Act states that agreements in restraint of legal proceedings are void, but Explanation (1) specifically saves contracts by which two or more persons agree that any dispute, or one which may arise between them, in respect of any subject or class of subjects shall be referred to arbitration. Arbitration agreement must satisfy the objective mandates of the law of contract to qualify as an

agreement. Clauses (g) and (h) of Section 2 of the Contract Act state that an agreement not enforceable in law is void and an agreement enforceable in law is a contract. As a sequitur, it follows that an arbitration agreement that is not enforceable in law is void and not legally valid.

12. Sub-section (1) to Section 7 ordains that the arbitration agreement should be in respect of disputes arising from a defined legal relationship, whether contractual or not. The expression 'legal relationship', again not defined in the Arbitration Act, means a relationship which gives rise to legal obligations and duties and, therefore, confers a right. These rights may be contractual or even non-contractual.[12] Non-contractual disputes would require a separate or submission arbitration agreement based on the cause of action arising in tort, restitution, breach of statutory duty or some other non-contractual cause of action.[13]

12 Legal relationship will be normally followed by certain immediate or remote consequences in the form of action or non-action by the judicial and executive agents of the society as distinct from purely private affairs or other events which have nothing to do with law. Legal relationship exists in every situation that is or may be procedurally asserted for a declaration or denial of a right or for imposition of a sanction or any other purpose within the scope of adjudicative action. In actual practice, objection regarding defined legal relationship is seldom raised and tested.

13 Russell on Arbitration, 24th Edition # 2-004

13. Sub-section (2) to Section 7 is of some importance as it states that an arbitration clause may be in the form of a separate agreement or form a part of the underlying or another contract. Clause (3) of Section 7 of the Arbitration Act states that the arbitration agreement shall be in writing, that is, the agreement should be evidenced in writing. By clause (4) the term 'arbitration agreement in writing' would include any agreement by exchange of letters, telegrams, electronic mails or communications which provide a record of the agreement or exchange of statements of claim and defence in which one party claims the existence of the agreement and the other party does not deny it. Sub-section (5) to Section 7 states that reference in a contract to a document containing an arbitration clause would constitute a valid arbitration agreement if the contract is in writing and reference is made to the arbitration clause that forms a part of the contract.

14. Questions as to the existence of an arbitration agreement also arise when a party opposing the reference raises plea of novation of contract by entering into a new contract in substitution of the original or 'accord and satisfaction' by acceptance of modified obligations in discharge of the contract by performance or simple

termination by express or implied consent. Similar plea of discharge can be raised opposing an application for reference on the ground that the claim is long barred and dead or there are no outstanding disputes as the parties have accepted part performance or have absolved the other side from performance, fully or partly, on account of frustration or otherwise. The contention is that once the original contract stands extinguished, abandoned, repudiated or substituted, the arbitration clause in the underlying/original contract perishes with it.

15. Arbitration being a matter of contract, the parties are entitled to fix boundaries as to confer and limit the jurisdiction and legal authority of the arbitrator. An arbitration agreement can be comprehensive and broad to include any dispute or could be confined to specific disputes. The issue of scope of arbitrator's jurisdiction invariably arises when the disputes that are arbitrable are enumerated or the arbitration agreement provides for exclusions as in case of 'excepted matters'. The arbitration agreement may be valid, but the arbitral tribunal in view of the will of the parties expressed in the arbitration agreement, may not have jurisdiction to adjudicate

the dispute. The will of the parties as to the scope of arbitration is a subjective act and personal to the parties.

16. Another facet, not highlighted earlier, arises from the dictum in ***Sukanya Holdings (P) Ltd.*** v. ***Jayesh H. Pandya and Another***,[14] a decision upholding rejection of an application under Section 8, on the ground that there is no provision in the Arbitration Act to bifurcate and divide the causes or parties, that is, the subject matter of the suit/judicial proceedings, and parties to the arbitration agreement. The suit should be in respect of a 'matter' which the parties have agreed to refer and which comes within the ambit of the arbitration agreement. The words 'a matter', it was interpreted, would indicate that the entire subject matter of the suit should be subject to arbitration agreement. Bifurcation of subject matter or causes of action in the suit is not permissible and contemplated. Similarly, the parties to the suit should be bound by the arbitration agreement, as there is no provision in the Arbitration Act to compel third persons who have not exercised the option to give up the right to have access to courts and be bound by the arbitration clause. This would violate party autonomy and consensual nature

14 (2003) 5 SCC 531

of arbitration. Bifurcation in such cases would result in a suit being divided into two parts, one being decided by the arbitral tribunal, and the other by the court or judicial authorities. This would defeat the entire purpose and inevitably delay the proceedings and increase cost of litigation, cause harassment and on occasions give rise to conflicting judgments and orders by two different fora. Cause of action in relation to the subject matter relates to the scope of the arbitration agreement and whether the dispute can be resolved by arbitration. Second mandate relating to common parties exposits the inherent limitation of the arbitration process which is consensual and mutual, an aspect we would subsequently examine.

17. A two Judges' Bench in ***Booz Allen & Hamilton Inc.***, while interpreting the dictum in ***Sukanya Holdings (P) Ltd.***, had drawn a distinction between ambit and scope of judicial inquiry while deciding an application under Section 8(1) of the Arbitration Act which is filed in pending civil suit/judicial proceedings and an application for reference of the dispute to arbitration under Section 11 of the Arbitration Act. In ***Booz Allen & Hamilton Inc.*** it was observed:

> "32. The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(*b*)(*i*) of that section."

However, in ***SBP & Co.*** v. ***Patel Engineering Ltd. and Another***,[15] the majority judgment of the Constitution Bench of seven Judges had noticed the complementary nature of Sections 8 and 11 of the Arbitration Act, and has observed:

> "16. We may at this stage notice the complementary nature of Sections 8 and 11. Where there is an arbitration agreement between the parties and one of the parties, ignoring it, files an action before a judicial authority and the other party raises the objection that there is an arbitration clause, the judicial authority has to consider that objection and if the objection is found sustainable to refer the parties to arbitration. The expression used in this section is "shall" and this Court in *P. Anand Gajapathi Raju* v. *P.V.G. Raju* and in *Hindustan Petroleum Corpn. Ltd.* v. *Pinkcity Midway Petroleums* has held that the judicial authority is bound to refer the matter to arbitration once the existence of a valid arbitration clause is established. Thus, the judicial authority is entitled to, has to and is

15 (2005) 8 SCC 618

> bound to decide the jurisdictional issue raised before it, before making or declining to make a reference. Section 11 only covers another situation. Where one of the parties has refused to act in terms of the arbitration agreement, the other party moves the Chief Justice under Section 11 of the Act to have an arbitrator appointed and the first party objects, it would be incongruous to hold that the Chief Justice cannot decide the question of his own jurisdiction to appoint an arbitrator when in a parallel situation, the judicial authority can do so. Obviously, the highest judicial authority has to decide that question and his competence to decide cannot be questioned. If it is held that the Chief Justice has no right or duty to decide the question or cannot decide the question, it will lead to an anomalous situation in that a judicial authority under Section 8 can decide, but not a Chief Justice under Section 11, though the nature of the objection is the same and the consequence of accepting the objection in one case and rejecting it in the other, is also the same, namely, sending the parties to arbitration. The interpretation of Section 11 that we have adopted would not give room for such an anomaly."

We are clearly bound by the dictum of the Constitutional Bench judgment in ***Patel Engineering Ltd.*** that the scope and ambit of court's jurisdiction under Section 8 or 11 of the Arbitration Act is similar. An application under Section 11 of the Arbitration Act need not set out in detail the disputes or the claims and may briefly refer to the subject matter or broad contours of the dispute. However, where judicial proceedings are initiated and pending, specific details of the claims and disputes are normally pleaded and, therefore, the court or the judicial authority has the advantage

of these details. There is a difference between a non-arbitrable claim and non-arbitrable subject matter. Former may arise on account of scope of the arbitration agreement and also when the claim is not capable of being resolved through arbitration. Generally non-arbitrability of the subject matter would relate to non-arbitrability in law. Further, the decision in ***Sukanya Holdings (P) Ltd.*** has to be read along with subsequent judgment of this Court in ***Chloro Controls India Private Limited*** v. ***Severn Trent Water Purification Inc. and Others***.[16] The effect of amendment by Act 3 of 2016 with retrospective effect from 20.10.2015 on Sections 8 and 11 of the Arbitration Act with the stipulation that the amendments apply notwithstanding any earlier judgment has been examined by us under the heading *Who Decides Non-arbitrability.*

18. Sub-section (3) to Section 2 of the Arbitration Act states:

> "Section 2(3)- this Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."

The Arbitration Act clearly recognizes and accepts that certain disputes or subjects are not capable of being resolved by arbitration. Similarly, Section 34(2)(b)(i) of the Arbitration Act states that the courts may set aside awards when they find that "the

16 (2013) 1 SCC 641

subject matter of the dispute is not capable of settlement by arbitration". However, the two sub-sections conspicuously do not enumerate or categorize non-arbitrable matters or state the principles for determining when a dispute is non-arbitrable by virtue of any other law[17] for the time being in force. It is left to the courts by *ex visceribus actus* to formulate the principles for determining non-arbitrability. As, exclusion from arbitrability is predominantly a matter of case law, we begin by examining the case law on the subject.

19. In ***Booz Allen & Hamilton Inc.***, elucidating on the question of non-arbitrability of a dispute, it has been observed:

> "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

17 Section 34(2)(b)(i) of the Arbitration Act

> 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.
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> xx xx xx
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> 37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)
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> 38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

Booz Allen & Hamilton Inc. states that civil or commercial dispute, whether contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by an arbitral tribunal unless the jurisdiction of the arbitral tribunal is either expressly or by necessary implication excluded.

Legislature is entitled to exclusively reserve certain category of proceedings for public forums, be it a court or a forum created or empowered by the State to the exclusion of private forum. Exclusion of the jurisdiction of the arbitral tribunal are matters of public policy. When public policy mandates and states that a case or a dispute is non-arbitrable, the court would not allow an application under Section 8 (or even Section 11 as observed *supra*) even if the parties have agreed upon arbitration as the mechanism for settlement of such disputes.

20. Exclusion or non-arbitrability when clearly expressed would pose no difficulty and should be respected. However, exclusion or non-arbitrability of subjects or disputes from the purview of a private forum like arbitration by necessary implication requires setting out the principles that should be applied.

21. ***Booz Allen & Hamilton Inc.*** draws a distinction between actions *in personam*, that is, actions which determine the rights and interests of parties themselves in the subject matter of the case, and actions *in rem* which refer to actions determining the title of the property and the rights of the parties not merely amongst themselves but also against all the persons at any time claiming an

interest in that property. Rights *in personam* are considered to be amenable to arbitration and disputes regarding rights *in rem* are required to be adjudicated by the courts and public tribunals. The latter actions are unsuitable for private arbitration. Disputes relating to subordinate rights *in personam* arising from rights *in rem* are considered to be arbitrable. Paragraph 36 of the judgment in ***Booz Allen & Hamilton Inc.*** refers to certain examples of non-arbitrable disputes and reads:

> "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 offenses; (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."

22. Landlord-tenant disputes governed by rent control legislation are not actions *in rem*, yet they are non-arbitrable. In ***Booz Allen & Hamilton Inc.*** reference was made to *Russell on Arbitration* (22nd Edition) in Para 2.007 at Page 28 wherein the author has observed that certain matters in English Law are reserved for the court alone and if an arbitral tribunal purports to deal with them the resulting

award would be unenforceable. These matters would include where the type of remedy required is not one which the arbitral tribunal is empowered to give. Reference was made to *Law and Practice of Commercial Arbitration in England* (2nd Ed. 1989) by Mustill and Boyd which states that certain types of remedies which the arbitrator can award are limited by consideration of public policy and as arbitrator is appointed by the parties and not by the State. Arbitrator cannot impose fine, give imprisonment, commit a person for contempt or issue a writ of *subpoena* nor can he make an award binding on third parties and affect public at large, such as a judgment *in rem*. Mustill and Boyd in their *2001 Companion Volume* have observed that axiomatically rights that are valid as against the whole world, cannot be a subject of private arbitration, although subordinate rights *in personam* derived from such rights may be ruled upon by the arbitrators. Therefore, rights under a patent license may be arbitrated but the validity of the underlying patent may not be arbitrable. Similarly, an arbitrator who derives its power from a private agreement between A and B, plainly has no jurisdiction to bind a third person by a decision on whether the patent is valid or not, for no one else has mandated him to make

the decision and the decision which attempts to do so would be useless.

23. Analysing provisions of Order XXXIV of the Code of Civil Procedure, 1908, ***Booz Allen & Hamilton Inc.*** holds that this Order not only relates to execution of a decree, it provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with the Code relating to mortgage suits makes it clear that all persons having interest either in the mortgage security or in the right of redemption have to be joined as parties whether they are parties to the mortgage or not. The object of the provisions is to avoid multiplicity of suits/proceedings and to enable all the interested persons to raise their defences and claims, which are to be taken note of while dealing with the claim in the mortgage suit. By passing a preliminary decree or final decree, the court adjudicates, adjusts and safeguards the interests of not only the mortgager or mortgagee but also puisne/mesne mortgagees, persons entitled to the equity of redemption, persons having an interest in the mortgaged property, auction-purchasers and persons in

possession, which an arbitral tribunal cannot do. Therefore, a suit for foreclosure or redemption of mortgage property can be dealt with by a public forum and not by a private forum.

24. D.Y. Chandrachud, J. in ***A. Ayyasamy*** v. ***A. Paramasivam and Others***,[18] referring to the dictum in ***Booz Allen & Hamilton Inc.,*** has made two important comments:

> "35...This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals...
>
> xx xx xx
>
> 38. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration."

18 (2016) 10 SCC 386

25. In ***Vimal Kishor Shah*** disputes relating to private trusts, trustees, and beneficiaries of the trust and the Trusts Act were held to be non-arbitrable. The Order of Reference explains why disputes under the Trusts Act are non-arbitrable by necessary implication, for which reference was made to few sections of the Trusts Act to demonstrate how the disputes could not be made the subject matter of arbitration. The reasoning is illustrative and elucidating: -

> "27...Under Section 34 of the Indian Trusts Act, a trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting management or administration of trust property, subject to other conditions laid down in the Section. Obviously, an arbitrator cannot possibly give such opinion, advice, or direction. Under Section 46, a trustee who has accepted the trust, cannot afterward renounce it, except, *inter alia*, with the permission of a principal Civil Court of original jurisdiction. This again cannot be the subject matter of arbitration. Equally, under Section 49 of the Indian Trusts Act, where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, only a principal Civil Court of original jurisdiction can control such power, again making it clear that a private consensual adjudicator has no part in the scheme of this Act. Under Section 53, no trustee may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust property or any part thereof. Here again, such permission can only be given by an arm of the State, namely, the principal Civil Court of original jurisdiction. Under Section 74 of the Indian Trusts Act,

> under certain circumstances, a beneficiary may apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint such trustee accordingly. Here again, such an appointment cannot possibly be by a consensual adjudicator. It can only be done by a petition to a principal Civil Court of original jurisdiction. Also, it is important to note that it is not any civil court that has jurisdiction, but only one designated court, namely, a principal Civil Court of original jurisdiction. All this goes to show that by necessary implication, disputes arising under the Indian Trusts Act cannot possibly be referred to arbitration."

26. In ***Emaar MGF Land Limited***, the Division Bench referred to the object and the purpose behind the Consumer Protection Act, 1986 as a law that meets the long-felt necessity of protecting the common man as a consumer against wrongs and misdeeds for which the remedy under the ordinary law has become illusory as the enforcement machinery does not move, or moves ineffectively or inefficiently. Thus, to remove helplessness and empower consumers against powerful businesses and the might of the public bodies, the enactment has constituted consumer forums with extensive and wide powers to award, wherever appropriate, compensations to the consumers and to impose penalties for non-compliance with their orders. The Consumer Protection Act has

specific provisions for execution and effective implementation of their orders which powers are far greater than the power of the ordinary civil court. After referring to the amendments made to Sections 8 and 11 of Arbitration Act by Act No. 3 of 2016, it was observed that the amendments cannot be given such expansive meaning so as to inundate entire regime of special legislation where such disputes are not arbitrable. This amendment was not intended to side-line or override the settled law on non-arbitrability. Reference was made to an earlier decision in ***Premier Automobiles Ltd.*** v. ***Kamlekar Shantaram Wadke of Bombay and Others***[19] wherein examining Section 9 of the Code of Civil Procedure in the context of rights and remedies under Industrial Disputes Act, 1947 it was observed that the legislature has made provisions for the investigation and settlement of industrial disputes between unions representing the workmen and the management. The authorities constituted under the Act have extensive powers in the matter of industrial disputes. Labour Court and Tribunal can lay down new industrial policy for industrial peace and order, or reinstatement of dismissed workmen, which no civil court can do. For this, the provisions of Industrial Disputes Act completely oust

19 (1976) 1 SCC 496

the jurisdiction of the civil court for trial of the industrial disputes. The intent of the legislature is to protect the interest of workmen and consumers in larger public interest in the form of special rights and by constituting a judicial forum with powers that a civil court or an arbitrator cannot exercise. Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration.

27. In ***Olympus Superstructures Pvt. Ltd.***, this Court had held that an arbitrator can grant specific performance as there is no prohibition in the Specific Relief Act, 1963. This decision on the question of arbitrability has observed, and in our humble opinion rightly, as under:

> "34. In our opinion, the view taken by the Punjab, Bombay and Calcutta High Courts is the correct one and the view taken by the Delhi High Court is not correct. We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree — with a view to shorten litigation in regular courts — to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of a contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(*b*) of the English Arbitration Act, 1996 which contained a prohibition relating to specific

performance of contracts concerning immovable property.

35. It is stated in *Halsbury's Laws of England*, 4th Edn., (Arbitration, Vol. 2, para 503) as follows:

> "503. *Nature of the dispute or difference*.—The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction (Cf. Bac Abr Arbitrament and Award A)."

28. In ***V.H. Patel & Company and Others*** v. ***Hirubhai Himabhai Patel and Others***,[20] this Court has held that in deference to the arbitration clause covering all matters there was no principle of law or provision that bars an arbitrator from deciding whether the dissolution of a partnership is just and equitable.

29. Having examined and analysed the judgments, we would coalesce and crystalize the legal principles for determining non-arbitrability. We begin by drawing principles that draw distinction between adjudication of actions *in rem* and adjudication of actions *in personam*.

30. A judgment is a formal expression of conclusive adjudication of the rights and liabilities of the parties. The judgment may operate in

20 (2000) 4 SCC 368

two ways, *in rem* or *in personam*. Section 41 of the Indian Evidence Act, 1872 on the question of relevancy of judgments in the context of conclusiveness of a judgment, order or decree provides:

> "**41. Relevancy of certain judgments in probate, etc., jurisdiction.—**A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.
>
> Such judgment, order or decree is conclusive proof—
>
> > that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;
> >
> > that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree] declares it to have accrued to that person;
> >
> > that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree] declared that it had ceased or should cease;
> >
> > and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree] declares that it had been or should be his property."

