**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 08.04.2021

\+ **ARB. P. 477/2020**

**SPML INFRA LTD** .... Petitioner

versus

**NTPC LIMITED** .... Respondent

**Advocates who appeared in this case:**

For the Petitioner: Mr Raman Kapoor, Senior Advocate with Mr Samrat Sengupta, Mr Aayush Agarwala and Mr Parag Chaturvedi, Advocates.

For the Respondent: Mr Aman Lekhi, ASG with Mr Adarsh Tripathi, Mr Rtiwiz Rishabh and Mr Nikhil Kandpal, Advocates.

**CORAM**

**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioner, SPML Infra Ltd. (hereafter 'SPML') is a company incorporated under the Companies Act, 1956 and undertakes civil engineering works.

2. The respondent (hereafter 'NTPC') is a public sector undertaking and is largely involved in commissioning and operation of thermal power plants.

3. SPML has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter the 'A&C Act'), *inter alia*, praying that an Arbitral Tribunal be constituted to adjudicate the disputes that have arisen between the parties in relation to the Contract Agreement being "*01/CS-3530-131-2R-FC-COA-5288 & 5299*" dated 22.06.2009 in respect of a Project for "*Installation Services for Station Piping Package for Simhadri Super Thermal Power Project Stage II (2X500 MS) at NTPC Simhadri, Vishakapatnam"* (hereafter the 'Contract Agreement').

4. In terms of the Contract Agreement, SPML had furnished Performance Bank Guarantees and Advance Bank Guarantee of a total amount of ₹14,96,89,136/- to secure NTPC. The details of the said Bank Guarantees are set out as below:

| Nature of BG | Bank Guarantee No. | Opening Date of BG | Bank Guarantee Amount | Final Validity Period |
|---|---|---|---|---|
| Advance | 0040ILG002609 | 11.08.2009 | ₹1,91,99,725 | 19.05.2019 |
| PBG | 0040ILG0009 | 01.07.2009 | ₹2,26,31,532 | 18.06.2019 |
| PBG | 0040ILG001209 | 01.07.2009 | ₹8,23,63,368 | 18.06.2019 |
| Advance | 0040ILG001309 | 01.07.2009 | ₹2,54,94,501 | 18.06.2019 |

5. The Performance and Advance Bank Guarantees as set out above are hereafter referred to as the Bank Guarantees.

6. SPML claims that the execution of the project was hampered for reasons attributable to NTPC. Nonetheless, SPML completed the project on 18.12.2015 and accordingly, was granted a completion certificate. It is SPML's case that even after issuance of the completion certificate, NTPC failed and neglected to release the Bank Guarantees.

7. NTPC on 10.04.2019 informed SPML that the final payment would be released upon receipt of "CCP-11" (No Demand Certificate) from SPML and further undertook that the Bank Guarantees would be released only after the final payment is released. Final payment amounting to a sum of ₹ 1,40,00,000/- was released by NTPC towards SPML in April 2019. However, despite repeated reminders, NTPC did not release the Bank Guarantees.

8. By an e-mail dated 14.05.2019, NTPC informed SPML that the Bank Guarantees were being withheld on the pretext that some liabilities and/or arbitral disputes were pending between the parties in respect of other projects at other sites. SPML responded to the above e-mail by a letter dated 15.05.2019 clarifying that the said disputes are not attributable to it, and raised interim claims amounting to ₹ 72,01,53,898/-. SPML also called upon NTPC to make payment within a period of fifteen days from the date of receipt of the said letter. The interim claims raised by SPML are set out below:

| | | |
|---|---|---|
| A. | Revocation of the imposed liquidated damages | ₹ 86,19,871/- |
| B. | Compensation for extended stay at the site, beyond stipulated Contract period as per the following break up: | |
| | i. Retaining on Site establishment | ₹ 3,04,36,3030/- |
| | ii. Retaining off Site establishment | ₹ 10,77,12,644/- |
| | iii. Additional BG Commission Charges | ₹ 1,02,90,824/- |
| | iv. Additional Insurance Premium | ₹ 25,52,382/- |
| | v. Loss of Profit | ₹ 52,90,88,568/- |
| | vi. Additional Price Variation | ₹ 2,63,48,767/- |
| C. | Additional works | ₹ 35,92,200/- |
| D. | Wrongful deduction | ₹ 15,12,340 |
| TOTAL | | ₹ 72,01,53,898/- |

9. No response was received from NTPC to the letter dated 15.05.2019. Accordingly, on 12.06.2019, SPML issued a notice calling upon NTPC to appoint an Adjudicator within thirty days in terms of the Dispute Resolution Clause as mandated under Clause 6 of the General

Conditions of the Contract (GCC) read with Clause 3 of the Special Conditions of the Contract (SCC).