A judgment *in rem* determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence.[21] By contrast, a judgment *in personam*, "although it may concern a res, merely determines the rights of the litigants *inter se* to the res".[22] Distinction between judgments *in rem* and judgments in *personam* turns on their power as *res judicata*,[23] i.e. judgment *in rem* would operate as *res judicata* against the world, and judgment *in personam* would operate as *res judicata* only against the parties in dispute. Use of expressions "rights *in rem*" and "rights *in persona*m" may not be correct for determining non-arbitrability because of the inter-play between rights *in rem* and rights *in personam*. Many a times, a right *in rem* results in an enforceable right *in personam.* ***Booz Allen & Hamilton Inc.*** refers to the statement by *Mustill and Boyd* that the subordinate rights *in*

21 G.C. Cheshire & P.M. North, Private International Law 12th ed. by North & Fawcett (London: Butterworth's, 1992, p. 362

22 *Ibid*

23 G.C. Cheshire & P.M. North, Private International Law 12th ed. by North & Fawcett (London: Butterworth's, 1992

personam derived from rights *in rem* can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right *in rem.* Arbitration by necessary implication excludes actions *in rem*.

31. Exclusion of actions *in rem* from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on 'the parties' to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The arbitral tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has *erga omnes* effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralized mode of dispute resolution is unsuitable when the subject matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or

sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise.[24]

32. Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive

24 Prof. Stavros Brekoulakis – 'On Arbitrability: Persisting Misconceptions and New Areas of Concern'

right and duty to perform such functions.[25] For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon etc., as distinguished from commercial activities, economic adventures and welfare activities.[26] Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.

33. Fourth principle of non-arbitrability is alluded to in the Order of Reference, which makes specific reference to ***Vimal Kishor Shah***,

25 Ajar Raib – Defining Contours of the Public Policy Exception – A New Test for Arbitrability
26 Common Cause v. Union of India, (1999) 6 SCC 667 and Agricultural Produce Market Committee v. Ashok Harikuni & Another, (2000) 8 SCC 61.

which decision quotes from ***Dhulabhai***, a case which dealt with exclusion of jurisdiction of civil courts under Section 9 of the Civil Procedure Code. The second condition in ***Dhulabhai*** reads as under:

> "32. (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

The order of reference notes that ***Dhulabhai*** refers to three categories mentioned in ***Wolverhampton New Waterworks Co.*** v. ***Hawkesford***,[27] to the following effect:

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by

27 9 [1859] 6 C.B. (NS) 336

> necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

Dhulabhai's case is not directly applicable as it relates to exclusion of jurisdiction of civil courts, *albeit* we respectfully agree with the Order of Reference that the condition No. 2 is apposite while examining the question of non-arbitrability. Implied legislative intention to exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and further lays down that all questions about the said right and liability shall be determined by the court or tribunals so empowered and vested with exclusive jurisdiction. Therefore, mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non-arbitrability. Conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be

the decisive test to answer and decide whether arbitrability is impliedly barred.

34. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum. In ***Transcore*** v. ***Union of India and Another***,[28] this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act,1993 (the 'DRT Act') is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the 'NPA Act'). For analysing the scope and remedies under the two Acts, it was held that NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms:

> "64. In the light of the above discussion, we now examine the doctrine of election. There are three

28 (2008) 1 SCC 125

> elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If anyone of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the "text of the statute, the legislative history, and 'inherent conflict' between arbitration and the statute's underlying purpose"[29] with reference to the nature and type of special rights

29 Jennifer L. Peresie, Reducing the Presumption of Arbitrability.

conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable.

35. In ***M.D. Frozen Foods Exports Private Limited and Others*** v. ***Hero Fincorp Limited***,[30] and following this judgment in ***Indiabulls Housing Finance Limited*** v. ***Deccan Chronicle Holdings Limited and Others***,[31] it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The

30 (2017) 16 SCC 741
31 (2018) 14 SCC 783

NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

36. In ***Transcore,*** on the powers of the Debt Recovery Tribunal (DRT) under the DRT Act, it was observed:

> "18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."

Consistent with the above, observations in ***Transcore*** on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the

judgment of the Full Bench of the Delhi High Court in ***HDFC Bank Ltd.*** v. ***Satpal Singh Bakshi***,[32] which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in ***HDFC Bank Ltd.*** has been referred to in ***M.D. Frozen Foods Exports Private Limited***, but not examined in light of the legal principles relating to non-arbitrability. Decision in ***HDFC Bank Ltd.*** holds that only actions *in rem* are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.

32 2013 (134) DRJ 566 (FB)

37. In ***Natraj Studios (P) Ltd.,*** a case under the Arbitration Act,1940, it was observed that on broader consideration of public policy the disputes were non-arbitrable. In ***N. Radhakrishnan*** v. ***Maestro Engineers and Others***,[33] reliance was placed on the following observations in ***Abdul Kadir Samshuddin Bubere*** v. ***Madhav Prabharkar Oak and Another***:[34]

> "There is no doubt that when a serious allegation of fraud is laid against the party and the party who charged with the fraud desires that the matter should be tried in the open court it would be sufficient cause for the court for the court not to order an arbitration agreement to be filed and not to make the reference."

N. Radhakrishnan upheld the order rejecting the application under Section 8 of the Arbitration Act on the ground that it would be in furtherance of justice that the allegations as to fraud and manipulation of finances in the partnership firm are tried in the court of law which is more competent and has means to decide a complicated matter. However, in ***A. Ayyasamy***, notwithstanding the allegations of fraud, the civil appeal was allowed, the civil suit was stayed and reference to arbitration under Section 8 of the Arbitration Act was made. A.K. Sikri J. held that the Arbitration Act does not make any specific provision for excluding any category of

33 (2010) 1 SCC 72
34 AIR 1962 SC 406

disputes terming them as non-arbitrable but there are a number of pronouncements which hold that fraud is one such category where the dispute would be considered as non-arbitrable. Elucidating on the exclusion, he observed that pleading of a mere allegation of fraud by one party is not enough. The allegation of fraud should be such which makes a virtual case of a criminal offence. On the question of non-arbitrability when there are allegations of fraud, he observed:

> "25... finds that there are very serious allegations of fraud which make a virtual case of criminal offense or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself...Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration..."

D.Y. Chandrachud, J. in his concurring judgment unclasped the mandatory nature of Section 8 of the Arbitration Act to observe that allegations of fraud can be made a subject matter of arbitration by relying on Russell on *Arbitration,* Redfer Hunter on *International Arbitration* and Gary B. Born in *International Commercial Arbitration.* Reliance was placed on the principle of separation and legal effect of the doctrine of competence-competence, to observe:

> "13. Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law — *generalia specialibus non derogant*. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."
>
> xx xx xx
>
> 43**.** Hence, the allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the Arbitral Tribunal to resolve a dispute arising out of a civil or contractual relationship on the

> basis of the jurisdiction conferred by the arbitration agreement."

Elucidating and summarising the legal position, D.Y.Chandrachud J. has observed:

> "53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle."

38. Arbitrability as noticed above in essence is a matter of national policy.[35] A statute, on the basis of public policy, can expressly or by implication restrict or prohibit arbitrability of disputes. To this extent there is uniformity and consensus. However, ***N. Radhakrishnan*** while accepting that the dispute may be arbitrable under the applicable mandatory law, holds that the dispute would be non-arbitrable on public policy consideration if it relates to serious allegations of fraud. The two views in ***A. Ayyasamy*** exposit the predicament on the role of public policy in deciding the question of law of non-arbitrability. Whether a subject matter or a dispute should be held as non-arbitrable on public policy is vexed

35 A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany by Patrick M. Baron and Stefan Liniger

and not free from difficulty as reflected in the strong opinions expressed in the judgments. Indeed, under the Arbitration Act, 1940, the case law in view of the statutory discretion under sub-section (4) to Sections 20 and 34 clearly supports and accepts the role and relevance of public policy. Legal position under the Arbitration Act as examined under the heading *'Who decides non-arbitrability'*, however, is different.

39. We begin by examining sub-clauses (i) and (ii) of clause (b) to Sub-section (2) to Section 34, which read as under:

> "34. **Application for setting aside arbitral award**. –
>
> xx xx xx
>
> (2) An arbitral award may be set aside by the Court only if –
>
> (a) ...
>
> (b) the Court finds that—
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in fore, or
>
> (ii) the arbitral award is in conflict with the public policy of India.
>
> Explanation 1. —For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, —

> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice.
>
> Explanation 2. —For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

Section 34(2)(b) consists of two sub-clauses both accrediting the court with the power to set aside an award. Under sub-clause (i) an award is liable to be set aside when the subject matter is not capable of settlement by arbitration under law for the time being in force. Under sub-clause (ii) an award can be set aside if it is in conflict with the public policy of India. As per Explanation No. 1, an award is in conflict with the public policy of India only if it was induced or affected by fraud, corruption, etc. or it is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice. Explanation 2 cautions the courts not to review on the merits of the case while examining the question whether an award is in contravention with the fundamental policy of law. Therefore, conflict with the public policy of India and a subject matter of

dispute not capable of settlement by arbitration, are two separate and independent grounds on which the court can set aside the award. Reference to public policy in ***Booz Allen & Hamilton Inc.*** and in the present matter and non-arbitrability of the subject matter is completely different and has nothing in common with the public policy of India referred to in sub-clause (ii) of Section 34(2)(b) of the Arbitration Act. Public policy in the context of non-arbitrability refers to public policy as reflected in the enactment, that is, whether the enactment confers exclusive jurisdiction to the specified court or the special forum and prohibits recourse to arbitration. Public policy in the context of sub-clause(ii) to Section 34(2)(b) refers to the public policy of the enactment, defining and fixing rights and obligations, and application of those rights and obligations by the arbitrator. Statutes unfailingly have a public purpose or policy which is the basis and purpose behind the legislation. Application of mandatory law to the merits of the case do not imply that the right to arbitrate is taken away. Mandatory law may require a particular substantive rule to be applied, but this would not preclude arbitration. Implied non-arbitrability requires prohibition against waiver of jurisdiction, which happens when a statute gives special rights or obligations and creates or stipulates

an exclusive forum for adjudication and enforcement. An arbitrator, like the court, is equally bound by the public policy behind the statute while examining the claim on merits. The public policy in case of non-arbitrability would relate to conferment of exclusive jurisdiction on the court or the special forum set up by law for decision making. Non-arbitrability question cannot be answered by examining whether the statute has a public policy objective which invariably every statue would have. There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject matter of the dispute was non-arbitrable.

40. However, the above discussion would not be a complete answer to ***N. Radhakrishnan*** that if justice demands, then notwithstanding the arbitration clause, the dispute would be tried in the open court. To accept this reasoning one would have to agree that arbitration is a flawed and compromised dispute resolution mechanism that can be forgone when public interest or public policy demands the

dispute should be tried and decided in the court of law. The public policy argument proceeds on the foundation and principle that arbitration is inferior to court adjudication as: (i) fact finding process in arbitration is not equivalent to judicial fact finding, which is far more comprehensive and in-depth; (ii) there is limited or lack of reasoning in awards; (iii) arbitrators enjoy and exercise extensive and unhindered powers and therefore are prone in making arbitrary and despotic decisions; (iv) there is no appeal process in arbitration which combined with the (iii) above and limited review of an arbitral award in post-award court proceedings, arbitration may have devastating consequences for the losing party and undermines justice; (v) arbitration proceedings are usually private and confidential; (vi) arbitrators are unfit to address issues arising out of the economic power disparity or social concerns;[36] (vii) business and industry, by adopting and compulsorily applying arbitration process, leave the vulnerable and weaker sections with little or no meaningful choice but to accept arbitration. A few people realize and understand the importance of loss of their right to access the court of law or public forum, which are impartial, just

36 (i) to (vi) from Prof. Stavros Brekoulakis – On Arbitrability: Persisting Misconceptions and New Area of Concern.

and fair;[37] and (viii) arbitration is expensive and costly in comparison to court adjudication.[38]

41. While it would not be correct to dispel the grounds as mere conjectures and baseless, it would be grossly irrational and completely wrong to mistrust and treat arbitration as flawed and inferior adjudication procedure unfit to deal with the public policy aspects of a legislation. Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement. This would be contrary to and defeat the legislative intent reflected in the public policy objective behind the Arbitration Act. Arbitration has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice, and it is informal, flexible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, adhere to natural justice, and follow a fair and just

37 (vii) from the preamble of the text of the bill of 2007 Arbitration Fairness Act as was written by the sponsor and submitted to the House for consideration

38 Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523.

procedure. Arbitrators are normally experts in the subject and perform their tasks by referring to facts, evidence, and relevant case law. Complexity is not sufficient to ward off arbitration. In terms of the mandate of Section 89 of the Civil Procedure Code and the object and purpose behind the Arbitration Act and the mandatory language of Sections 8 and 11, the mutually agreed arbitration clauses must be enforced. The language of Sections 8 and 11 of the Arbitration Act are peremptory in nature. Arbitration Act has been enacted to promote arbitration as a transparent, fair, and just alternative to court adjudication. Public policy is to encourage and strengthen arbitration to resolve and settle economic, commercial and civil disputes. Amendments from time to time have addressed the issues and corrected the inadequacies and flaws in the arbitration procedure. It is for the stakeholders, including the arbitrators, to assure that the arbitration is as impartial, just, and fair as court adjudication. It is also the duty of the courts at the post-award stage to selectively yet effectively exercise the limited jurisdiction, within the four corners of Section 34(2)(b)(ii) read with *Explanation* 1 and 2 and check any conflict with the fundamental policy of the applicable law. We would

subsequently refer to the 'second look'[39] principle which is applicable in three specific situations dealing with arbitrability as per the mandate of Section 34 of the Arbitration Act.

42. Recently, the Supreme Court of Canada in ***TELUS Communications Inc.*** v. ***Avraham Wellman***,[40] while conceding that arbitration as a method of dispute resolution was met with "overt hostility" for a long time on public policy grounds as it ousts jurisdiction of courts, observed that the new legislation, the Arbitration Act of 1991, marks a departure as it encourages parties to adopt arbitration in commercial and other matters. By putting party autonomy on a high pedestal, the Act mandates that the parties to a valid arbitration agreement must abide by the consensual and agreed mode of dispute resolution. The courts must show due respect to arbitration agreements particularly in commercial settings by staying the court proceedings, unless the legislative language is to the contrary. The principle of party autonomy goes hand in hand with the principle of limited court intervention, this being the fundamental principle underlying modern arbitration law. Party autonomy is weaker in non-

39 Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc, 473 U.S. 614 S Ct 3346 (1985) (U.S. Supreme Court, 2 July 1985)
40 (2019) SCC 19 (CanLII)

negotiated "take it or leave it" contracts and, therefore, the legislature can through statutes shield the weakest and vulnerable contracting parties like consumers. This is not so in negotiated agreements or even in adhesion contracts having an arbitration clause in commercial settings. Virtues of commercial and civil arbitration have been recognised and accepted and the courts even encourage the use of arbitration.

43. A recent judgment of this Court in ***Avitel Post Studioz Limited and Others*** v. ***HSBC PI Holdings (Mauritius) Limited***[41] has examined the law on invocation of 'fraud exception' in great detail and holds that ***N. Radhakrishnan*** as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in paragraph 14 of the judgment in ***Avitel Post Studioz Limited***, which quotes observations in ***Rashid Raza*** v. ***Sadaf Akhthar***[42]:

> "4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/ fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."

41 Civil Appeal No. 5145 of 2016 and connected matters, decided on 19.08.2020
42 (2019) 8 SCC 710

to observe in ***Avitel Post Studioz Limited***:

> "it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or *mala fide* conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain."

The judgment in ***Avitel Post Studioz Limited*** interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post-contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.

44. In ***Deccan Paper Mills Co. Ltd.*** v. ***Regency Mahavir Properties***[43], legal proceedings for cancellation of documents

43 Civil Appeal No. 5147 of 2016, decided on 19.08.2020

under Section 31 of the Specific Relief Act, 1963 were held to be actions *in personam* and not actions *in rem*. Significantly, the judgment refers to the definition of action *in rem* by R.H. Graveson (Conflict of Laws 98, 7th ed. 1974), which reads as under:

> "An action *in rem* is one in which the judgment of the Court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the Court had adjudicated."

45. In view of the above discussion, we would like to propound a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

> (1) when cause of action and subject matter of the dispute relates to actions *in rem*, that do not pertain to subordinate rights *in personam* that arise from rights *in rem*.
>
> (2) when cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;
>
> (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and
>
> (4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

These tests are not watertight compartments; they dovetail and overlap, *albeit* when applied holistically and pragmatically will

help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

However, the aforesaid principles have to be applied with care and caution as observed in ***Olympus Superstructures Pvt. Ltd.***:

> "35...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of fats relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir v. Leeman*). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst, Wilson v. Wilson and Cahill v. Cahill)."

46. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralized forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions *in rem*. Similarly, grant and issue of patents and registration of trademarks are exclusive matters falling within the

sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offenses against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect. Matters relating to probate, testamentary matter etc. are actions *in rem* and are a declaration to the world at large and hence are non-arbitrable.

47. In view of the aforesaid discussions, we overrule the ratio in ***N. Radhakrishnan*** *inter alia* observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in the case of ***HDFC Bank Ltd.*** which holds that

the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable.

48. Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*. Such actions normally would not affect third-party rights or have *erga omnes* affect or require centralized adjudication. An award passed deciding landlord-tenant disputes can be executed and enforced like a decree of the civil court. Landlord-tenant disputes do not relate to inalienable and sovereign functions of the State. The provisions of the Transfer of Property Act do not expressly or by necessary implication bar arbitration. Transfer of Property Act, like all other Acts, has a public purpose, that is, to regulate landlord-tenant relationships and the arbitrator would be bound by the provisions, including provisions which enure and protect the tenants.

49. In view of the aforesaid, we overrule the ratio laid down in ***Himangni Enterprises*** and hold that landlord-tenant disputes are arbitrable as the Transfer of Property Act does not forbid or

foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.

Who decides non-arbitrability?

50. Lord Mustill's well-known comparison of the relationship between courts and arbitrators to a relay race, reads:

> "Ideally, the handling of arbitrable disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement for being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award."

Thus, the legal problem of allocation of decision-making authority between courts and arbitral tribunals.

51. Issue of non-arbitrability can be raised at three stages. *First*, before the court on an application for reference under Section 11 or for stay of pending judicial proceedings and reference under

Section 8 of the Arbitration Act; *secondly*, before the arbitral tribunal during the course of the arbitration proceedings; or *thirdly*, before the court at the stage of the challenge to the award or its enforcement. Therefore, the question – *'Who decides non-arbitrability?'* and, in particular, the jurisdiction of the court at the first look stage, that is, the referral stage.

52. Who decides the question of non-arbitrability? - a jurisdictional question is a technical legal issue, and requires clarity when applied to facts to avoid bootstrapping and confusion. The doubt as to who has the jurisdiction to decide could hinder, stray, and delay a many arbitration proceedings. Unfortunately, *who decides non-arbitrability* remains a vexed question that does not have a straightforward universal answer as would be apparent from opinions in the at-variance Indian case laws on this subject. To some extent, the answer depends on how much jurisdiction the enactment gives to the arbitrator to decide their own jurisdiction as well as the court's jurisdiction at the reference stage and in the post-award proceedings. It also depends upon the jurisdiction bestowed by the enactment, viz. the facet of non-arbitrability in

question, the scope of the arbitration agreement and authority conferred on the arbitrator.