10. Aggrieved by the fact that the Bank Guarantees were not yet released despite repeated assurances given by NTPC, SPML filed a Writ Petition being W.P. (C) No. 7213 of 2019 captioned *M/S SPML Infra Ltd. vs. NTPC Ltd.* and by an order dated 08.07.2019 passed in that petition, this court stayed the encashment of the Bank Guarantees subject to SPML keeping the same alive.

11. On 23.07.2019, SPML issued a notice under Clause 6.2.1 of the GCC to commence arbitration as NTPC had failed to meet its claims as set out in its notice dated 12.06.2019. SPML nominated Justice (Retd.) Dr Satish Chandra, a former judge of the High Court of Indore, to adjudicate the disputes between the parties and requested NTPC to nominate another arbitrator. NTPC responded to the said notice by a letter dated 29.08.2019 calling upon SPML to amicably settle the dispute or in the alternative, to constitute an Expert Settlement Council (ESC). On 07.09.2019, SPML in reply to the letter dated 29.08.2019 stated that the mechanism as suggested by NTPC is not agreeable as the same is beyond the contractual provisions. SPML once again requested NTPC to nominate an arbitrator so that an Arbitral Tribunal be constituted to adjudicate the disputes. Vide letter dated 30.09.2019, NTPC requested SPML to resolve the disputes through an Expert Settlement Council (ESC) as the notice to commence arbitration is untenable; however, assured SPML that in case the disputes cannot be

resolved through an ESC, the same could nonetheless be referred for arbitration.

12. On 14.10.2019, SPML intimated its willingness to resolve the disputes in an amicable manner through a meeting however, informed NTPC that the Arbitration Clause will be invoked in case the disputes are not resolved amicably and the Bank Guarantees are not released within thirty days.

13. A meeting was held between the parties on 08.11.2019 wherein NTPC proposed to consult with its higher management for expeditious release of the Bank Guarantees only if SPML withdraws the arbitration notice. In the meeting, SPML informed NTPC that they would revert back on the said proposal by 15.11.2019, to accordingly finalize on the future course of action.

14. On 13.11.2019, SPML issued a letter to NTPC indicating its willingness to withdraw its arbitration notice subject to NTPC releasing the Bank Guarantees before 30.11.2019. NTCP responded to the said letter on 18.11.2019 and demanded a complete and unconditional acceptance from SPML to proceed further. On 25.11.2019 SPML informed NTPC about the losses it had suffered on account of non-release of the Bank Guarantees and thus, requested NTPC to release the Bank Guarantees or in the alternative, to nominate an Arbitrator so that an Arbitral Tribunal be constituted to adjudicate the disputes between the parties. The said letter was followed up by letters dated 05.12.2019

and 20.12.2019, wherein SPML once again reiterated its request to nominate an arbitrator for adjudication of the disputes.

15. On 21.12.2019, SPML withdrew its arbitration notice subject to release of the Bank Guarantees by NTPC by 20.01.2020. SPML claims that during the pendency of the Writ Petition before this court, NTPC proposed a Settlement Agreement to SPML and took a position that the Bank Guarantees would not be released until SPML signs the Settlement Agreement. The Settlement Agreement was signed on 22.05.2020 and in pursuance of the same, NTPC released the Bank Guarantees although the same had expired earlier. The same was acknowledged by SPML in its letter dated 22.07.2020.