53. Under the Arbitration Act, 1940, the jurisdiction to settle and decide non-arbitrability issues relating to existence, validity, scope as well as whether the subject matter was capable of arbitration, with possible exception in case of termination, novation, frustration and 'accord and satisfaction' when contested on facts, was determined and decided at the first or at the reference stage by the courts. The principle being that the court should be satisfied about the existence of a valid arbitration agreement and that the disputes have arisen with regard to the subject matter of the arbitration agreement. At this stage, the court would be, however, not concerned with the merits or sustainability of the disputes. Despite best efforts to contain obstructive tactics, adjudication and final decision of non-arbitrability issues at the reference stage would invariably stop, derail and thwart the proceedings in the courts for years.

54. The Arbitration Act based upon the UNCITRAL Model Law introduced an entirely new regimen with the objective to promote arbitration in commercial and economic matters as an alternative

dispute resolution mechanism that is fair, responsive and efficient to contemporary requirements. One of the primary objectives of the Arbitration Act is to reduce and minimize the supervisory role of courts. Accordingly, the statutory powers of the arbitral tribunal to deal with and decide jurisdictional issues of non-arbitrability were amplified and the principles of separation and competence-competence were incorporated, while the courts retained some power to have a 'second look' in the post-award challenge proceeding. On the jurisdiction of the court at the referral stage, views of this Court have differed and there have been statutory amendments to modify and obliterate the legal effect of the court decisions.

55. The legal position as to who decides the question of non-arbitrability under the Arbitration Act can be divided into four phases. The first phase was from the enforcement of the Arbitration Act till the decision of the Constitution Bench of seven Judges in ***Patel Engineering Ltd.*** on 26th October 2005. For nearly ten years, the ratio expressed in ***Konkan Railway Corpn. Ltd. and Others*** v. ***Mehul Construction Co.***,[44] affirmed by the

44 (2000) 7 SCC 201

Constitution Bench of five Judges in ***Konkan Railway Construction Ltd. and Another*** v. ***Rani Construction Pvt. Ltd.***,[45] had prevailed. The second phase commenced with the decision in ***Patel Engineering Ltd.*** till the legislative amendments, which were made to substantially reduce court interference and overrule the legal effect of ***Patel Engineering Ltd.*** vide Act 3 of 2016 with retrospective effect from 23rd October 2015. The third phase commenced with effect from 23rd October 2015 and continued till the enactment of Act 33 of 2019 with effect from 9th August 2019, from where commenced the fourth phase, with a clear intent to promote institutionalized arbitration rather than *ad hoc* arbitration. The amendments introduced by Act 33 of 2019 have been partially implemented and enforced. In the present case, we are primarily concerned with the legal position in the third phase with effect from 23rd October 2015 when amendments by Act 3 of 2016 became operative.

56. We begin by reproducing the relevant statutory provisions, namely, Sections 8, 11, 16, sub-sections (1) and (2) to Section 34 including clause (b), which has been partly quoted in paragraph 39 above, and sub-sections (1), (2), (3) to Section 43 of the Arbitration Act.

45 (2002) 2 SCC 388

For the sake of clarity and convenience, we are reproducing below the provisions of Sections 8 and 11 of the Arbitration Act in a tabulated form as Sections 8 and 11 were amended by Act 3 of 2016 with retrospective effect from 23rd October, 2015 and Section 11 has undergone another amendment vide Act 33 of 2019 with effect from 9th August, 2019.

Section 8, pre and post Act 3 of 2016, read as under:

SECTION 8 (before Act 3 of 2016)	**SECTION 8 (post Act 3 of 2016)**
8. Power to refer parties to arbitration where there is an arbitration agreement. —	**8. Power to refer parties to arbitration where there is an arbitration agreement**. —
(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.	**(1)** A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.	**(2)** The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]
(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.	**(3)** Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

xx xx xx

Section 11, pre and post amendments vide Act 3 of 2016 and Act 33 of 2019, reads as under:

SECTION 11 (before Act 3 of 2016)	**SECTION 11 (post Act 3 of 2016)**	**SECTION 11 (post Act 33 of 2019)**
11. Appointment of arbitrators. – **(1)** A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.	**11. Appointment of arbitrators. –** **(1)** A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.	**11. Appointment of arbitrators**. — **(1)** A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.	**(2)** Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.	**(2)** Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall	**(3)** Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrations, each party shall appoint one arbitrator, and the two appointed arbitrators shall	**(3)** Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the

appoint the third arbitrator who shall act as the presiding arbitrator.	appoint the third arbitrator who shall act as the presiding arbitrator.	two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator. **(3-A)** The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under Section 43-I, for the purposes of this Act: Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at the rate as specified in the Fourth Schedule: Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.]
(4) If the appointment procedure in sub-section (3) applies and— (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.	**(4)** If the appointment procedure in sub-section (3) applies and — (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.	**(4)** If [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be].
(5) Failing any agreement referred to in sub-section (2),	**(5)** Failing any agreement referred to in sub-section (2),	**(5)** Failing any agreement

in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.	in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.	referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree [the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4)].
(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.	**(6)** Where, under an appointment procedure agreed upon by the parties,— (a) a party fails to act as required under that procedure; or (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.	**(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 [the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
NA	**(6-A)** 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.	**(6-A)** [* * *]

NA	**(6B)** The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.	**(6-B)** The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High court.]
(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.	**(7)** A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision.	**(7)** [* * *]
(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to— (a) any qualifications required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of any independent and impartial arbitrator.	**(8)** The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to— (a) any qualifications required for the arbitrator by the agreement of the parties; and (b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.	**(8)** [The arbitral institution referred to in sub-sections (4), (5) and (6)], before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of Section 12, and have due regard to— (*a*) any qualifications required for the arbitrator by the agreement of the parties; and (*b*) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.]
(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.	**(9)** In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.	**(9)** In the case of appointment of sole or third arbitrator in an international commercial arbitration, [the arbitral institution designated by the Supreme Court] may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.
(10) The Chief Justice may make such scheme[1] as he may deem appropriate for dealing with matters entrusted	**(10)** The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court	**(10)** [* * *]

by sun-section (4) or sub-section (5) or sub-section (6) to him.	may deed appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.	
(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.	**(11)** Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to 3 different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request	**(11)** Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution to which the request has been first made under the relevant sub-section shall be competent to appoint.
(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to Chief Justice in those sub-sections shall be construed as a reference to the Chief Justice of India (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to Chief Justice in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.	**(12)** (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the Supreme Court or, as the case may be, the High Court in those sub-sections shall be construed as a reference to the Supreme Court; and (b) where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to the Supreme Court or, as the case may be, the High Court in those subsections shall be construed as a reference to the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.	**(12)** Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3-A).
NA	**(13)** An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of	**(13)** An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

	sixty days from the date of service of notice on the opposite party.	
NA	**(14)** For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule. Explanation.— For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.	**(14)** The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.

XX XX XX

Section 16 of the Arbitration Act reads as under:

> **"16. Competence of arbitral tribunal to rule on its jurisdiction.—** (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34.

xx xx xx"

Sub-sections (1) and (2) of Section 34 of the Arbitration Act read as under:

"**34. Application for setting aside arbitral award.—** (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

(a) the party making the application establishes on the basis of the record of the arbitral tribunal that —

(i) a party was under some incapacity, or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any

indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation 1—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

xx xx xx

Sub-sections (1), (2) and (3) of Section 43 of the Arbitration Act reads as under:

"**43. Limitations. –** (1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in Courts.

(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred in section 21.

(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless the agreement, and a dispute arises to which the agreement applies, the Court , if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper."

57. In, ***Rani Construction Pvt. Ltd.*** the Constitution Bench reiterated the earlier view expressed in ***Mehul Construction Co.***, that an order appointing an arbitrator under Section 11 of the Arbitration Act is an administrative order that did not mandate notice and hearing of the other party. Being an administrative order, the Chief Justice or his nominee do not decide any preliminary issue, or the issue of non-arbitrability, validity and existence of the arbitration agreement, which are to be decided by the arbitrator at the first instance.

58. However, a Constitution Bench of seven Judges vide majority judgment in ***Patel Engineering Ltd.*** overruled this ratio and held:

> "38… But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator.....

> 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. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

In ***Patel Engineering Ltd.***, the Court also held that Section 16 of the Arbitration Act makes explicit, what is otherwise implicit, that the arbitral tribunal has jurisdiction to rule on its own jurisdiction, including ruling on objections to existence or validity of

the arbitration agreement, but this provision would apply when the parties have gone to the arbitral tribunal without recourse to Sections 8 or 11 of the Arbitration Act and not when the court at the reference stage has decided the jurisdictional issues. Decision of the court at the referral stage would be final and binding on the arbitral tribunal. Majority judgment also clarified that when an arbitral tribunal has been constituted by the parties without having taken recourse to a court order, the arbitral tribunal will have jurisdiction to decide all matters contemplated by Section 16 of the Arbitration Act.

59. In ***National Insurance Company Limited*** v. ***Boghara Polyfab Private Limited***,[46] a two Judges' Bench of this Court, elucidating on ***Patel Engineering Ltd.***, had identified and segregated the issues that arise for consideration in an application under Section 11 of the Arbitration Act into three categories, viz. (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can *also* decide, that is, issues which he may choose to decide or leave it to the arbitral tribunal to decide; and (iii) issues

46 (2009) 1 SCC 267

which should be left to the arbitral tribunal to decide, and thereafter had enumerated them as under:

> "22.1 The issues (first category) which the Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court.
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.
>
> 22.2 The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:
>
> (a) Whether the claim is a dead (long-barred) claim or a live claim.
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.
>
> 22.3 The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:
>
> (i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).
>
> (ii) Merits or any claim involved in the arbitration."
>
> 23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.*, that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those

> issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue."
>
> 24. What is however clear is when a respondent contends that the dispute is not arbitrable on account of discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under Section 11 of the Act or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant."

60. The issues included in the first category were: whether the party making the application had approached the appropriate High Court, that is, the jurisdictional High Court; whether there is an arbitration agreement and whether the person who had applied under Section 11 is a party to such agreement. This would include the question whether the defendant or the opposite party is a party

to the arbitration agreement or bound by the arbitration agreement in terms of Section 7 of the Arbitration Act. With respect to the second category, the Court observed that the Chief Justice or his designate may decide the issue, if necessary, by taking evidence or in the alternative may leave the issues open with the direction to the arbitral tribunal to decide the same. Where the Chief Justice or his designate examines the issue and decides it, the arbitral tribunal cannot re-examine the issue. The Chief Justice or his designate would exercise this choice being guided by the object of the Arbitration Act, that is, expediting the arbitration process with minimum judicial intervention. Where dispute arises on account of settlement agreement, discharge voucher, no claim certificate amounting to discharge or accord and satisfaction, and the other side contends that such certificates were obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice or his designate in proceedings under Section 11 or by the arbitral tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that the settlement agreement or discharge voucher had been executed if its validity is disputed. The third category would cover all other questions within the arbitration

clause, which the court believed are within the exclusive jurisdiction of the arbitral tribunal at the first stage. This was explained by giving an example of a matter purportedly reserved for the final determination of the departmental authority or excepted or excluded matters. It would also include merits of any claim involved in arbitration.

61. Paragraph 22 of ***Boghara Polyfab Private Limited***, if read carefully, states that the factors to be considered while deciding an application under Sections 8 and 11 of the Arbitration Act would require an examination of whether there exists an arbitration agreement, that is, the agreement provides for arbitration proceedings in respect of disputes which have arisen between the parties to the agreement. The latter portion requires the court to apply its mind whether the disputes which have arisen can be settled by the arbitration agreement. The aforesaid observations, in our opinion, would be in conformity with the majority decision of the Constitution Bench in ***Patel Engineering Ltd.*** wherein it was observed that Sections 8 and 11 of the Arbitration Act are complimentary in nature and the Court, while exercising powers under the two Sections on whether the matter should be referred to

arbitration, enjoys equal powers, otherwise, it would lead to an anomalous situation in that a judicial authority has wider power under Section 8 but lesser power of examination under Section 11.

62. In ***Arasmeta Captive Power Company Private Limited and Another*** v. ***Lafarge India Private Limited***,[47] this Court had examined whether there is any conflict between ***Patel Engineering Ltd.*** and ***Boghara Polyfab Private Limited*** on the question of the scope of inquiry while deciding an application under Section 11(6) of the Arbitration Act. The Division Bench in ***Arasmeta Captive Power Co. Pvt. Ltd.*** had referred to paragraph 39 and sub-para (iv) of paragraph 47 in ***Patel Engineering Ltd.***, to observe:

> "18. On a careful reading of para 39 and Conclusion (*iv*), as set out in para 47 of *SBP case* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] , it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (*i*) territorial jurisdiction, (*ii*) existence of an arbitration agreement between the parties, (*iii*) existence or otherwise of a live claim, and (*iv*) existence of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by

47 (2013) 15 SCC 414

> recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection."

Thereafter, reference was made to the opinion expressed in judgment in ***Shree Ram Mills Ltd.*** v. ***Utility Premises (P) Ltd.***,[48] which it was contented had taken a different view from one in ***Boghara Polyfab Private Limited***. Disagreeing, the Court referred to the three Judge Bench decision in ***Chloro Controls India Private Limited*** which had considered the issue whether there was any variance between ***Shree Ram Mills Ltd.*** and ***Boghara Polyfab Private Limited***, to hold that there was none and both the judgments are capable of being read in harmony to bring in line with the law declared in ***Patel Engineering Ltd.*** In particular, a reference was made to the following portion of the paragraph 27 of ***Shree Ram Mills Ltd.*** and paragraph 119 of ***Chloro Controls India Private Limited*** which read as under:

> "*27*. … If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and

48 (2007) 4 SCC 599

> fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation."
>
> xx xx xx
>
> "*119*. Thus, the Bench while explaining the judgment of this Court in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the Arbitral Tribunal to decide."

In ***Arasmeta Captive Power Co. (P) Ltd.***, elucidating on the question whether the dispute was arbitrable within the scope of the arbitration clause should be decided by the Chief Justice/designate Judge or by the arbitrator, this Court has observed:

> "... The stress laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in para 39, it is extremely difficult to state that the principle stated in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted

> matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the ratio decidendi". That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in *SBP*, in our opinion, have been correctly understood by the two-Judge Bench in *Boghara Polyfab (P) Ltd.* and the same have been appositely approved by the three-Judge Bench in *Chloro Controls India (P) Ltd.* and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in *SBP*, were not noticed. We may hasten to add that the three-Judge Bench has been satisfied that the ratio decidendi of the judgment in *SBP* is really inhered in para 39 of the judgment."

63. B.N. Srikrishna, J. in ***Shin-Etsu Chemical Co. Ltd.*** v. ***Aksh Optifibre Ltd. and Another***,[49] a case relating to transnational arbitration under the New York Convention, had invoked the principle of *ex visceribus actus* for interpretation of the Arbitration Act. Sub-section (3) of Section 8 of the Arbitration Act envisages that even in a situation where an application to the court has been made in a pending proceeding, arbitration proceedings may commence and continue and even an award can be made. Section 16, it was held, incorporates the principles of separation and competence-competence thereby clearly indicating that the

49 (2005) 7 SCC 234

arbitrator can decide his or her own jurisdiction even when the validity of the main contract or the arbitration agreement is challenged. Section 34 states that the Court can go into three different aspects of arbitrability at the post-award stage. Therefore, the Arbitration Act itself envisages that the arbitral tribunal should rule on the questions of non-arbitrability subject to the second look of the court post the award. This helps in expeditious and quick disposal of matters before the court at the first stage while reserving the court's power to examine the three facets of arbitrability at the third stage. This also prevents the possibility of a multiplicity of trials, an aspect highlighted in ***Sukanya Holdings (P) Ltd.*** On the ambit of the Court's jurisdiction at the reference stage, it was observed that the correct approach to the review of the arbitration agreement would be restricted to *prima facie* finding that there exists an arbitration agreement that is not null and void, inoperative or incapable of being performed. The key rationale for holding that the courts' review of the arbitration agreement should be limited to a *prima facie* standard is the principle of competence-competence. Further, were the courts are to be empowered to fully scrutinize the arbitration agreement an arbitral proceeding would have to be stayed until such time that the court seized of the

matter renders a decision on the arbitration agreement. If the finding of the courts would be a final and determinative conclusion, then it is obvious that, until such a pronouncement is made, the arbitral proceedings would have to hang in abeyance. This evidently would defeat the credo and ethos of the Arbitration Act, which is to enable expeditious arbitration without avoidable intervention by the judicial authorities. As a result, the approach to be adopted at the reference stage is whether it is 'plainly arguable' that the arbitration agreement is in existence. The judgment laid emphasis on the fact that the rule of priority in favour of the arbitrators is counter-balanced by the courts' power to review the existence and validity of the arbitration agreement at the end of the arbitral process. It was elucidated:

> "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 … Even after the court takes a *prima facie* view that the arbitration agreement is not vitiated on account of factors enumerated in Section 45, and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48(1)(a). The award will be set aside if the party against whom it is invoked satisfies the court *inter alia* that the agreement was not valid under the law to which the parties had subjected it or under the law of the country where the award was made. The

> two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by the interpreting Section 45 as enabling the court to act on a *prima facie* view.
>
> [T]he object of the Act would be defeated if the proceedings remain pending in the court even after commencing of the arbitration. It is precisely for this reason that I am inclined to the view that at the pre-reference stage contemplated by Section 45, the court is required to take only a *prima facie* view for making the reference, leaving the parties to a full trial either before the Arbitral Tribunal or before the court at the post-award stage."

D.M. Dharmadhikari, J. in his partly concurring opinion agreed with the view expressed by B.N. Srikrishna, J. on most of the above aspects with the following reservation:

> "112. Whether such a decision of the judicial authority or the court, of refusal to make a reference on grounds permissible under Section 45 of the Act would be subjected to further re-examination before the Arbitral Tribunal or the court in which eventually the award comes up for enforcement in accordance with Section 48(1)(*a*) of the Act, is a legal question of sufficient complexity and in my considered opinion since that question does not directly arise on the facts of the present case, it should be left open for consideration in an appropriate case where such a question is directly raised and decided by the court."

While Y.K.Sabharwal, J. (as His Lordship then was) dissented.

64. We would now refer to decisions of this court post enforcement of Act 3 of 2016 with effect from 23rd October,2015. Reference Order observes that "one moot question that therefore arises, and which

needs to be authoritatively decided by a Bench of three learned Judges, is whether the word 'existence' would include weeding-out arbitration clauses in agreements which indicate that the subject matter is incapable of arbitration". Thereafter paragraph 59 from ***Duro Felguera S.A.*** as to the scope of Section 11(6-A) is quoted.

65. In ***Mayavati Trading Private Limited*** v. ***Pradyuat Deb Burman***,[50] a three Judge Bench has held that the legislature by inserting sub-section (6-A) to Section 11 and making amendments to Section 8 by Act 3 of 2016 has legislatively introduced a new regime so as to dilute and legislatively overrule the effect and ratio of the judgment of this Court in ***Patel Engineering Ltd.*** Reliance was placed on paragraph 48 and 59 in ***Duro Felguera S.A.*** The concluding paragraph in ***Mayavati Trading Private Limited*** records:

> "10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment, as 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 as has been laid down in the judgment in *Duro Felguera, SA."*

50 (2019) 8 SCC 714

66. Paragraph 48 and paragraph 59 of ***Duro Felguera, S.A.*** referred to above, read as under:

> "48...From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.
>
> xx xx xx
>
> 59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co.* 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."

67. Dr. D.Y. Chandrachud, J. in ***A. Ayyasamy*** observed that Section 8 of the Arbitration Act has made a departure from Article 8 of UNCITRAL Model Law as the former uses the expression 'judicial authority' rather than court and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" mentioned in Article 8 do not find place in Section 8.

Section 16 empowers the arbitral tribunal to rule upon its own jurisdiction, including the ruling with respect to the existence or validity of the arbitration agreement. Further clause (b) to Section 16(1) stipulates that a decision by an arbitral tribunal that the main contract is void, will not entail *ipso jure* the invalidity of the arbitration clause. The arbitration agreement survives for determining whether the contract in which the arbitration clause is embodied is null and void, which would include voidability. The severability doctrine in arbitration is of crucial significance. Reference was made to the judgment of the U.K. Court of Appeal in ***Fiona Trust and Holding Corpn.*** v. ***Privalov***,[51] which judgment was affirmed by the House of Lords in ***Filli Shipping Co. Limited*** v. ***Premium Nafta Products Ltd.***,[52] to highlight that the arbitration clause should be liberally construed in favour of one-stop arbitration. Mere allegation that the agent had no authority to enter into the main contract is not necessarily an attack on the arbitration agreement. The principle of severability treats arbitration agreement as a distinct agreement that can be void or voidable only on the ground that relates to the arbitration agreement. Reference was also made to the opinion of Scalia, J. of the

51 (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)
52 2007 UKHL 40 : 2007 Bus LR 1719 (HL)

Supreme Court of America in ***Buckeye Check Cashing Inc.*** v. ***Cardegna***[53] that arbitration agreement is severable from the remainder of the contract and unless the challenge is to the arbitration clause itself, the issue of contract's validity should be considered by the arbitrator in the first instance. In conclusion, it was observed:

> "48. The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial understanding a sense of business efficacy.
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> xx xx xx
>
> 53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle."

53 163 L Ed 2d 1038 : 546 US 440 (2006) : 2006 SCC OnLine US SC 14

68. In ***Garware Wall Ropes Limited*** v. ***Coastal Marine Constructions and Engineering Limited***,[54] the question related to the effect of an arbitration clause contained in the master contract which was required to be stamped. The second part of Section 7(2) was applicable. The issue was whether the judge hearing the Section 11 application should impound the main contract and ensure that duty and penalty, if any, are paid or in view of sub-section (6-A) to Section 11 this issue should be examined and decided by the arbitrator. The argument drawing distinction between validity and existence was raised before the Court (see paragraph 5 which records the contention) but was rejected for several reasons, including the reasoning given in ***Patel Engineering Ltd.***, to hold that it is difficult to accede to the argument that Section 16 of the Arbitration Act makes it clear that an arbitration agreement has an independent existence of its own. Secondly, on the connect between existence and validity of an arbitration agreement, it was observed:

> "20. Looked at from a slightly different angle, an arbitration agreement which is contained in an agreement or conveyance is dealt with in Section 7(2) of the 1996 Act. We are concerned with the first part of Section 7(2) on the facts of the present case, and therefore, the arbitration clause that is contained in

54 (2019) 9 SCC 209

the sub-contract in question is the subject-matter of the present appeal. It is significant that an arbitration agreement may be in the form of an arbitration clause "in a contract".

21. Sections 2(a), 2(b), 2(g) and 2(h) of the Contract Act, 1872 (the Contract Act) read as under:

> "**2. Interpretation clause**.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context—
>
> (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
>
> (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
>
> xx xx xx
>
> (g) An agreement not enforceable by law is said to be void;
>
> (h) An agreement enforceable by law is a contract;

22. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6-A), when read with Section 7(2) of the 1996 Act and Section 2(*h*) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an

> indicator that *SMS Tea Estates* has, in no manner, been touched by the amendment of Section 11(6-A)."

Thereafter, reference was made to paragraph 83 in ***Enercon (India) Ltd.*** v. ***Enercon GmbH***[55] wherein the concept of separability of arbitration clause or agreement from the underlying contract was dealt with, and it was observed that it is necessary to ensure that the intention of the parties does not evaporate into thin air when there is a challenge to the legality, validity, finality, or breach of the underlying contract. This is the mandate of Section 16 of the Arbitration Act which accepts the concept that the main contract and the arbitration agreement form two different contracts. It is true that support of the national courts would be required to ensure the success of arbitration but this would not detract from the legitimacy or independence of the collateral arbitration agreement even if it is contained in a contract, which is claimed to be void or voidable or un-concluded. However, this judgment was distinguished in ***Garware Wall Ropes Limited*** as a case relating to the controversy whether an arbitration clause was to apply even if there is no concluded contract, but the finding was to the contrary as the case was within the second part and not under the first part of Section 7(2) of the Arbitration Act. In ***Enercon (India)***

55 (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59

Ltd., on facts it was held that the arbitration clause was separate from the main contract as the disputes relating to the intellectual property right license agreement were arbitrable. Thereafter, reference was made to the decision in ***United India Insurance Co. Ltd.*** v. ***Hyundai Engg. & Construction Co. Ltd.***[56] and it was observed that the arbitration clause was identical as in ***Oriental Insurance Company Limited*** v. ***Narbheram Power and Steel Private Limited***[57] with the conditional expression of intent only when the liability was unequivocally admitted by the insurer and the dispute was related to the quantum to be paid under the policy. On the question of 'existence' and 'validity', the Bench held:

> "29. This judgment in *Hyundai Engg. case* is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the

56 (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530
57 (2018) 6 SCC 534

expression "existence" in *Hyundai Engg. case*, as followed by us."

69. In ***Narbheram Power and Steel Private Limited***, a three Judges' Bench of this Court had decided the Civil Appeal arising from an application under Section 11(6) of the Arbitration Act in an insurance contract. Primarily relying upon the decision of three Judges' Bench in ***Vulcan Insurance Co. Ltd.*** v. ***Maharaj Singh and Another***,[58] it was held that the disputes were not arbitrable as in terms of the arbitration clause as the insurer had disputed and not accepted the liability. The arbitration clause applies only if there is a dispute pertaining to the quantum. This decision, though dated 2nd May 2018, did not refer to Section 11(6-A) of the Arbitration Act and interpret the same. The Civil Appeal had arisen from the correspondence exchanged between the insurance company and the insured in the years 2013 and 2014. However, reference was made to the concurring opinion of Dr. D.Y. Chandrachud, J. in ***A. Ayyasamy***, and it was observed that the decision was not applicable to the case at hand. The decision in ***Chloro Controls India Private Limited*** was held to be not remotely relevant for deciding the *lis* in the said case.

58 (1976) 1 SCC 943

70. This decision in ***Narbheram Power and Steel Private Limited*** was followed in ***Hyundai Engg. & Construction Co. Ltd.***, wherein a similar arbitration clause had come up for consideration. However, in this case, reference was made to Section 11(6-A) of the Arbitration Act. It is, therefore, clear that on two occasions, in ***Narbheram Power and Steel Private Limited*** and ***Hyundai Engineering and Construction Company Limited***, a three Judges' Bench of this Court affirmatively and in clear terms held that the question of non-arbitrability relating to the enquiry whether the dispute was governed by the arbitration clause, can be examined by the courts at the reference stage and may not be left unanswered to be examined and decided by the arbitral tribunal. These are decisions by a Bench of three Judges and, as noticed above, were quoted with affirmation in ***Garware Wall Ropes Limited*** by a Bench of two Judges.

71. In ***M/s. PSA Mumbai Investments PTE. Limited*** v. ***The Board of Trustees of the Jawaharlal Nehru Port Trust and Another***,[59] a division bench of this Court, after referring to in detail the global invitation of request for qualification and the request for proposal, came to the conclusion that the arbitration clause in the request for

59 Civil Appeal No. 9352 of 2018 decided on 11th September 2018.

qualification documents would not be applicable and govern the disputes. Therefore, the respondent was left to pursue its claim before an appropriate forum, in accordance with law. The decision was made at the first or the referral stage.

72. At this stage we would like to refer to different views expressed by scholars on the subject, which also refer to the legal position in different countries. Stavros Brekoulakis in his paper titled *On Arbitrability: Persisting Misconceptions and New Areas of Concern* accepts that as per prevailing view in-arbitrability of the subject matter of the arbitration agreement renders the arbitration agreement invalid. However, he argues that in-arbitrability of the subject matter is an issue concerning jurisdiction of arbitral tribunal rather than the validity of the arbitration agreement. Referring to Article V(1)(a) and Article V(2)(a) of the New York Convention, he draws a distinction between in-arbitrability and invalidity. Arbitration agreements are *sui generis* contracts with both contractual and jurisdictional features. The latter is wider in scope. The courts at the referral stage may review only whatever is related to the formation of the arbitration agreement as a substantive contract, that is, contractual aspects of the arbitration

agreement and jurisdictional aspects of the arbitration agreement should be left to the arbitral tribunal. In other words, at the stage of referral, the courts may review only whatever is related to the formation of the arbitration agreement (the contractual aspects of the arbitration agreement) and the issues relating to the jurisdictional aspects of the arbitration agreement, which as per the author includes the question relating to non-arbitrability of the claims, should be under the exclusive jurisdiction of the arbitral tribunals. Thus, distinction is drawn between validity in terms of substantive and formal validity of an arbitration agreement as contractual aspects; and whether a claim is non-arbitrable. The latter question would be arbitrable and not for the courts to decide at the referral stage. However, on referring to Articles II(1) and II(3) of the New York Convention the author did observe that it seems to include arbitrability of subject matter within the essential meaning of an arbitration agreement.

73. Emmanuel Gaillard and Yas Banifatemi in *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators* observe that it is the basic requirement that the parties to the arbitration agreement should honour their undertaking to

submit to the arbitration any dispute covered by the agreement. This entails the consequence that the courts are prohibited from hearing such disputes. On the question of courts' interference at the reference stage in terms of Article II(3) of the New York Convention, they are of the opinion that there is no indication provided as to the standard that should be applied for such determination, that is, whether the courts are required to conduct in-depth investigation into the merits of the existence and validity of the arbitration agreement and issue a final decision on the question, or the court should restrict itself to *prima facie* verification that the arbitration agreement exists and is valid, and reserve its full review until the time when there is an action to enforce or set aside the arbitral award. The question, in effect, is one of timing and to the extent the courts are entitled to review the existence and validity of the arbitration agreement. The answer, they observe, is found in the notion of competence-competence, one of the founding principles of the international arbitration law that provides the arbitrators with power to rule on their own jurisdiction and embodies the mirroring effect that the court should refrain from engaging in examination of the arbitrator's jurisdiction before the arbitrators themselves have an opportunity to do so. This, they

state, by no means suggests that the domestic courts relinquish their power to review the existence and validity of an arbitration agreement which is first left to the arbitrators to rule. The courts enjoy the power of scrutiny after the award is rendered. They have referred to decisions of the higher courts of Switzerland,[60] England, France, Canada and India (***Shin-Etsu Chemical Co. Ltd.***) to observe that the court's review at the first stage is limited to *prima facie* verification of existence and validity of the arbitration clause without the question being analysed in detail which the tribunal is empowered to decide when necessary. At the reference stage, the court shall decline jurisdiction if the summary examination of the arbitration agreement does not allow it to find that the agreement is null and void, inoperative and incapable of being performed. The Canadian courts, apply the general rule that in any case involving an arbitration clause, a challenge to arbitrator's jurisdiction must be resolved first by the arbitrator and the court will depart from this rule of systematic referral of arbitration only if the challenge to arbitrator's jurisdiction is solely based on a question of law. Exercise of court's jurisdiction in the latter case would be justified as the court is the forum to which the parties first apply when

60 Article 5 of the Concordat (domestic law) provides that any dispute concerning rights the parties may freely dispose of is capable of resolution by arbitration, unless the subject matter of the dispute falls within the exclusive jurisdiction of a state authority by virtue of mandatory law.

requesting for referral and that the arbitrator's jurisdiction regarding his or her jurisdiction can be reviewed by the court. Further, it allows the court to decide the legal argument for once and for all and avoids duplication of a strictly legal debate. Another condition is that the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of arbitration proceedings. This means that the court, when considering one of the exceptions, may allow the arbitrator to rule on his or her *competence* as would be best for the arbitration process.

74. Referring to the House of Lords decision in ***Premium Nafta Products Ltd.***, the authors have observed that the decision reaffirms the principle of severability of an arbitration agreement and the proper approach is to stay the court proceedings in favour of arbitration. Lord Hoffmann speaking for the House of Lords in ***Premium Nafta Products Ltd.*** has observed:

> "to determine on the evidence before the court that [an arbitration agreement] does exist in which case (if the disputes fall within the terms of that agreement) a stay must be granted, in the light of the mandatory 'shall' in section 9(4). It is this mandatory provision which is the statutory enactment of the relevant article of the New York Convention, to which the United Kingdom is a party."

xx xx xx

> "the arbitrators are, 'in general', recognised the right 'to be the first tribunal to consider whether they have jurisdiction to determine the dispute' are limited by the requirement that a valid arbitration agreement exist, as well as the further requirements that the arbitration agreement be 'wide enough to comprise the relevant dispute' and that the arbitration agreement not be 'directly impeached by whatever ground... to attack the invalidity of the contract in which the arbitration clause is contained'. In other words, to the extent that the English courts retain a degree of scrutiny as regards the existence, validity and scope of the arbitration agreement, the question of the extent to which English courts will give effect to the negative effect of competence-competence remains uncertain."

75. John J. Barcelo III, in his paper titled *'Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective'*, observes that the greater the number of issues required to be fully adjudicated at Stage I, the greater is the potential for disruption of the arbitration process by an obstructing party even in case of a genuine agreement to arbitration. An extremely pro-arbitration approach with no or minimal judicial scrutiny might send all the questions to the arbitrators. At the same time arbitration is no holy grail and not all parties resisting arbitration are obstructionists. A party must have its say in the court, unless he has agreed to arbitrate. A good legal order must decide what weight be given to these competing values and how to structure the process to maximize overall value by

reducing opportunities for obstructionism while preserving legitimate claims for reasonably prompt judicial decision. Referring to the competence-competence and severability principles the author has observed: -

> "Competence-competence thus addresses the "who decides" question on a broader scale and is more central to resolving the policy tension between protecting arbitration from obstruction, on one hand, and preserving legitimate disputes over arbitrator jurisdiction for a prompt court hearing, on the other... Whereas separability is universally accepted, competence-competence is controversial and has spawned a range of different national responses."

The French approach, as the paper notes, is that if an arbitral tribunal is already seized of the matter, the court will refuse jurisdiction and leave questions as to existence, validity and scope of the arbitration agreement to the arbitrators. However, if the arbitral tribunal is not yet seized of the matter, the court will undertake a limited scrutiny of the challenge and will retain jurisdiction only if the arbitration agreement is manifestly null. The German Law of *Kompetenz-Kompetenz* prior to the new 1998 German Arbitration Act was relatively unique, or arguably so, as some commentaries maintain that when express power to decide their jurisdiction is conferred on the arbitrator, then it would exclude judicial scrutiny at state 1 and stage 3. However, the 1998

German Arbitration Act based upon UNCITRAL Model Law, states that the court may only decide the arbitrator's jurisdiction if requested to do so before the arbitral tribunal is constituted. The German Law expostulates preference for the arbitrator to decide the jurisdiction in an interim award. Referring to the UNCITRAL Model Law, reference is made to the competence-competence as spelled in Article 8(1) which directly deals with judicial review at Stage I, which is limited to the existence of a valid arbitration agreement. It postulates that the parties shall be referred to arbitration, unless the court finds that the agreement is null and void, inoperative or incapable of being performed. This, the author feels, could be read as authorizing full judicial determination and settlement of arbitration agreement's existence and validity. Article 16 (1) embodies the positive competence-competence concept and Articles 16(3) and 8(2) enact a partial negative competence-competence principle. The latter allows arbitration proceedings to go forward despite the court consideration of the arbitrator's jurisdiction. Article 16(3) encourages outcome by expressly empowering arbitrators to rule over their jurisdiction as a preliminary question. The British Arbitration Act of 1996 based on the Model Law requires the court to stay the legal proceedings,

'unless satisfied' that the arbitration agreement is null and void, inoperative or incapable of being performed. "Unless satisfied", the author observes, is closer to "unless it is manifest", rather than it is to the Model Law terminology "unless it finds". The British Act allows the arbitrator to render his/her decision on jurisdiction either in the preliminary award or in the final award, but allows the parties to insist the arbitrators for preliminary and an early decision as a check against wasteful proceedings. The paper also deals with the American approach in domestic and international arbitration. In domestic law the issues of arbitrability have been divided into procedural and substantial objections. Procedural arbitrability issues include whether a time limit for bringing a claim has been observed or whether a party has waived its right to arbitrate and also issues like waiver or estoppel thereby denying a party from claiming the right or any pre-condition for invoking arbitration has not been made, etc. These issues are 'gateway questions'[61] that are presumptively for the arbitrator to decide and not for the courts to decide, at least at the first stage. The substantive aspects are those wherein the court at the first stage would go into *prima facie* examination. Substantive issues pertaining to the validity and

61 First Options of Chicago v. Kaplan, 514 U.S. 938 (1995) and Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002).

existence of the arbitration agreement (Legal position in domestic law post- ***Buckeye Check Cashing Inc.*** is explained below.) He observes that the United States Supreme Court has frequently been more receptive to international as opposed to domestic agreements. An important consideration being that international agreements are commercial and involve sophisticated, generally well-advised parties and there is a need for uniformity of interpretation under the New York Convention.

76. The United States Supreme Court in ***Buckeye Check Cashing Inc.,*** relying on earlier decisions in ***Prima Paint Corpn.*** v. ***Flood & Conklin Mfg. Co.***[62] and ***Southland Corpn.*** v. ***Keating***,[63] in respect of the domestic American law has clarified the legal position as establishing the following propositions:

> "First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance...Applying them to this case, we conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court."

62 18 L Ed 2d 1270: 388 US 395 (1967): 1967 SCC OnLine US SC 160
63 79 L Ed. 2d 1: 465 US 1 (1984): 1984 SCC OnLine US SC 19

However, these observations have to be read with caution as American law states that:

> "(a) party aggrieved by the alleged failure... of another to arbitrate... (the) court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not an issue, the court shall make an order directing the parties to arbitration....if the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof."

Therefore, in case of issue, if in the trial the court determines that arbitration agreement was not made it does not order the parties to arbitration. However, this principle does not apply when the arbitration clause is contained in a 'container contract' by the application of 'separability' doctrine. In ***Buckeye Check Cashing Inc.***, the US Supreme Court held that separability doctrine applies to both voidable and void 'container contract' with an arbitration agreement. Distinction is drawn and different principles apply to 'container contract' with an arbitration clause, and stand-alone arbitration agreement.[64] ***Buckeye Check Cashing Inc.*** ruled that courts must send to arbitrators any "challenge to the validity of the contract as a whole," (the container contract), while courts themselves must resolve any challenge directed "specifically to the

64 Prof. Stephen J. Ware in Arbitration Law's Separability Doctrine After *Buckeye Check Cashing, Inc. v. Cardegna*

arbitration clause". When arbitrators hear any challenge to the container contract's validity, ***Buckeye Check Cashing Inc.*** cautioned:

> "The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and oblige was ever concluded."