16. Consequently, the aforesaid Writ Petition filed by SPML before this Court was also withdrawn on 21.09.2020.

17. SPML in its letter dated 22.07.2020, stated that it was compelled to sign the Settlement Agreement under duress and without free consent. SPML further repudiated the said Agreement. SPML further requested NTPC to accept its claims as set out in the letter dated 15.05.2019.

18. NTPC responded to the said letter dated 22.07.2020 disputing SPML's claim of ₹72,01,53,899/-.

***Submissions***

19. Mr Raman Kapoor, learned Senior Counsel appearing for the petitioner contended that there is no dispute as to the existence of the

Arbitration Agreement (Arbitration Clause) and the same would be binding amongst the parties. He submitted that pre-arbitral steps as envisaged under the GCC of the Contract Agreement has been resorted to before taking recourse to arbitration. He submitted that in terms of the letter dated 12.06.2019, the petitioner had requested the respondent to appoint an Adjudicator as per Clause 6.1.3. of the GCC read with Clause 3 of the SCC. He submitted that as per the minutes of the meeting dated 08.11.2019 it is evident that both parties had come together and thus, the first pre-arbitral step of 'mutual consultation' has been taken recourse to. He also submitted that the settlement of dispute scheme as envisaged under the Contract Agreement does not contemplate any recourse to conciliation and thus, cannot be settled by the Expert Settlement Council (ESC) as sought by the respondent. He submitted that the same is untenable as first, the ESC has been internally devised by the respondent and does not fall within the scope of Clause 6 of the GCC; and second, that the ESC came into existence after the award of the Contract Agreement.

20. Next, he submitted that the Settlement Agreement dated 27.05.2020 is not a valid document as it was signed under economic duress and coercion. He submitted that the Bank Guarantees had been withheld by NTPC for several years even after due completion of the project on account of purported claims in another project. He stated that SPML signed the Settlement Agreement under duress as it was conditional upon release of the Bank Guarantees. He also submitted that SPML was strongarmed by NTPC to sign the Settlement Agreement as

NTPC had an upper hand on account of its outstanding legitimate dues and thus, took advantage of SPML's financial hardship to sign a Settlement Agreement and thereby, release NTPC from all liabilities towards SPML.

21. He averred, that in view of Section 11(6A) as introduced by The Arbitration and Conciliation (Amendment) Act, 2015 and by relying upon the Apex Court judgment in ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman: (2019) 8 SCC 714*** as well as ***Vidya Drolia v. Durga Trading Corporation (2021) 2 SCC 1,*** the scope of enquiry of this Court in an application filed under Section 11 of the A&C Act is limited only to *prima facie* satisfaction of the existence of an arbitration agreement and it is the Arbitral Tribunal which would decide any preliminary issues including the validity, the efficacy and the effect of the Settlement Agreement.

22. Mr Aman Lekhi, learned ASG appearing for NTPC contended that the present petition is premature as the petitioner has failed to take the mandatory pre-arbitral steps. He submitted that in terms of Clause 6 of the GCC of the Contract Agreement the parties must, reach an amicable settlement by mutual consultation and incase, the same is not possible, then the disputes are to be referred to an adjudicator and, the decision of the adjudicator becomes final if neither party invoke the arbitration clause within fifty-six days from the date of passing of the award. He stated that NTPC on several occasions had communicated to SPML to amicably resolve the disputes and had also advised to refer the dispute to the ESC wherein, an adjudicator would have been appointed

for resolution of the disputes. However, SPML chose not to refer the disputes to the adjudicator rather, to execute a Settlement Agreement instead. He submitted that the arbitration clause must be construed strictly and it is essential for the partis to observe all pre-arbitral steps prior to the invocation of the arbitration clause. He relied upon the decisions of the Supreme Court in ***Oriental Company Insurance Ltd. v. M/s Narbheram Power and Steel Pvt. Ltd., C.A. 2268 of 2018*** and ***United India Insurance Company Ltd. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors., C.A 8146 of 2018,*** in support of his submission.