77. Prof. Alan Scott Rau[65] questions the "abstract distinction between 'invalidity and nonexistence" as "nothing". The author while supporting the principle of separability rejects the argument that formation of a contract is different from enforcement of the contract as when the agreement is invalid there is no agreement to anything. He observes:

> "But how much of an improvement is it, really, to sweep away the conceptual distinction between "void and voidable" contracts—only to replace it with the equally abstract distinct between "invalidity" and "nonexistence"? These are all, as a colleague of mine likes to say, nothing but word balloons.
>
> Ingenious riffs on this metaphysical distinction between contract "invalidity" and contract "nonexistence" have long been a staple of Continental legal learning. It has been well-established for over a century in learned treatises on the law of obligations. Its tendency to take metaphor for reality, its personification of legal concepts, its characterization of doctrine in terms of what is "unthinkable" or "impossible"...of all of this exemplifies the worst excesses of formalism....But like the "void/voidable" distinction that it closely resembles...to which indeed it

65 Alan Scott Rau in Separability in the United States Supreme Court

> may even be identical[50]...this is not only slippery, but serves no instrumental function whatever. Happily, some modern scholarship seems now at last to appreciate that the whole notion of "nonexistence" is not only sterile and purely verbal...but what is worse, is completely unnecessary. And particularly when we come to the doctrine of "separability," this is a distinction that leads precisely.
>
> Foot note 50 reads as:
>
> "See Christian Larroumet, 3 Droit Civil: Les Obligations, Le Contrat 539-540, 580-81 (5th ed. 2003) (French case law has often conflated the notions of a contract's "nonexistence" and its "invalidity"; if an essential condition imposed by the law is missing then whether the agreement is termed void *[null]* or nonexistent "amounts to the same thing, for what is void is treated to all intents and purpose as if it had never existed", nonexistence and "voidness" are "one and the same notion")."

78. Prof. Stephen J. Ware in *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc.*, with reference to the American Law projects a different view:

> "under the contractual approach to arbitration law, the right to litigate (like other rights) would be alienable through an enforceable contract but not a contract that is unenforceable due to misrepresentation, duress, illegality, or any other contract-law defense. By contrast, the separability doctrine holds that a party alienates its right to litigate when that party forms a contract containing an arbitration clause even if that contract is unenforceable...The only way to fix this problem is to repeal the separability doctrine and allow courts to hear defenses to the enforcement of the contract containing the arbitration clause. Courts should send cases to arbitration only after rejecting any such defenses."

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

> "24. Two further sets of amendments have been proposed in this context. *First*, it is observed that a lot of time is spent for appointment of arbitrators at the very threshold of arbitration proceedings as applications under section 11 are kept pending for many years. In this context, the Commission has proposed a few amendments. The Commission has proposed changing the existing scheme of the power of appointment being vested in the "Chief Justice" to the "High Court" and the "Supreme Court" and has expressly clarified that delegation of the power of "appointment" (as opposed to a finding regarding the existence/nullity of the arbitration agreement) shall not be regarded as a judicial act. This would rationalise the law and provide greater incentive for the High Court and/or Supreme Court to delegate the power of appointment (being a non-judicial act) to specialised, external persons or institutions. The Commission has further recommended an amendment to section 11(7) so that decisions of the High Court (regarding existence/nullity of the arbitration agreement) are final where an arbitrator has been *appointed*, and as such are non-appealable. The Commission further proposes the addition of section 11(13) which requires the Court to make an endeavour to dispose of the matter within sixty days from the service of notice on the opposite party.
>
> xx xx xx
>
> 31. The Commission is of the view that, in this context, the same test regarding *scope* and *nature* of judicial intervention, as applicable in the context of

section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd.* v. *Aksh Optifibre*, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only *prima facie*.

33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The *scope* of judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreemend does not exist or is null and void. In so far as the *nature* of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is *prima facie* satisfied against the argument challenging the arbitration agreement, it *shall* appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that *prima facie* the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not *prima facie*. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be

> final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

The Law Commission's Report specifically refers to the decision of this Court in ***Shin-Etsu Chemical Co. Ltd.***, a decision relating to transnational arbitration covered by the New York Convention.

80. The Statement of Objects and Reasons of Act 3 of 2016 read as under:

> "**Statement of Objects and Reasons**
>
> ***
>
> 6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely—
>
> (i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;
>
> (ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
>
> (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;
>
> (iv) to provide that while considering any application for appointment of arbitrator, the High Court or the

Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

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

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

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

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

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

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

81. We would now examine the principles of separability and competence-competence. Clauses (a) and (b) to sub-section (1) to Section 16 enact the principle of separation of the arbitration agreement from the underlying or container contract. Clause (a),

by legal fiction, gives an independent status to an arbitration clause as if it is a standalone agreement, even when it is only a clause and an integral part of the underlying or container contract. Clause (b) formulates a legal rule that a decision by the arbitral tribunal holding that the main contract is null and void shall not *ipso jure* entail invalidity of the arbitration clause. Successful challenge to the existence or invalidity or rescission of the main contract does not necessarily embrace an identical finding as to the arbitration agreement, provided the court is satisfied that the arbitration clause had been agreed upon. The arbitration agreement can be avoided only on the ground which relates directly to the arbitration agreement. Notwithstanding the challenge to the underlying or container contract, the arbitration clause in the underlying or container contract survives for determining the disputes. The principle prevents boot-strapping as it is primarily for the arbitral tribunal and not for the court to decide issues of existence, validity and rescission of the underlying contract. Principle of separation authorises an arbitral tribunal to rule and decide on the existence, validity or rescission of the underlying contract without an earlier adjudication of the questions by the referral court.

82. An interesting and relevant exposition, when assertions claiming repudiation, rescission or 'accord and satisfaction' are made by a party opposing reference, is to found in ***Damodar Valley Corporation*** v. ***K.K. Kar***,[66] which had referred to an earlier judgment of this Court in ***Union of India*** v. ***Kishorilal Gupta & Bros.***,[67] to observe:

> "11. After a review of the relevant case law, Subba Rao, J., as he then was, speaking for the majority enunciated the following principles: "(*1*) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it; (*2*) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (*3*) the contract may be *non est* in the sense that it never came legally into existence or it was void *ab initio*; (*4*) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (*5*) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (*6*) between the two falls many categories "of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain

66 (1974) 1 SCC 141
67 AIR 1959 SC 1362

> purposes, the arbitration clause operates in respect of these purposes." In those cases, as we have stated earlier, it is the performance of the contract that has come to an end but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. We think as the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

Reference was also made to the minority judgment of Sarkar, J. in ***Kishorilal Gupta & Bros.*** to observe that he had only disagreed with the majority on the effect of settlement on the arbitration clause, as he had held that arbitration clause did survive to settle the dispute as to whether there was or was not an 'accord and satisfaction'. It was further observed that this principle laid down by Sarkar, J. that 'accord and satisfaction' does not put an end to the arbitration clause, was not disagreed to by the majority. On the other hand, proposition (6) seems to be laying the weight on to the views of Sarkar, J. These decisions were under the Arbitration Act,1940. The Arbitration Act specifically incorporates principles of separation and competence-competence and empowers the arbitral tribunal to rule on its own jurisdiction.

83. Principles of competence-competence have positive and negative connotations. As a positive implication, the arbitral tribunals are declared competent and authorised by law to rule as to their

jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the arbitral tribunal to rule as to their jurisdiction and decide non-arbitrability questions. As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability. Such prioritisation of arbitral tribunal over the courts can be partial and limited when the legislation provides for some or restricted scrutiny at the 'first look' referral stage. We would, therefore, examine the principles of competence-competence with reference to the legislation, that is, the Arbitration Act.

84. Section 16(1) of the Arbitration Act accepts and empowers the arbitral tribunal to rule on its own jurisdiction including a ruling on the objections, with respect to all aspects of non-arbitrability including validity of the arbitration agreement. A party opposing arbitration, as per sub-section (2), should raise the objection to jurisdiction of the tribunal before the arbitral tribunal, not later than

the submission of statement of defence. However, participation in the appointment procedure or appointing an arbitrator would not preclude and prejudice any party from raising an objection to the jurisdiction. Obviously, the intent is to curtail delay and expedite appointment of the arbitral tribunal. The clause also indirectly accepts that appointment of an arbitrator is different from the issue and question of jurisdiction and non-arbitrability. As per sub-section (3), any objection that the arbitral tribunal is exceeding the scope of its authority should be raised as soon as the matter arises. However, the arbitral tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-section (2) and (3) if it considers that the delay is justified. As per the mandate of sub-section (5) when objections to the jurisdiction under sub-sections (2) and (3) are rejected, the arbitral tribunal can continue with the proceedings and pass the arbitration award. A party aggrieved is at liberty to file an application for setting aside such arbitral award under Section 34 of the Arbitration Act. Sub-section (3) to Section 8 in specific terms permits an arbitral tribunal to continue with the arbitration proceeding and make an award, even when an application under sub-section (1) to Section 8 is pending consideration of the

court/forum. Therefore, pendency of the judicial proceedings even before the court is not by itself a bar for the arbitral tribunal to proceed and make an award. Whether the court should stay arbitral proceedings or appropriate deference by the arbitral tribunal are distinctly different aspects and not for us to elaborate in the present reference.

85. Section 34 of the Act is applicable at the third stage post the award when an application is filed for setting aside the award. Under Section 34, an award can be set aside – (i) if the arbitration agreement is not valid as per law to which the party is subject; (ii) if the award deals with the disputes not contemplated by or not falling within the submission to arbitration, or contains a decision on the matter beyond the scope of submission to arbitration; and (iii) when the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Thus, the competence - competence principle, in its negative effect, leaves the door open for the parties to challenge the findings of the arbitral tribunal on the three issues. The negative effect does not provide absolute authority, but only a priority to the arbitral tribunal to rule the jurisdiction on the three issues. The

courts have a 'second look' on the three aspects under Section 34 of the Arbitration Act.[68]

86. The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that *prima facie* no valid arbitration agreement exists. Examining the term *'prima facie',* in ***Nirmala J. Jhala*** v. ***State of Gujarat and Another***,[69] this Court had noted:

> "48. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."

Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the arbitral tribunal. It is restricted to the subject matter of the suit being *prima facie* arbitrable under a

68 The nature and extent of power of judicial review under Section 34 has not been examined and answered in this reference.
69 (2013) 4 SCC 301

valid arbitration agreement. *Prima facie* case means that the assertions on these aspects are *bona fide*. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, referral court without getting bogged-down would compel the parties to abide unless there are good and substantial reasons to the contrary.[70]

87. *Prima facie* examination is not full review but a primary first review to weed out manifestly and *ex facie* non-existent and invalid arbitration agreements and non-arbitrable disputes. The *prima facie* review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are

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70 The European Convention on International Commercial Arbitration appears to recognise the *prima facie* test in Article VI (3):

> "Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."

preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of 'plainly arguable' case in ***Shin-Etsu Chemical Co. Ltd.*** are of importance and relevance. Similar views are expressed by this Court in ***Vimal Kishore Shah*** wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement. The test of "good arguable case" has been elaborated by the England and Wales High Court in ***Silver Dry Bulk Company Limited*** v. ***Homer Hulbert Maritime Company Limited***,[71] in the following words:

> "Good arguable case" is an expression which has been hallowed by long usage, but it means different things in different contexts. For the purpose of an application under Section 18, I would hold that what must be shown is a case which is somewhat more than merely arguable, but need not be one which appears more likely than not to succeed. It shall use the term "good arguable case" in that sense. It represents a relatively low threshold which retains flexibility for the Court to do what is just, while excluding those cases where the jurisdictional merits were so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it was very likely that the tribunal had no jurisdiction. In this connection it is important to remember that crossing the threshold of "good arguable case" means that the Court has power to make one of the orders listed in

71 (2017) EWHC 44 (Comm.)

> Section 18(3). It remains for consideration whether it should do so as a matter of discretion."

Appropriate at this stage would be a reference to the judgment of the Delhi High Court in ***NCC Ltd.*** v. ***Indian Oil Corporation Ltd.***,[72] wherein it has been held as under:

> "59.1 In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view of the language of Section 11(6A) of the 1996 Act. To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.
>
> 59.2 Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the arbitral tribunal."

72 Arbitration Petition No. 115 of 2018, decided on 08.02.2019

88. The nature and facet of non-arbitrability could also determine the level and nature of scrutiny by the court at the referral stage. *Stravos Brekoulakis* has differentiated between contractual aspects of arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which he feels should be left to the arbitral tribunal. *John J. Barcelo III,* referring to some American decisions had divided the issue of non-arbitrability into procedural and substantive objections. The procedurals are ‘gateway questions’ which would presumptively be for the arbitrator to decide at least at the first stage. In the Indian context, we would respectfully adopt the three categories in ***Boghara Polyfab Private Limited***. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action *in personam* or *rem*; whether the subject matter of the

dispute affects third party rights, have *erga omnes* effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statue(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the arbitral tribunal to decide. We would not like be too prescriptive, *albeit* observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary *prima facie* review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the arbitral tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration

and the court. There are certain cases where the *prima facie* examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the *prima facie* case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.[73]

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

73 Ozlem Susler – *'The English Approach to Competence-Competence'*

90. The Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the arbitral tribunal should first decide the disputes and rule on non-arbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings. Appropriate in this regard, are observations of the Supreme Court of Canada in ***Dell Computer Corporation*** v. ***Union des consommateurs and Olivier Dumoulin,***[74] which read:

> "85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> 86. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."

Judgment in ***Dell's*** case has been elucidated and diluted by the Supreme Court of Canada in ***TELUS Communications Inc.*** v.

74 [2007] 2 S.C.R. 801, 2007 SCC 34

Avraham Wellman, viz. interpretation of Section 7(5) of the Arbitration Act, 1991, an aspect with which we are not concerned.

91. We would now examine Section 11 of the Arbitration Act. As noticed above sub-section (6-A) was inserted by the Act 3 of 2016 with retrospective effect from 23rd October, 2015 and omitted by Act 33 of 2019. Section 11 (6) requires the court to appoint an arbitrator on an application made by a party. Section (6-A) to Section 11 stipulates that the court shall, at the stage of appointment under sub-section (4), (5) or (6), confine itself to the examination of the existence of an arbitration agreement. Sub-section (6-A) was omitted by Act 33 of 2019, but the omission is in view of the introduction of a new regime of institutionalised arbitration as per the report of the committee headed by Justice B. N. Srikrishna, dated 30.07.2017 which records for the reason of recommending the omission as:

> "Thus, it can be seen that after the Amendment Act of 2019, Section 11 (6-A) has been omitted because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists."

As observed earlier, ***Patel Engineering Ltd.*** explains and holds that Sections 8 and 11 are complementary in nature as both

relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. ***Mayavati Trading Private Ltd.,*** in our humble opinion, rightly holds that ***Patel Engineering Ltd.*** has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. ***Mayavati Trading Private Ltd.*** has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the Section, as originally enacted, was facsimile with Article 11 of the UNCITRAL Model of law of arbitration on which the Arbitration Act was drafted and enacted. Referring to the legislative scheme of Section 11, different interpretations, and the Law Commission's Reports, it has been held that the omitted sub-section (6-A) to Section 11 of the Arbitration Act would continue to apply and guide the courts on its scope of jurisdiction at stage one, that is the pre-arbitration stage. 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) to Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3A) 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 concerned High Court 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) to Section 11 the ratio in ***Patel Engineering Ltd.*** would become applicable.

92. We now proceed to examine the question, whether the word 'existence' in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence'. However, it is equally

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

(i) In ***Garware Wall Ropes Ltd.***, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, *albeit* the observations made and quoted above with reference to 'existence' and 'validity' of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof:

> "29. This judgment in *Hyundai Engg. case* is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in *Hyundai Engg. case*, as followed by us.";

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

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

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

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

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

(vi) Exercise of power of *prima facie* judicial review of existence as including validity is justified as a court is the first

forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

(vii) Exercise of the limited *prima facie* review does not in any way interfere with the principle of competence–competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

(viii) Exercise of *prima facie* power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In ***Subrata Roy Sahara*** v. ***Union of India***,[75] this Court has observed:

> "191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending

75 (2014) 8 SCC 470

> without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".

(ix) Even in ***Duro Felguera***, Kurian Joseph, J., in paragraph 52, had referred to Section 7(5) and thereafter in paragraph 53 referred to a judgment of this Court in ***M.R. Engineers and Contractors Private Limited*** v. ***Som Datt Builders Limited***[76] to observe that the analysis in the said case supports the final conclusion that the Memorandum of Understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to ***Patel Engineering Ltd.*** and ***Boghara Polyfab Private Limited*** to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Paragraph 48 in ***Duro Felguera***

76 (2009) 7 SCC 696

specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Paragraph 59 is more restrictive and requires the court to see whether an arbitration agreement exists – nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties - nothing more, nothing less. Reference to decisions in ***Patel Engineering Ltd.*** and ***Boghara Polyfab Private Limited*** was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

(x) In addition to ***Garware Wall Ropes Limited*** case, this Court in ***Narbheram Power and Steel Private Limited*** and ***Hyundai Engg. & Construction Co. Ltd.***, both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond

and not covered by the arbitration agreement. The court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in ***Vulcan Insurance Co. Ltd.*** Similarly, in ***M/s. PSA Mumbai Investments PTE. Limited***, this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the arbitral tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

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

93. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to

court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are *ex facie* time barred and dead, or there is no subsisting dispute. All other cases should be referred to the arbitral tribunal for decision on merits. Similar would be the position in case of disputed 'no claim certificate' or defence on the plea of novation and 'accord and satisfaction'. As observed in ***Premium Nafta Products Ltd.***, it is not to be expected that commercial men while entering transactions *inter se* would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

94. We would also resolve the question of principles applicable to interpretation of an arbitration clause. This is

important and directly relates to scope of the arbitration agreement. In ***Premium Nafta Products Ltd.***, on the question of interpretation and construction of an arbitration clause, it is observed:

> "In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction."

In ***Narbheram Power and Steel Private Ltd***., this Court while dealing with the arbitration clause in the insurance agreement, has held that the arbitration clause should be strictly construed, relying on the principles of strict interpretation that apply to insurance contracts. These observations have been repeated in other cases.

What is true and applicable for men of commerce and business may not be equally true and apply in case of laymen and

to those who are not fully aware of the effect of an arbitration clause or had little option but to sign on the standard form contract. Broad or narrow interpretations of an arbitration agreement can, to a great extent, effect coverage of a retroactive arbitration agreement. Pro-arbitration broad interpretation, normally applied to international instruments, and commercial transactions is based upon the approach that the arbitration clause should be considered as per the true contractual language and what it says, but in case of doubt as to whether related or close disputes in the course of parties' business relationship is covered by the clause, the assumption is that such disputes are encompassed by the agreement. The restrictive interpretation approach on the other hand states that in case of doubt the disputes shall not be treated as covered by the clause. Narrow approach is based on the reason that the arbitration should be viewed as an exception to the court or judicial system. The third approach is to avoid either broad or restrictive interpretation and instead the intention of the parties as to scope of the clause is understood by considering the strict language and circumstance of the case in hand. Terms like 'all', 'any', 'in respect of', 'arising out of' etc. can expand the scope and ambit of the arbitration clause. Connected and incidental matters,

unless the arbitration clause suggests to the contrary, would normally be covered.