23. He submitted that SPML completed the project on 18.01.2015 and thereafter, a completion certificate was duly awarded to SPML. A final payment amounting to ₹ 1,40,00,000/- was also released in favour of SPML, which was followed by a No-Demand Certificate released by SPML towards NTPC. He submitted that NTPC had no ill intention to withhold the Bank Guarantees and the same were being withheld due to an outstanding amount recoverable from SPML which was arising out of several allied contractual obligations between the parties. He contended that subsequently a Settlement Agreement dated 27.05.2020 was entered into between the parties with their free will and consent and the same was also executed under the supervision of this court and thus, is not a case of accord and satisfaction. It is alleged that SPML had undertaken to not initiate any further proceedings arising out of the Contract Agreement and over and above that, had also acted upon the Settlement Agreement as it accordingly, enjoyed the release of the Bank

Guarantees. It is also alleged that the current claims of SPML amounting to ₹ 70 crores (approx.) are a mere afterthought as the same was never raised during the execution of the Settlement Agreement and no valid, maintainable claims lie against NTPC as full and final payment has already been made between the parties.

24. Further, it is submitted that the issue of novation/supersession is not a preliminary issue and is beyond the jurisdiction of the Arbitrator under Section 16 of the A&C Act as the Arbitrator under Section 16 of the A&C Act is not empowered to decide upon any issue if the appointment of the learned Arbitrator itself is on the basis of an arbitration clause which has become void along with the original contract. He submitted that the Settlement Agreement entered into between the parties supersedes the Contract Agreement, which stood terminated on completion of the project and since, the Contract Agreement has now lost its validity, the arbitration clause, being a component part of the agreement, falls with it. He relied upon the decisions of the Supreme Court in ***The Union of India v. Kishorilal Gupta and Bros: AIR 1959 SC 1362, Damodar Valley Corpn. Vs KK KAR: (1974)1 SCC 141*** and ***Young Achievers v. IMS Learning Resources Pvt. Ltd.: (2013) 10 SCC 535*** as well as a Division Bench judgment of this Court in ***Samyak Projects (P) Ltd. v. Ansal Housing & Construction Ltd.: FAO (OS) No. 33 of 2019, decided on 13.02.2019,*** in support of his contention.

***Reasons and Conclusion***

25. The principal controversy that requires to be addressed by this Court relates to the scope of examination under Section 11 of the A&C Act at a pre-referral stage. According to NTPC, the Settlement Agreement entered into by the parties novated the Contract Agreement. With the said novation, the Arbitration Clause contained in the Contract Agreement perished and since the Settlement Agreement does not include an Arbitration Clause, the parties cannot be referred to arbitration. According to NTPC, the Arbitration Agreement as embodied in the Arbitration Clause under the Contract Agreement has ceased to exist. The said contention is disputed by SPML. According to SPML, the Settlement Agreement is invalid as it has been induced by economic coercion and undue influence. It is contended on behalf of SPML that there is no dispute that the parties had entered into a Contract Agreement and therefore, an Agreement to refer the disputes arising in relation thereto exists between the parties. The dispute whether the Contract Agreement stands discharged by the Settlement Agreement is required to be adjudicated by the Arbitral Tribunal constituted in terms of the Arbitration Clause as contained in the Contract Agreement.

26. The Arbitration Clause in the Contract Agreement reads as under:-

> "6.2 Arbitrator

6.2.1 If either the Employer or the Contractor is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within twenty eight (28) days of a dispute being referred to it, then either the Employer or the Contractor may, within fifty six (56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

6.2.2 Any dispute in respect of which a notice of intention to commence arbitration has been given, in accordance with GCC Sub Clause 6.2.1, shall be finally settled by arbitration. Arbitration may be commenced prior to or after completion of the Facilities.

6.2.3 Any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators, -in accordance with the provisions set forth below.

6.2.4 The Employer and the Contractor shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the two arbitrators do not succeed in appointing a third arbitrator within twenty eight (28) days after the latter of the two arbitrators has been appointed, the third arbitrator shall, at the request of either party, be appointed by the Appointing Authority for arbitrator designated in the SCC.

6.2.5 If one party fails to appoint its arbitrator within forty-two (42) days after the other party has named its arbitrator, the party which has named an arbitrator may request the Appointing Authority to appoint the second arbitrator.

6.2.6 If for any reason an arbitrator is unable to perform its function, the mandate of the Arbitrator shall terminate in accordance with the provisions of applicable laws as

mentioned in GCC Clause 5 (Governing Laws) and a substitute shall be appointed in the same manner as the original arbitrator.