Which approach as to interpretation of an arbitration agreement should be adopted in a particular case would depend upon various factors including the language, the parties, nature of relationship, the factual background in which the arbitration agreement was entered, etc. In case of pure commercial disputes, more appropriate principle of interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication.

95. Accordingly, we hold that the expression ‘existence of an arbitration agreement’ in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, *albeit* the court at the referral stage would apply the *prima facie* test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the arbitral tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

96. Discussion under the heading ‘Who decides Arbitrability?’ can be crystallized as under:

(a) Ratio of the decision in ***Patel Engineering 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 09.08.2019), is no longer applicable.

(b) Scope of judicial review and jurisdiction of the court under Section 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

(c) 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.

(d) Rarely as a demurrer the court may interfere at the 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.

97. Reference is, accordingly, answered.

98. In view of the aforesaid findings and ratio, we dispose of the Civil Appeal and the Special Leave Petitions in the following manner:

Civil Appeal No. 2402 of 2019

In view of the fact that the Arbitral Tribunal is hearing the matter, we leave the issue of arbitrability to the Tribunal to decide and come to a conclusion on the same. Further, the parties are at liberty to execute or challenge the award in accordance with law. The direction that the award cannot be executed without applying for permission of this Court is hereby vacated.

Special Leave Petition (Civil) Nos. 5605-5606 of 2019

In this case, arbitral award has been passed on 24th August 2019. It is apprised before this Bench that the Arbitral Tribunal has rejected the objection to the Tribunal's jurisdiction. In this view, the petitioner is at liberty to pursue the remedy available under Section 34 of the Arbitration Act.

Special Leave Petition (Civil) No. 11877 of 2020

In view of the fact that the Arbitral Tribunal is hearing the matter, we leave the issue of arbitrability to the Tribunal to decide and come to a conclusion on the same. Further, the parties are at liberty to challenge the award if they are not satisfied with the same in this regard.

.....J.
(N.V. RAMANA)

.....J.
(SANJIV KHANNA)

.....J.
(KRISHNA MURARI)

NEW DELHI;
DECEMBER 14, 2020.

Reportable ☐

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2402 OF 2019

VIDYA DROLIA & ORS. ...APPELLANTS

VERSUS

DURGA TRADING CORPORATION ...RESPONDENT

WITH

SLP (C) 5605-5606 OF 2019

LINDSAY INTERNATIONAL PVT. LTD. ...PETITIONER

VERSUS

IFGL REFRACTORIES LIMITED ...RESPONDENT

SLP (C) NO. 11877 OF 2020
(ARISING OUT OF DIARY NO. 40679 of 2019)

CREATIVE INFOCITY LTD. ...PETITIONER

VERSUS

GUJARAT INFORMATICS LTD. ...RESPONDENT

J U D G M E N T

N. V. RAMANA, J.

1. I have had the advantage of reading in advance the opinion of my learned Brother Justice Sanjiv Khanna. The present matters deal with a very important aspect in the arbitration jurisprudence in this country, which necessitate a separate opinion.

2. Recently, Mr. Fali S. Nariman, in one of his lectures had alluded that the development of arbitration in India is not attributable to the success in arbitration, rather to the failures of the Court. This reflects an uncomfortable relationship which arbitration has had with litigation all these days. The judicial hesitancy of the courts to be more accommodative towards the tribunal and the need for

respecting arbitral awards requires this Court to extensively reflect and bring the Court's jurisprudence in tune with the liberal intention sought to be furthered post the 2015 amendment to the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act").

3. Before we delve into the merits of the matters, we need to have a brief reference to the facts which are necessary for the disposal of these cases. As all the cases are similar, we take facts from Civil Appeal No. 2402 of 2019, to indicate the history of this litigation and the questions which arise from the same. In the year 2006, appellants (tenants) entered into a tenancy agreement with the predecessor title holder with respect to certain buildings. Clause 23 of the agreement contained a dispute resolution clause. In the year 2012, the tenancy was attorned to the respondent, after which the appellants started paying monthly rent to the respondent (landlord). On 24.08.2015, the respondent (landlord) wrote a letter seeking vacant possession of the property as the period of lease was expiring on 01.02.2016. Appellants (tenants) did not vacate. Aggrieved, the

respondent (landlord) invoked the arbitration under the dispute resolution mechanism provided under the contract. On 28.04.2016, the respondent filed the present Section 11 petition before the Calcutta High Court for appointment of an arbitrator. On 07.09.2016, the High Court passed the impugned order appointing an arbitrator, after rejecting the appellants objections on the arbitrability of the dispute.

4. Aggrieved by the same, the appellants (tenants) have approached this Court in the present proceedings, on the reason that, after the judgment of the High Court was rendered appointing the arbitrator, this Court in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia***, (2017) 10 SCC 706 [hereinafter referred as '***Himangni Enterprises***'] held that where the Transfer of Property Act, 1882 applied between the landlord and tenant disputes between the said parties would not be arbitrable.

5. When Civil Appeal No. 2402 of 2019 was listed for hearing on 28.02.2019, then the said matter was referred to a three-Judge Bench, with following observations:

> "7. It will be noticed that "validity" of an arbitration agreement is, therefore, apart from its "existence". One moot question that therefore, arises, and which needs to be authoritatively decided by a Bench of three learned Judges, is whether the word "existence" would include weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration…
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> x x x x x
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> x x x x x
>
> 30. In this view of the matter, this case is referred to a Bench of three Hon'ble Judges.
>
> 31. Given the facts of this case and the fact that 18 hearings have been held, the stay that has been granted to the arbitral proceedings by our order dated 13.08.2018 is lifted, and the proceedings may go on and culminate in an award. The award cannot be executed without applying to this Court. The appeal is disposed of accordingly."

6. The reference order primarily indicates that there are two substantive issues to be settled by this Court herein, namely:

I. To what extent does the Court decide the question of non-arbitrability under Section 11 of the Act?

II. Whether tenancy disputes are capable of being resolved through arbitration?

7. Before we analyze the issue, we need to observe arguments canvassed by the counsel appearing for the parties, who set the tone for these cases.

8. Learned senior counsel, Mr. K. V. Vishwanathan, appearing for the petitioners in SLP (C.) No. 5605-5606 of 2019, submitted as under:

- That Section 11(6A) of the Act is a unique provision, which is neither traceable to UNCITRAL Model Law nor any other domestic legislation.
- In spite of the absence of legislative provision in other countries, Courts have adjudicated on the existence of the arbitration agreement at the stage of the appointment of the arbitrator itself.
- The standard of 'good arguable case' as expounded in ***Noble Denton Middle East v. Noble Denton International Ltd.***, [2010] EWHC 2574 (Comm.), should be applied by the Courts to examine the existence of a valid arbitration agreement.

- Therefore, the scope of judicial enquiry at the stage of reference/appointment is not limited to the mere presence of the arbitration clause.

9. Learned Senior advocate, Mr. Nakul Dewan on behalf of the Respondent in SLP (C.) No. 5605-5606 of 2019, argued that:

- Section 11(6A) was a conscious departure from the earlier existing judicial interpretation, which had widened the scope of judicial enquiry.
- The 246th Law Commission Report stated that Section 11(6A) limits the scope of judicial enquiry to determination of a *prima facie* existence.
- Word 'existence' under Section 11(6A) means legally enforceable existence and not mere presence in the contract.
- While examining the issue of existence in an application under Section 11, this Court is merely functioning as an appointing authority.

10. Learned senior counsel, Mr. Manoj Swarup on behalf of the Petitioner in SLP (C.) No. 11877 of 2020, has submitted that:

- Lease hold rights under the Transfer of Property Act, 1882 [hereinafter referred to as "TP Act"]are rights in rem.
- A contractual tenant upon determination of lease becomes a statutory tenant and is entitled to the statutory protection. Therefore, the arbitration in that case would be ousted.
- Section 11 is not the stage for determination of the issue of arbitrability in those cases where the test of Section 89, CPC is to be applied.

11. Learned senior counsel, Mr. Gopal Shankarnarayan on behalf of the Petitioners in SLP (C.) No. 5605-5606 of 2019, submitted that:

- Section 11(6A) mandates an 'examination of the evidence of an arbitration agreement'.
- The 2015 Amendment does not convert the judicial power conferred in Section 11(6) into an administrative power.
- The decision in ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman***, (2019) 8 SCC 714 is inapplicable.

12. Learned counsel, Mr. Sourav Agarwal on behalf of the Respondent in Civil Appeal No. 2402 of 2019, contended that:

- the Court under Section 8 and 11 of the Act, does not act as a mere post-office.
- this is a case in which the appellants have participated in the arbitral proceedings.
- Relying upon various judgments, including certain High Court judgments that were passed after the judgment in ***Himangni Enterprises*** (*supra*) to state that, on facts, ***Himangni Enterprises*** (*supra*) was wholly distinguishable as it did not apply to a situation of a lease expiring by efflux of time.
- certain High Court judgments had, after the judgment in ***Himangni Enterprises*** (*supra*), distinguished the said judgment on this and other grounds. As an alternative submission, he said that, in any case, ***Himangni Enterprises*** (*supra*) would require reconsideration as it did not state the law correctly.

13. We answer the two questions in *seriatim*.

14. Arbitration is a creature of consensus. It is completely dependent on party autonomy and the intention expressed in the agreement. A contract, having multiple clauses including arbitration agreements, can be divided into two parts. The clauses relating to the commercial relationship, *i.e.*, the obligations and duties of each party, can be referred to as the 'main contract'. The arbitration agreement so to say is a separate contract in itself.

15. The separability of the arbitration agreement from the main contract, historically existed in Roman law. Since early times, arbitration was viewed with suspicion, which allowed for the development of separability. Ironically, the 'pro-arbitration' function of separability in the present day is a late 19th and 20th century development, traceable to Germanic and Swiss jurisprudence.

16. In India, arbitration was governed earlier by the Arbitration Act of 1899, and later 1940. Presently, arbitration is governed by the Act of 1996, with subsequent amendments. A cursory reading of the legislative history points to the fact

that the intention of the legislature is to make the regime 'pro-arbitration'. Whenever this Court has afforded a contrary view, there has been a trend to undo the changes to bring it in line with the international standards prevailing in certain arbitration havens such as Singapore, London and Hong Kong.

17. Before we move to the analysis of the case, we need to briefly describe the structure of the Arbitration Act, 1996 with subsequent amendments. The set-up of both international and domestic arbitration is contained under PARTS I, IA and II of the Act. The preamble to the Act provides that it was enacted with a view to have uniformity of the law of arbitral procedures to establish a fair and efficient mechanism to resolve disputes.

18. Section 2 provides for the definition of 'arbitration agreement' which is to be interpreted in terms of Section 7 of the Act, which states as under:

> **7. Arbitration agreement.** —
>
> (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which

may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

19. Section 5 emphasizes a very important principle, that judicial interference in arbitral proceedings should be minimum and should be limited to instances where it is specifically provided for under the Act. Although the provision envisages a wide amplitude, various judgments of

this Court have restricted the utility of same. [***ICICI Bank Ltd. v. Sidco Leathers Ltd.***, (2006) 10 SCC 452]

20. Section 8 of the Act in its present and earlier form, are extracted below:

Section 8 prior to Act 3 of 2016	**Section 8 after Act 3 of 2016**	**Section 8 after Act 33 of 2019**
Power to refer parties to arbitration where there is an arbitration agreement.-(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the	**Power to refer parties to arbitration where there is an arbitration agreement**.—(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement *or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or*	**Power to refer parties to arbitration where there is an arbitration agreement.-**(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement *or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or*

original arbitration agreement or a duly certified copy thereof. (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.	*order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.* *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:* *Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along*	*order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.* *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:* *Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying*

	with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court. *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made*	*shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.* *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made*.

Under the old Arbitration Act, 1940, the Court had the discretion in referring the parties to arbitration, however such discretion is done away with after the coming into force of the 1996 Act. The Arbitration and Conciliation Act, 1996 does not, in specific terms, exclude any category of

disputes—civil or commercial—from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration agreement, the parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute. The only exception is where the authority finds, *prima facie*, that there is no valid arbitration agreement. Section 8 contains a positive mandate and obligates the judicial authority to refer parties to arbitration in terms of the arbitration agreement. While dispensing with the element of judicial discretion, the statute imposes an affirmative obligation on every judicial authority to hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration. Article 8 of the UNCITRAL Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being

performed. Section 8 of the Act has made a departure from the UNCITRAL law which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8.

21. On the 2015 amendment to Section 8, Justice Indu Malhotra, comments as under:

> Section 8 was amended by the 2015 Amendment to clarify the scope of enquiry by the judicial authority at the pre-reference stage. The court would be required to make a *prima facie* determination as to whether there is valid arbitration agreement.[77]

We must state that we are partly in agreement with the aforesaid, wherein the judicial authorities have been given a clear mandate for interference at the pre-reference stage, however, the threshold standard is worded differently, as pointed herein.

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77 Justice Indu Malhotra, Commentary on the Law of Arbitration, Vol. I, 4th Ed., p. 317.

22. Section 11 of the Act in its present and earlier forms, are extracted below:

Section 11 prior to Act 3 of 2016	**Section 11 after Act 3 of 2016**	**Section 11 after Act 33 of 2019**
Appointment of arbitrators.- (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.	***Appointment of arbitrators.—****(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.* *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.* *(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.* *(4) If the appointment*	***Appointment of arbitrators.****-(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.* *(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.* *(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.*

(4) If the appointment procedure in sub-section (3) applies and – (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from	*procedure in sub-section (3) applies and —* *(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or* *(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.* *(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree*	*(3A) The Supreme Court and the High Court shall have the power to designate, arbitral institutions, from time to time, which have been graded by the Council under section 43-I, for the purposes of this Act:* *Provided that in respect of those High Court jurisdictions, where no graded arbitral institution are available, then, the Chief Justice of the concerned High Court may maintain a panel of arbitrators for discharging the functions and duties of arbitral institution and any reference to the arbitrator shall be deemed to be an arbitral institution for the purposes of this section and the arbitrator appointed by a party shall be entitled to such fee at*

receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. (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	*the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.* *(6) Where, under an appointment procedure agreed upon by the parties,—* *(a) a party fails to act as required under that procedure; or* *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or* *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court to take*	*the rate as specified in the Fourth Schedule:* *Provided further that the Chief Justice of the concerned High Court may, from time to time, review the panel of arbitrators.* *(4) If the appointment procedure in sub-section (3) applies and —* *(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or* *(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,* *the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international*

necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. (7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final. (8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to – (a) any qualification required of the arbitrator by the agreement of the parties; and (b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator. (9) In the case of	*the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.* *(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.* *(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High*	*commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be.* *(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made on an application of the party in accordance with the provisions contained in sub-section (4).* *(6) Where, under an appointment procedure agreed upon by the parties,—* *(a) a party fails to act as required under that*

appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities. (10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him. (11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section(6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his	*Court.* *(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision* *(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—* *(a) any qualifications required for the arbitrator by the agreement of the parties; and* *(b) the contents of the*	*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,* *the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment*

designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request. (12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India" (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to " Chief Justice" in those sub -sections shall be construed as a reference to the Chief Justice of the High Court within whose	*disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.* *(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Supreme Court or the person or institution designated by that Court may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.* *(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.* *(11) Where more than one request has been*	*procedure provides other means for securing the appointment.* *(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.* *(8) The arbitral institution referred to in sub-sections (4), (5) and (6), before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—* *(a) any qualifications required for the arbitrator by the*

local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.	*made under sub-section (4) or sub-section (5) or sub-section (6) to different High Courts or their designates, the High Court or its designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.* *(12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the "Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "Supreme Court"; and* *(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to "the*	*agreement of the parties; and* *(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.* *(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the arbitral institution designated by the Supreme Courtmay appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.* *(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to different arbitral institutions, the arbitral institution*

	Supreme Court or, as the case may be, the High Court" in those sub-sections shall be construed as a reference to the "High Court" within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court. *(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case maybe, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of*	*to which the request has been first made under the relevant sub-section shall be competent to appoint.* *(12) Where the matter referred to in sub-sections (4), (5), (6) and (8) arise in an international commercial arbitration or any other arbitration, the reference to the arbitral institution in those sub-sections shall be construed as a reference to the arbitral institution designated under sub-section (3-A).* *(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite*

	notice on the opposite party. *(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.* *Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.*	*party.* *(14) The arbitral institution shall determine the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal subject to the rates specified in the Fourth Schedule.* *Explanation.— For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) where parties have agreed for determination of fees as per the rules of an arbitral institution.*

23. Section 12 imposes, upon a person approached to be an arbitrator, the obligation to disclose to the parties in writing any circumstance that may give rise to justifiable doubts as to his independence and impartiality. An arbitrator can be challenged if there are circumstances that give rise to justifiable doubts about his independence and impartiality or if he does not possess the qualifications agreed to by the parties, but such challenge can be made only for reasons which the party challenging becomes aware of after the appointment has been made. Section 13 speaks of the challenge procedure. It states that the parties are free to agree on such a procedure. Failing that, the party who makes the challenge must within fifteen days after becoming aware of the constitution of the Arbitral Tribunal or of any of the circumstances mentioned in Section 12, send a written statement of the reasons for the challenge to the Arbitral Tribunal. Unless the challenged arbitrator withdraws or the other party to the arbitration agrees to the challenge, the Arbitral Tribunal shall decide upon the challenge and if the challenge is not successful it shall

continue the arbitration proceedings and make an award. That award can be sought to be set aside under Section 34.

24. Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction. Sub-section (1) of Section 16 is relevant, and reads thus:

> "16. (1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
> (b) a decision by the Arbitral Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."