6.2.7 Arbitration proceedings shall be conducted (i) in accordance with the rules of procedure designated in the SCC, (ii) in the place designated in the SCC, and (iii) in the language in which this Contract has been executed.

6.2.8 The decision of a majority of the arbitrators (or of the third arbitrator chairing the arbitration, if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction as decree of the court. The parties thereby waive any objections to or claims of immunity from such enforcement.

6.2.9 The arbitrator(s) shall give reasoned award."

27. Mr Lekhi, learned ASJ had relied on the decision of the Supreme Court in ***The Union of India v. Kishorilal Gupta and Bros.*** (*supra*) and contended that the present case was not one of discharge of the Contract Agreement by accord and satisfaction simpliciter, but by novation in terms of the Settlement Agreement.

28. At this stage, it would be relevant to refer to the Settlement Agreement. In terms of Clause 1 of the Settlement Agreement, SPML had undertaken to withdraw its writ petition – *Writ Petition No. 7213/2019* filed in this Court – immediately on execution of the Settlement Agreement on receipt of the Bank Guarantees. In terms of Clause 2 of the Settlement Agreement, SPML undertook not to raise any claims of any nature against NTPC in respect of the Contract

Agreement or initiate any proceedings in that regard. In terms of Clause 3, SPML confirmed that it had received the entire payment relating to the Contract Agreement and the same stood closed. Clause 4 of the Settlement Agreement records that, in view of the commitments made by SPML, NTPC agreed to release the Bank Guarantees which had been withheld earlier. NTPC also agreed not to initiate any contempt proceedings against SPML for not keeping the Bank Guarantee alive. In terms of Clause 8, the parties agreed to mutually release all claims. The remaining clauses are general clauses expressly recording that the Settlement Agreement has been executed by authorized persons; it constitutes the entire agreement between the parties; and that the parties shall keep all matters relating to consultation as confidential.

29. The Settlement Agreement in essence records SPML's Agreement to give up all its claims and in consideration for the release of the bank guarantees withheld by NTPC. The substratum of the Settlement Agreement is simply this and nothing else.

30. In view of the above, it is difficult to accept that the Settlement Agreement would stand on a separate footing from a document recording the party's agreement for discharge of the Contract Agreement by an accord and satisfaction.

31. In ***The Union of India v. Kishorilal Gupta and Bros*** (*supra*), K. Subba Rao, J referred to various decisions and summarized the principles in the following words:

> "The following principles relevant to the present case emerge from the aforesaid discussion: (*1*) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (*2*) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (*3*) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (*4*) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (*5*) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (*6*) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.

32. Sarkar J, entered a dissenting opinion. He emphasized that the Arbitration Clause in a contract stands apart from the rest of the contract. He held that the dispute whether the obligations under a Contract have been discharged by accord and satisfaction is also a dispute relating to obligations under a contract and have to be settled by

arbitration if it falls within the scope of the Arbitration Clause. The relevant extract of his opinion is as under:

> "**31.** In my view therefore an accord and satisfaction does not destroy the arbitration clause. An examination of what has been called the accord and satisfaction in this case shows this clearly. From what I have earlier said about the terms of the settlement of February 22, 1949, it is manifest that it settled the disputes between the parties concerning the breach of the contract for kettles camp and its consequences. All that it said was that the contract had been broken causing damage and the claim to the damages was to be satisfied "in terms of the settlement". It did not purport to annihilate the contract or the arbitration clause in it. I feel no doubt therefore that the arbitration clause subsisted and the arbitrator was competent to arbitrate. The award was not in my view, a nullity.
>
> **32.** The position is no different if the matter is looked from the point of view of Section 62 of the Contract Act. That section is in these terms:
>
> > "62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed."
>
> The settlement cannot be said to have altered the original contract or even to have rescinded it. It only settled the dispute as to the breach of the contract and its consequences. For the same reason it cannot be said to substitute a new contract for the old one. As I have earlier stated it postulates the existence of the contract and only decides the incidence of its breach.
>
> **33.** It remains now to express my views on the question whether the settlement of February 22, 1949, amounted to an accord and satisfaction. I have earlier stated that an

> accord and satisfaction is the purchase of a release from an obligation under a contract. This release is purchased by an agreement which is the accord. But this agreement like all other agreements must be supported by consideration. The satisfaction is that consideration. It was formerly thought that the consideration had to be executed."