25. Section 34 of the Act is as under:

Section 34 prior to Act 3 of 2016	**Section 34 after Act 3 of 2016**	**Section 34 after Act 33 of 2019**
Application for setting aside arbitral award.- (1) Recourse to a Court against an arbitral award	***Application for setting aside arbitral award***. *—(1) Recourse to a Court against an arbitral award*	***Application for setting aside arbitral award.*** *(1) Recourse to a Court against an*

may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3). (2) An arbitral award may be set aside by the Court only if – (a) the party making the application furnishes proof that- (i) a party was under some incapacity, or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or (iii) the party making the	*may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).* *(2) An arbitral award may be set aside by the Court only if—* *(a) the party making the application furnishes proof that—* *(i) a party was under some incapacity, or* *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or* *(iii) the party making the application was*	*arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).* *(2) An arbitral award may be set aside by the Court only if--* *(a) the party making the application establishes on the basis of the record of the arbitral tribunal that--* *(i) a party was under some incapacity, or* *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in*

application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the arbitration award	*not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or* *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:* *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be*	*force; or* *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or* *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:* *Provided that, if the decisions on matters submitted to arbitration can be separated from those not so*

which contains decisions on matters not submitted to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or (b) the Court finds that- (i) the subject-matter of the dispute is not capable of settlement by	*set aside; or* *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or* *(b) the Court finds that—* *(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or* *(ii) the arbitral award is in conflict with the public policy of*	*submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or* *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or* *(b) the Court finds that--* *(i) the subject-matter of the*

arbitration under the law for the time being in force, or (ii) the arbitral award is in conflict with the public policy of India. Explanation.- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81. (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making	*India.* *Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—* *(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or* *(ii) it is in contravention with the fundamental policy of Indian law; or* *(iii) it is in conflict with the most basic notions of morality or justice.* *Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental*	*dispute is not capable of settlement by arbitration under the law for the time being in force, or* *(ii) the arbitral award is in conflict with the public policy of India.* *Explanation 1: For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--* *(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or* *(ii) it is in contravention with the fundamental*

that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter. (4) On receipt of an application under sub-section *(1)*, the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings	*policy of Indian law shall not entail a review on the merits of the dispute.* *(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:* *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.* *(3) An application for setting aside may not be made after three months have elapsed from the date on which*	*policy of Indian law; or* *(iii) it is in conflict with the most basic notions of morality or justice.* *Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.* *(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the*

for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.	*the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:* *Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.* *(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a*	*face of the award:* *Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.* *(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:* *Provided that if the Court is satisfied that the applicant was*

	period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award. *(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.* *(6) An application under this section shall be disposed of expeditiously, and in any event,*	*prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.* *(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting*

	within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.	*aside the arbitral award.* *(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.* *(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.*

The intention of the legislators to provide for Section 34 in its present form, is to have a limited review of the award

instead of a full-fledged appeal process. A party intending to object to an award, is first required to file an application under Section 34 (1) indicating the objections along with the copy of an award and other necessary documents, which are required as proof to satisfy grounds provided under Section 34(2)(a) and (b) of the Act. Such complete petition is required to be filed within the time period prescribed under Section 34 (3) of the Act, failing which the appeal is rendered nugatory. The limitation prescribed under Section 34(3) is bound with the right to file objections itself. The objections filed under Section 34 must be relatable to the limited grounds provided under Section 34 (2) of the Act. It is the legislative intention to provide for numerous limitations under Section 34 of the Act, which are required to be strictly adhered to so as to make Indian arbitration time-bound and commercially prudent to opt for the same. Section 37 of the Act, provides for limited appeal against the Section 34 order, as well as against certain other specified orders.

26. It is important to observe Section 45 of the Act, which provides a judicial authority with the power to refer parties to arbitration when Part II of the Act applies, in the following manner:

Section 45 prior to Act 3 of 2016	**Section 45 after Act 3 of 2016**	**Section 45 after Act 33 of 2019**
Power of judicial authority to refer parties to arbitration. Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to	**Power of judicial authority to refer parties to arbitration.** Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have	**Power of judicial authority to refer parties to arbitration.** Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have

arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.	made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.	made an agreement referred to in section 44, shall, at the request of *one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it prima facie finds that the said agreement is null and void, inoperative or incapable of being performed.*

27. The present structure of arbitration is such that Courts are to assist and support arbitration and leave the substantive part of adjudication to the arbitral tribunal. Some scholars have suggested that the judicial mechanism that comports with the rule of law may be fundamentally at odds with non-judicial/arbitral mechanism which is therefore less formal. But our understanding is that that the rule of law is less in tension with arbitration than critics imagine, because they both aim to serve the same goal-the pursuit of justice.

28. On a plain reading of the Act, whenever a dispute arises between parties, they are free to approach an appropriate judicial forum to get their dispute resolved. If the parties have contemplated an arbitration agreement, then they can approach a tribunal for getting the matter resolved. Once they choose the non-judicial method, a party aggrieved by the award, has a chance to approach judicial institutions under Section 34 and 37 (appeal jurisdiction), if the award is violative of the grounds provided thereunder.

29. With this understanding, we need to have regards to certain precedents of this Court, in order to understand the

dispute. The case, which started the debate was the case of ***Konkan Railway Corpn. Ltd. v. Mehul Construction Co.***, (2000) 7 SCC 201, wherein a Bench of three Judges of this Court, emphasized the utility of 'Chief Justice' as occurring under the earlier Section 11, to come to a conclusion that the power of appointment of an arbitrator was an administrative action. The proposition laid down in the aforesaid case, was confirmed by a Constitution Bench of this Court in ***Konkan Railway Corporation Ltd. v. Rani Construction (P.) Ltd.***, (2002) 2 SCC 388. It may be relevant to quote the following observation by this Court:

> **"21.** It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. **That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration**

> **agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction.** There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."
>
> (**emphasis supplied**)

30. Again, the aforesaid decision came to be referred to a seven-Judge Bench in ***SBP & Co. v. Patel Engineering Ltd.***, (2005) 8 SCC 618, wherein majority was penned by Justice P.K. Balasubramanyan and the minority dissent was by Justice C. K. Thakker.

31. The majority opinion, concluded that the power of reference under Section 11 is a judicial function for the following reasons:

First, the sub-section (7) of Section 11 makes the adjudication by the Chief Justice, final. Such final

determination in usual course would be a judicial determination.

Second, the reason for delegating the power to the highest judicial authority in the State or the Country, is to provide credibility for the process.

Third, the power of a *persona designata* cannot be delegated, unless such power is judicial power.

Fourth, Section 8 and 11 are complimentary and the ambit of power is the same.

Fifth, the principle of *Kompetenz-Kompetenz*, as enshrined under Section 16, will come to play only if the parties approach the Arbitral Tribunal, without taking recourse to Section 8 or 11.

Sixth, it is incongruous to permit the order of the Chief Justice under Section 11(6) of the Act being subjected to scrutiny under Article 226 of the Constitution.

Seventh, the Court on earlier instances did not concentrate on the threshold satisfaction of the Chief Justice, before the same is referred to an arbitration.

Eighth, it would be a wasteful exercise for parties to arbitrate on the jurisdiction, only to find that tribunal did not have sufficient jurisdiction to entertain the arbitration.

32. The minority view posits that the function of the Chief Justice was administrative rather than judicial, for the following reasons:

First, merely because a decision adversely affects a party, cannot be the sole reason to conclude that the function is judicial.

Second, finality of decision taken by the Chief Justice under Section 11(7) refers to only matters such as qualification, independence and impartiality of the arbitrator. The aforesaid does not necessarily make the determination judicial or quasi-judicial.

Third, Section 16 spells out a rule of chronological priority.

Fourth, Section 16 has a negative effect, that is, it allows the arbitrators to decide their jurisdiction prior to the Courts stepping in post rendering of the award.

Fifth, there is a duty cast upon the Chief Justice under Section 11(6) 'to act fairly'.

In our consideration, the aforesaid case was heavily caught in the obfuscated concept of judicial or administrative duty, and there is scarce observation on the appropriate

standards of judicial enquiry or what aspects does the Court need to consider, while referring a matter to arbitration.

33. In ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.***, (2005) 7 SCC 234, this Court decided the ambit of Section 45 of the Act, which relates to the provision for referring parties to arbitration under the New York Convention. While deciding the scope of Section 45 of the Act, Justice Y. K. Sabharwal, as he then was, held in his opinion that a judicial forum seized of the mater should fully rule on the validity and existence of the agreement, before referring the same to the arbitration. The prima facie standard, which the Court found to be gaining popularity across the globe, could not be applied as the statutory language of Section 45, as it existed, did not support such a standard. It may be necessary to observe certain passage from Justice Sabharwal's opinion:

> "**55**. I may also deal with the contention urged on behalf of the appellant that only a prima facie finding is required to be given on a combined reading of Sections 45, 48 and 50 from which it can be culled out that a party who has suffered an award can always challenge the same under Section 48 on the

ground that the arbitration agreement is null and void. This read in conjunction with the right of appeal given under Section 50 and the power of the arbitrator to rule on his own jurisdiction clearly shows the intent of the legislature to avoid delay which would be inevitable if it has to be a final decision and it would defeat the object of soon placing all material before the Arbitral Tribunal. I am afraid that this cannot be accepted as the real purpose of Section 48 is to ensure that at some stage whether pre-award, post-award or both, a judicial authority must decide the validity, operation, capability of performance of the arbitration agreement. In various cases the parties may not resort to Section 45 in the first place, and to overcome such eventuality, the legislature has enacted Section 48(1)(a). In other words, if the court is not asked to satisfy itself as to the validity of the agreement at a pre-award stage (Section 45), then by virtue of Section 48, it is given another opportunity to do so. Apart from this, under Section 48, the court may refuse to enforce the foreign award on the ground other than the invalidity of the arbitration agreement. As far as the question of Section 50 is concerned, it is well settled in law that an appeal is a creature of statute (M. Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd. [(1983) 3 SCC 75]) and a right to appeal inheres in no one. (Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad [(1999) 4 SCC 468]). The legislature under Section 50 has clearly allowed appeal only in case the judicial authority refuses to refer the parties to arbitration or refuses to enforce the foreign award. The fact that a provision is not made for an appeal in case reference is made to

> arbitration is not a ground to say that the court should prima facie decide the validity of the agreement ignoring the express provisions of Section 45. The legislature has granted the right of appeal in the event of refusal to refer but not in the event of order being made for reference of the parties to arbitration. This provision for appeal is not determinative of the scope of Section 45 to mean that the determination thereunder has to be only prima facie."

Justice B. N. Srikrishna, on the other hand, held that the language of Section 8 and 45 are different, wherein the judicial authority is empowered under Section 45 to refuse reference to arbitration, if it finds that the agreement is 'null and void, inoperative or incapable of being performed'. He further held that *ex visceribus* interpretation of the Section 45 clearly points to a *prima facie* view. Justice Dharmadhikari, for different reasons, agreed with the reasoning of Justice B. N. Srikrishna, in the following manner:

> "**111.** With utmost respect to both of them, I am inclined to agree with the view expressed by learned Brother Srikrishna, J. but only with a rider and a partly different reason which may I state below:

The main issue is regarding the scope of power of any judicial authority including a regular civil court under Section 45 of the Act in making or refusing a reference of dispute arising from an international arbitration agreement governed by the provisions contained in Part III Chapter I of the Act of 1996. I respectfully agree with learned Brother Srikrishna, J. only to the extent that if on a prima facie examination of the documents and material on record including the arbitration agreement on which request for reference is made by one of the parties, the judicial authority or the court decides to make a reference, it may merely mention the submissions and contentions of the parties and summarily decide the objection if any raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case, however, on a prima facie view of the matter, which is required to be objectively taken on the basis of material and evidence produced by the parties on the record of the case, the judicial authority including a regular civil court, is inclined to reject the request for reference on the ground that the agreement is "null and void" or "inoperative" or "incapable of being performed" within the meaning of Section 45 of the Act, the judicial authority or the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead and then decide the question like trial of a preliminary issue on jurisdiction or limitation in a regular civil suit and pass an elaborate reasoned order. Where a judicial authority or the court refuses to make a reference on the grounds available under Section 45 of the Act, it is necessary for

the judicial authority or the court which is seized of the matter to pass a reasoned order as the same is subject to appeal to the appellate court under Section 50(1)(*a*) of the Act and further appeal to this Court under sub-section (2) of the said section."

34. In ***Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.,*** (2007) 4 SCC 599, while observing the scope of the Court under Section 11 (6), the Court held as under:

"**27**.....A glance on this para would suggest the scope of the order under Section 11 to be passed by the Chief Justice or his designate. Insofar as the issues regarding territorial jurisdiction and the existence of the arbitration agreement are concerned, the Chief Justice or his designate has to decide those issues because otherwise the arbitration can never proceed. Thus, the Chief Justice has to decide about the territorial jurisdiction and also whether there exists an arbitration agreement between the parties and whether such party has approached the court for appointment of the arbitrator. The Chief Justice has to examine as to whether the claim is a dead one or in the sense whether the parties have already concluded the transaction and have recorded satisfaction of their mutual rights and obligations or whether the parties concerned have recorded their satisfaction regarding the financial claims. In examining this if the parties have recorded their satisfaction regarding the financial claims, there will be no question of any issue remaining. It is in this sense that the Chief Justice has to examine as to whether there remains anything to be decided between the

parties in respect of the agreement and whether the parties are still at issue on any such matter. If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above para that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation."

35. The next jurisprudential jump was provided by ***National Insurance Company Limited v. Boghara Polyfab Private***

Limited, (2009) 1 SCC 267, wherein this Court observed as under:

> **"19.** In *SBP & Co.* v. *Patel Engg. Ltd.* [(2005) 8 SCC 618] , a seven-Judge Bench of this Court considered the scope of Section 11 of the Act and held that the scheme of Section 11 of the Act required the Chief Justice or his designate to decide whether there is an arbitration agreement in terms of Section 7 of the Act before exercising his power under Section 11(6) of the Act and its implications. ... This Court held: (SCC pp. 660-61 & 663, paras 39 & 47)
>
> "39.... *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. ... For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. ...*
>
> (emphasis supplied)

...

22. Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (*i*) issues which the Chief Justice or his designate is bound to decide; (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(*a*) Whether the party making the application has approached the appropriate High Court.

(*b*) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

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

(*a*) Whether the claim is a dead (long-barred) claim or a live claim.

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

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

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

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

23. It is clear from the scheme of the Act as explained by this Court in *SBP & Co.* [(2005) 8 SCC 618] , that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. **If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue**. The Chief Justice/his designate will, in choosing whether he will

> decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue."
>
> **(emphasis supplied)**

36. In ***Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.***, (2013) 1 SCC 641, this Court had to expound the scope of Section 45 in a multi-party arbitration. The Court held as under:

> **"84.** The issue of whether the courts are empowered to review the existence and validity of the arbitration agreement prior to reference is more controversial. A majority of the countries admit to the positive effect of kompetenzkompetenz principle, which requires that the Arbitral Tribunal must exercise jurisdiction over the dispute under the arbitration agreement. Thus, challenge to the existence or validity of the arbitration agreement will not prevent the Arbitral Tribunal from proceeding with hearing and ruling upon its jurisdiction. If it retains jurisdiction, making of an award on the substance of the dispute would be permissible without waiting for the outcome of any court action aimed at deciding the issue of the jurisdiction. The negative effect of the kompetenzkompetenz principle is that

> arbitrators are entitled to be the first to determine their jurisdiction which is later reviewable by the court, when there is action to enforce or set aside the arbitral award. Where the dispute is not before an Arbitral Tribunal, **the court must also decline jurisdiction unless the arbitration agreement is patently void, inoperative or incapable of being performed."**
>
> **(emphasis supplied)**

37. In ***Arasmeta Captive Power Company Private Limited v. Lafarge India Pvt. Ltd.***, (2013) 15 SCC 414, this Court had to answer the issue concerning the conflict between ***Chloro Controls Case*** (*supra*) and ***SBP Case*** (*supra*), which the Court formulated in the following manner:

> **"2.** We have commenced our opinion with the aforesaid exposition of law as arguments have been canvassed by Mr Ranjit Kumar, learned Senior Counsel for the appellants, with innovative intellectual animation how a three-Judge Bench in *Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.,* (2013) 1 SCC 641 has inappositely and incorrectly understood the principles stated in the major part of the decision rendered by a larger Bench in *SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618 and, in resistance, Mr Harish Salve and Dr A.M. Singhvi, learned Senior Counsel for the respondent, while defending the view expressed later by the three-Judge Bench, have laid immense emphasis on consistency and certainty of law that garner public confidence, especially

in the field of arbitration, regard being had to the globalisation of economy and stability of the jurisprudential concepts and pragmatic process of arbitration that sparkles the soul of commercial progress. We make it clear that we are not writing the grammar of arbitration but indubitably we intend, and we shall, in course of our delineation, endeavour to clear the maze, so that certainty remains "A Definite" and finality is "Final"."

The Court answering the question, answered thus:

> **"40.** From the aforesaid authorities it is luculent that the larger Bench in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] , after deliberating at length with regard to the role of the Chief Justice or his designate, while dealing with an application under Section 11(6) of the Act, has thought it appropriate to define what it precisely meant in para 39 of the judgment. The majority, if we allow ourselves to say so, was absolutely conscious that it required to be so stated and hence, it did so. The deliberation was required to be made as the decision in *Konkan Railway Corpn. Ltd.* v. *Rani Construction (P) Ltd.* [(2002) 2 SCC 388] where the Constitution Bench had held that an order passed by the Chief Justice under Section 11(6) is an administrative order and not a judicial one and, in that context, the Bench in many a paragraph proceeded to state about the role of the Chief Justice or his designate. The phrases which have been emphasised by Mr Ranjit Kumar, it can be irrefragably stated, they cannot be brought to the eminence of ratio decidendi of the judgment. The stress

laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in para 39, it is extremely difficult to state that the principle stated in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the ratio decidendi". That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] , in our opinion, have been correctly understood by the two-Judge Bench in *Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267] and the same have been appositely approved by the three-Judge Bench in *Chloro Controls India (P) Ltd.* [*Chloro Controls India (P) Ltd.* v. *Severn Trent Water Purification Inc.*, (2013) 1 SCC 641] and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in *SBP* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618], were not noticed. We may hasten to add that the three-Judge Bench has been satisfied that the ratio decidendi of the judgment in *SBP* [*SBP &*

Co. v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] is really inhered in para 39 of the judgment."

38. This Court in ***Duro Felguera, S.A. v. Gangavaram Port***, (2017) 9 SCC 729, held as under:

(Justice Banumathi)

"20...Since the dispute between the parties arose in 2016, the amended provision of sub-section (6-A) of Section 11 shall govern the issue, as per which the power of the Court is confined only to examine the existence of the arbitration agreement."

(Justice Kurian Joseph)

"59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP and Co.* [*SBP and Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267]. **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 minimize 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."**

(emphasis supplied)

39. However, in ***Oriental Insurance Company Ltd. v. Narbheram Power and Steel Private Limited***, ("**Oriental Insurance**") (2018) 6 SCC 534, a three-Judge Bench of this Court, following the decision in ***Vulcan Insurance v. Maharaj Singh,*** (1976) 1 SCC 943, dismissed an application under Section 11 of the Act after examining the arbitrability of the dispute. It may be noted that the Court did not answer the question as to the power of the Court under Section 11 of the Act in this case.

40. Similarly, in ***United India Insurance Company Limited v. Hyundai Engineering and Construction Company Limited***, ("**Hyundai Engineering**") (2018) 17 SCC 607, the Court examined the arbitrability of the dispute as well as whether the dispute fell within the ambit of an excepted matter by placing heavy reliance on the decision in ***Oriental Insurance*** (*supra*). These two cases are, by necessary, implication to be restricted to the facts and circumstances of the case.

41. Further, in ***United India Insurance Company Limited v. Antique Art Exports Private Limited*** ("**Antique Arts**"), (2019) 5 SCC 362, this Court, in a proceeding under Section 11 of the Act, distinguished the holding in ***Duro Felguera*** (*supra*) on the grounds that the same was a mere general observation about the effect of the amended provisions and that the said decision was distinguishable on the facts of the case. The Court held that the power under Section 11 with the Chief Justice/ his designates is a judicial power and not an administrative function, therefore leaving some degree of judicial intervention. The Court went on to hold that when it comes to examining the *prima facie* existence of an arbitration agreement, it is always necessary to ensure that the dispute resolution process does not become unnecessarily protracted. On this basis, the Court, in a proceeding under Section 11 of the Act, analyzed the effect of the execution of a discharge voucher and the settlement of the claim by accord and satisfaction. On finding the claim to have been settled by accord and satisfaction, the Court held that there was no dispute under

the agreement to be referred to an arbitrator for adjudication.

42. In ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman***, (2019) 8 SCC 714, a Bench of three Judges, while overruling the ***Antique Arts Case*** (*supra*), held as under:

> **"10.** This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [*United India Insurance Co. Ltd.* v. *Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362] , as 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 as has been laid down in the judgment in *Duro Felguera, SA* [*Duro Felguera, SA* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729] — see paras 48 & 59 [**Ed.**: The said paras 48 & 59 of *Duro Felguera, SA* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729, for ready reference, read as follows:"*48.* Section 11(6-A) added by the 2015 Amendment, reads as follows:"**11. (6-A)** 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)From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.***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.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618 and *National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267. 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."].

11. We, therefore, overrule the judgment in *Antique Art Exports (P) Ltd.* [*United India Insurance Co. Ltd.* v. *Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362] as not having laid

down the correct law but dismiss this appeal for the reason given in para 3 above."

43. From the study of the precedents, the following propositions, concerning Section 11 of the Act, are clear and binding:

1. Reference power under Section 11 of the Act is judicial and not administrative.
2. There was a wide discretion for judicial interference at the stage of reference under Section 11 of the Act, prior to the Arbitration Amendment Act of 2015.
3. Amendment in 2015 was brought into force to limit the power of judicial interference under Section 11 of the Act.

44. Having observed the precedents holding the field in respect of Section 11, we now come to an analysis of Section 8. Section 8 of the Act applies, when a matter is brought by one of the parties before the Court, and the other party brings to the notice of the Court of existence of such arbitration agreement. Under these circumstances, the Court is obligated to refer a matter to arbitration, on satisfaction that a valid arbitration agreement exists

between the parties. The 2015 amendment clarified that the test to be utilized by the Court is on a *prima facie* basis.

45. The primary reason for the same, is the negative effect of *Kompetenz Kompetenz* under Section 16, which mandates that the arbitral tribunal is required to first look into any objections as to the jurisdiction of the tribunal itself. It is due to the fact that parties may abuse and protract the proceedings if there is no gatekeeping mechanism, that the legislature has found a balance, wherein the Court is required to examine the validity of an arbitration agreement on a *prima facie* basis.

46. In this context, we need to examine the meaning of 'validity of arbitration agreement' as occurring under Section 8 of the Act. There is no doubt that 'validity' to be examined under Section 8(2) of the Act, could be interpreted to mean formal validity as expressed under Section 7 of the Act. Such an interpretation would operate as a full application of the negative facet of Section 16, as the jurisdiction of the Court to step-in at the -reference stage would be limited. However,

the burden of the precedents stops us from accepting such a narrow interpretation.

47. This brings us to the issue whether the issue of 'arbitrability' can be analyzed by the Courts under Section 8 or 11 of the Act?

48. There is no doubt that 'arbitrability' has acquired various meaning around the world. In this context, this Court is required to first identify the various meaning for the aforesaid term, in order to recognize its meaning in the Indian context. Outside the United States of America, the term "arbitrability" has a reasonably precise and limited meaning, relating to whether specific classes of disputes are barred from arbitration because of national legislation or judicial authority. In the United States of America, arbitrability also refers to the complicated balance between courts and arbitrators regarding who should be the initial decision-maker on issues such as the validity of the arbitration agreement. Out of the two meanings, we subscribe to the international flavor, which is one of the cherished legislative intentions, *i.e.*, to bring the arbitration

act in tune with the global march. Having ascertained the meaning of arbitrability, we need to analyze whether arbitrability could be determined by the Court at the reference stage.

49. No doubt, arbitrability finds a close nexus with the validity of the arbitration agreement, yet we need to observe the unique nature of the arbitration agreement, which is a bundle of contractual and jurisdictional elements. Even if a Tribunal comes to an understanding that there exists a valid arbitration agreement, still it does not mean that certain subject matters are arbitrable *per se*. This distinction is required to be kept in mind.

50. Section 34 (2)(b) provides the statutory basis for objecting that an award which may not be capable of being settled by arbitration, or is against the public policy of India. The legislative intention of not arbitrating issues of public policy are intertwined with the fact that monopolies of the State activities should not be subject matter of a private tribunal, as the concerns of the State cannot not be dealt effectively. Further, an award, which has an *erga omnes* effect on third

parties, would not be in tune with the contractual nature of arbitration, which is binding on the consenting parties alone. However, this feature alone, does not explicitly mandate that the tribunal cannot first adjudicate a claim based on the public policy argument.

51. It is to be noted that whether a subject matter can or cannot be arbitrated should necessarily be dealt on a case to case basis, rather than a having a bold exposition that certain subject matters are incapable of arbitration. This case is one such example of over-broad ratio, expounded by this Court by laying that certain subject areas cannot be arbitrated *per se*. At this juncture, we may observe the case of ***The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain and The French State***, [2015] EWCA Civ 333. The case relates to an oil spill off the coast of Spain and France from a vessel named 'The Prestige', which resulted in the Government of Spain and France taking action against the Captain of the ship and other officers under the Spanish Criminal Code, as

well as instituting a case against the Owner to pay punitive damages under the Spanish Penal Code. It may be noted that the claim was also brought against the insurer of the ship for indemnity. Those claims were based both on the insurer's obligation to indemnify the owners against their obligations under the International Convention on Civil Liability for Oil Pollution Damage and on its obligation to indemnify them against their independent liability for the tortious acts of the master, chief officer and chief engineer. The insurers took pre-emptive action by commencing arbitral proceedings for declaratory relief: a declaration that France and Spain were bound by the arbitration clause provided in the insurers' rules and that the insurers were not liable under the underlying contract. The relief sought was granted in favour of the insurers in the form of arbitral awards. The insurers attempted to enforce the arbitral awards in England before the judgment was rendered in the Spanish legal proceedings. France and Spain opposed this enforcement of the arbitral awards on various grounds. One such reason, which was raised on behalf of Spain, was that

the matter was incapable of being resolved by arbitration. The Court while dismissing the aforesaid objection, held that:

> In my view this passage amounts to a finding that a conviction is not an integral element of the cause of action. The distinction is important, because even if a conviction were a pre-condition to the right to recover against the insurer, there would be no reason why an arbitrator should not determine a claim of this kind, taking into account whether the condition has or has not been satisfied. He cannot, on the other hand, formally convict any person of a criminal offence.

This Court does recognize the jurisdictional differences and uniqueness between England and India, while placing reliance on the same. However, the important aspect is that the plea of public policy is required to be specifically identified, pleaded and shown with respect to how the award is contrary to the public policy. It may be possible that there may be certain claims abutting a restricted sphere, which may not be specifically hit by public policy or have *erga omnes* effect. If that be so, it would be too early at the stage of reference to determine the same as it would

require complete examination of the issue at hand, which is more suited to be first dealt by the Tribunal and thereafter be looked into at the stage of enforcement.

52. To this extent, even this Court in ***Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited***, Civil Appeal No. 5145 of 2016 has held as under:

> **"16**. In the light of the aforesaid judgments, paragraph 27(vi) of Afcons [Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24] and paragraph 36(i) of Booz Allen [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011)5 SCC 532, must now be read subject to the rider that the same set of facts may lead to civil andcriminal proceedings and if it is clear that a civil dispute involvesquestions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under section 17 of the Contract Act, and/orthe tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so."

53. It is important to note that various countries have already allowed *inter-partes* arbitration with respect to *in rem* rights concerning intellectual property etc., through a statutory

framework. It is worthwhile to study the feasibility of the same, if we want to provide impetus to arbitration.

54. On a different note, we need to keep in mind that an arbitration agreement would, as a necessary implication, carry with it a presumption of a one-stop mechanism. When parties decide to enter into an arbitration agreement, they agree to take all their disputes before arbitration. This presumption, is a rebuttable presumption. Therefore, Section 8 and 11 has to be interpreted with sufficient strictness, wherein the jurisdiction of the Court to decide issues should be limited to those expressly provided by the law.

55. This Court has dealt with various judgments on the issue of arbitrability, which are required to be discussed at this point. The first case is of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.,*** (2011) 5 SCC 532, wherein a Division Bench dealt with the ambit of Section 8 and 11 (prior to amendment), *qua* subject matter arbitrability. This Court observed as under:

> **"32.** The nature and scope of issues arising for consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(*b*)(*i*) of that section."

The Court was cognizant of the fact that prior to the 2015 amendment, Section 11 posits a limited jurisdiction for the Courts to deal with, in comparison to Section 8, which occurs at a different stage. In this context, it is relevant to quote paragraphs 33 and 36, which reads as under:

> **33.** But where the issue of "arbitrability" arises in the context of an application

under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

X X X X X X

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.

The Court came to the aforesaid conclusion, of ascertaining certain subject matters as non-arbitrable, on two main reasons, (1.) that certain matters are excluded for examination by a private forum; (2) that *in rem* rights cannot be arbitrated.

56. In ***A. Ayysamy v. A. Paramsivam***, (2016) 10 SCC 386, this Court had to deal with an issue concerning the arbitrability of fraud under the Act, prior to the 2015 amendment. The Court by two separate opinions delivered by Justice A. K. Sikri and Dr. D. Y. Chandrachud, has recognized that the Court at the reference stage, could classify a matter and accordingly refer a matter to arbitration which does not have serious allegations of fraud.

57. In ***Emaar MGF Land Limited v. Aftab Singh***, (2019) 12 SCC 751, this Court held that Consumer Protection Act cases are not arbitrable. On a perusal of the judgment, no doubt reliance was placed on the ***Booz Allen Case*** (supra)

and there is some discussion on the scope of Section 8 of the Arbitration Act. However, the thrust of the reasoning is not on the question of arbitrability, rather it was on the fact that the Consumer Protection Act, had an implied bar for referring a matter to arbitration, being a special legislation. The difference is subtle, yet it is required to be recognized that the Consumer Protection Act, impliedly barred the application of the Arbitration Act.

58. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability under Section 8 or 11 of the Act, are pertinent:

a) In line with the categories laid down by the earlier judgment of ***Boghara Polyfab*** (*supra*), the Courts were examining 'subject-matter arbitrability' at the pre-arbitral stage, prior to the 2015 amendment.
b) Post the 2015 amendment, judicial interference at the reference stage has been substantially curtailed.
c) Although subject matter arbitrability and public policy objections are provided separately under

Section 34 of the Act, the Courts herein have understood the same to be interchangeable under the Act. Further, subject matter arbitrability is inter-linked with *in-rem* rights.

d) There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject matter.

59. It may be noted that the Act itself does not exclude any category of disputes as being non-arbitrable. However, the Courts have used the 'public policy' reason to restrict arbitration with respect to certain subject matters. In line with the aforesaid proposition, the Courts have interfered with the subject matter arbitrability at the pre-reference stage.

60. However, post the 2015 amendment, the structure of the Act was changed to bring it in tune with the pro-arbitration approach. Under the amended provision, the Court can only give *prima facie* opinion on the existence of a valid arbitration agreement. In line with the amended language

and the statutory scheme, the examination of the subject matter arbitrability may not be appropriate at the stage of reference under Section 8 of the Arbitration Act. It is more appropriate to be taken up by the Court at the stage of enforcement under Section 34 of the Act. Having said so, in clear cases where the subject matter arbitrability is clearly barred, the Court can cut the deadwood to preserve the efficacy of the arbitral process.

61. At this stage a word of caution needs to be said for arbitrators. They have been given jurisdiction to decide on the subject matter arbitrability. They are required to identify specific public policy in order to determine the subject matter arbitrability. Merely because a matter verges on a prohibited territory, should not by in itself stop the arbitrator from deciding the matter. He/she should be careful in considering the question of non-arbitrability.

62. This brings us to the question of what *prima facie* case means, as is required to determine the non-existence of a valid arbitration agreement under Section 8 of the Act. The

meaning and scope of '*prima facie*' has greatly varied in common law as well as the civil law systems. Immediately, at least two meanings can be attributed to this term. First, it means a party is said to have established a *prima facie* case when he has satisfied his burden of producing evidence. The second meaning postulates that a party has established a *prima facie* case only when he has made such a strong showing that he is entitled to a presumption in his favor. ***Shin-Etsu Case*** (*supra*), categorically laid that *prima facie* test is to be adopted under Section 45 of the Act (prior to the 2015 amendment). The Court was of the opinion that *prima facie* determination was seen as the view of Court, which can again be gone into by the Tribunal.

63. In ***Antique Arts*** (*supra*) (subsequently over-ruled on a different point), this Court while following ***New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.,*** (2015) 2 SCC 424 held that that a bald plea of fraud, coercion, duress or undue influence is not enough and the

party who sets up a plea, must establish the same on a *prima facie* basis by placing material before the Chief Justice/his designate. This categorically establishes that *prima facie* case is relatable to establishment of initial presumption, rather than an evidentiary standard.

64. The 246th Law Commission Report, in respect of scope and nature of pre-arbitral judicial intervention, states as under:

> "28. The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage i.e. prior to the constitution of the Arbitral Tribunal, which includes Sections 8, 9, 11 in the case of Part I arbitrations and Section 45 in the case of Part II arbitrations. Sections 8, 45 and also Section 11 relating to "reference to arbitration" and "appointment of the Tribunal", directly affect the constitution of the Tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.

29. The Supreme Court has had occasion to deliberate upon the *scope* and *nature* of permissible pre-arbitral judicial intervention, especially in the context of Section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power — which obfuscates the real issue underlying such nomenclature/description as to—

— the scope of such powers — i.e. the scope of arguments which a court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not — i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable, etc.; and which of these it should leave for decision of the Arbitral Tribunal.

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

30. After a series of cases culminating in the decision in *SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618 , the Supreme Court held that the power to appoint an arbitrator under Section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by Raveendran, J. in *National Insurance*

Co. Ltd. V. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267,

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32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd.* V. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234] , (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

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

the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under Sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under Section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

(emphasis supplied)

65. The difference of statutory language provided under the amended Section 8, which states *'refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists'* in comparison with the amended Section 11(6A), creates disparities which need to be ironed out. While the Court in the ***Shin-Etsu* case** (*supra*) and the

***Duro Felguera* case** (*supra*) recommended for finding a valid arbitration agreement on a *prima facie* basis *qua* Section 11, however, the negative language used under the amended Section 8 mandates for referring a matter to arbitration unless the Court *prima facie* finds that no valid arbitration exists. It is to be noted that a finding of non-existence of arbitration agreement is final subject to the appeal process only, without further scope for arbitration tribunal to decide anything as there can be no further reference. If that be the case, then the usage of phrase '*prima facie*' stands at odds with the established precedents on *prima facie* standards. In this context, we can only stress on the requirement of quality legislative drafting protocols to eliminate such complications.

66. From the aforesaid discussion, we can conclude that the respondent/defendant has to establish a *prima facie* case of non-existence of valid arbitration agreement, wherein it is to be summarily portrayed that a party is entitled to such a finding. If a party cannot satisfy the Court of the same on the basis of documents produced, and rather requires

extensive examination of oral and documentary production, then the matter has to be necessarily referred to the Tribunal for full trial. Such limited jurisdiction vested with the Court, is necessary at the pre-reference stage to appropriately balance the power of the Tribunal with judicial interference.

67. The amendment to the aforesaid provision was meant to cut the dead wood in extremely limited circumstances, wherein the respondent is able to *ex-facie* portray non-existence of valid arbitration agreement, on the documents and the pleadings produced by the parties. The *prima facie* view, which started its existence under Section 45 through ***Shin-Etsu Case*** (*supra*), has been explicitly accommodated even under domestic arbitration by the 2015 amendment with appropriate modifications.

68. Before we part with this aspect, it was extensively argued before us that the test for the Court is to see whether a party is able to establish a 'good arguable case' for establishing the existence of the arbitration agreement. However, the statutory language under Sections 8 and 11

emphasizes on the threshold requirement for a party for establishing the opposite. No doubt, the aforesaid approach may have merits. However, if the 'good arguable case standard' is integrated for a party requiring to show non-existence, then the same would amount to judicial activism. Such attempts to integrate alien formulations into the Act, which has already suffered sufficient judicial subjectivism, needs to be dissuaded.

69. Having established the threshold standard for the Court to examine the extent of validity of the arbitration agreement, as a starting point, it is necessary to go back to ***Duro Felguera*** (*supra*), which laid down:

> "**48.**...From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple —it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."

At first blush, the Court seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. This view is confirmed by the ***Duro Felguera* case** (*supra*), wherein the reference to the contractual aspect of arbitration agreement is ingrained under the Section 7 analysis. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc. In ***Mayavati Trading Case*** (*supra*) and ***Garware Wall Ropes Ltd. v. Coastal Marine Construction and Engineering Ltd.,*** [2019] 9 SCC 209, the aforesaid stand has been confirmed. Therefore, the scope of the Court to examine the *prima facie* validity of an arbitration agreement includes only the determination of the following:

92. Whether the arbitration agreement was in writing? or
93. Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc?

94. Whether the core contractual ingredients *qua* the arbitration agreement were fulfilled?
95. On rare occasions, whether the subject-matter of dispute is arbitrable?

At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not be referred to an arbitration by a court of law unless it finds that *prima facie* there is no valid arbitration agreement. The negative language used in the Section is required to be taken into consideration, while analyzing the Section. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above. Therefore, the rule for the Court is 'when in doubt, do refer'.

70. Moreover, the amendment to Section 8 now rectifies the short-comings pointed out in the ***Chloro Control Case*** (*supra*) with respect to domestic arbitration. Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc., in a multi-party arbitration raises complicated factual questions, which are best left for the

tribunal to handle. The amendment to Section 8 on this front also indicates the legislative intention to further reduce the judicial interference at the stage of reference.

71. Courts, while analyzing a case under Section 8, may choose to identify the issues which require adjudication pertaining to the validity of the arbitration agreement. If the Court cannot rule on the invalidity of the arbitration agreement on a *prima facie* basis, then the Court should stop any further analysis and simply refer all the issues to arbitration to be settled.

72. Coming to the scope of judicial interference under Section 11, the 246th Law Commission Report noted that:

> "31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of Section 11, should also apply to Sections 8 and 45 of the Act — since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement."

73. We are cognizant of the fact that the statutory language of Section 8 and 11 are different, however materially they do not vary and both Sections provide for limited judicial interference at reference stage, as enunciated above.

74. In line with our holding on question no. 1, generally it would not have been appropriate for us to delve into the second question. However, considering that a question of law has been referred to us, we agree with the conclusions reached by our learned brother.

75. Before we part, the conclusions reached, with respect to question no. 1, are:

a. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.

b. Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.

c. The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a *prima facie* (summary findings) case of non-existence of valid

arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

d. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above, i.e., 'when in doubt, do refer'.

e. The scope of the Court to examine the *prima facie* validity of an arbitration agreement includes only:

    a. Whether the arbitration agreement was in writing? or
    b. Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?
    c. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
    d. On rare occasions, whether the subject-matter of dispute is arbitrable?

.....J.
(N.V. RAMANA)

NEW DELHI;
DECEMBER 14, 2020.