33. There is no dispute that in the event a contract is novated by the parties entering into another contract, the rights and obligations of the parties would be covered by the new contract and not the one that has been novated. However, the present case is not one where the Settlement Agreement has substituted the Contract Agreement. It is essentially to record the agreement between the parties to settle their differences and disputes that have arisen in relation to performance and discharge of the Contract Agreement. Therefore, this Court has to examine the controversy arising in the present petition in the context of the dispute whether SPML had been compelled to enter into the Settlement Agreement by economic coercion and undue influence. The question whether there has been a valid novation of the Contract Agreement is itself a subject of dispute. The principal question before this court at this stage is whether the said dispute is required to be examined by the Arbitral Tribunal or by this Court.

34. In ***ONGC Mangalore Petrochemicals Limited v. ANS Constructions Limited and Anr.: (2018) 3 SCC 373***, the Supreme Court allowed an appeal against the decision of the High Court exercising powers under Section 11 of the A&C Act. In that case, the Supreme Court held that there was full and final settlement of claims

and therefore, no arbitrable dispute existed. The relevant extract of the said decision is set out below:

> "**31.** Admittedly, no-dues certificate was submitted by the contractee company on 21-9-2012 and on their request completion certificate was issued by the appellant contractor. The contractee, after a gap of one month, that is, on 24-10-2012, withdrew the no-dues certificate on the grounds of coercion and duress and the claim for losses incurred during execution of the contract site was made vide letter dated 12-1-2013 i.e. after a gap of 3½ (three-and-a-half) months whereas the final bill was settled on 10-10-2012. When the contractee accepted the final payment in full and final satisfaction of all its claims, there is no point in raising the claim for losses incurred during the execution of the contract at a belated stage which creates an iota of doubt as to why such claim was not settled at the time of submitting final bills that too in the absence of exercising duress or coercion on the contractee by the appellant contractor. In our considered view, the plea raised by the contractee company is bereft of any details and particulars, and cannot be anything but a bald assertion. In the circumstances, there was full and final settlement of the claim and there was really accord and satisfaction and in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not, therefore, justified in exercising power under Section 11 of the Act."

35. The said decision was rendered in the context of Section 11 prior to insertion of sub-section (6A) in Section 11 of the A&C Act. A similar issue arose in ***United India Insurance Co. Ltd. v. Antique Art Exports (P) Ltd.: (2019) 5 SCC 362***. In this case, the Court examined the dispute whether the contract in question had been discharged by accord and satisfaction. In the said case, disputes arose in respect of claims made

under several insurance policies issued by the appellant. The respondent (the Insurer) had executed a full and final settlement discharge voucher and had accepted payments from the appellant (the Insurer) in full and final discharge of its claims. Thereafter, the insured sent an email after eleven weeks of receipt of the amounts in full and final discharge of its claims alleging that it had signed the full and final settlement discharge voucher by fraud, coercion and undue influence exercised by the Insurer. It claimed that it was forced to sign on the dotted lines. The Court found that the said averments were not substantiated and the party who alleges fraud and coercion is "*under obligation to prima facie establish the same by placing satisfactory material on record before the Chief Justice or his designate to exercise powers under Section 11(6) of the Act*". The Court held that *"unless the claimant who alleges that execution of the discharge agreement or no claim certificate was obtained on account of fraud/coercion/undue influence practiced by the other party is liable to produce prima facie evidence to substantiate the same, the correctness thereof may be open for the Chief Justice to look into this aspect to find out where the dispute is bona fide and genuine in taking a decision under Section 11(6) of the Act"*. The Court concluded as under:

> "21. In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27th July, 2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being

> placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the Arbitrator for adjudication."

36. The decision in ***Antique Art Exports*** (*supra*) was rendered after introduction of sub-section (6A) in section 11 of the A&C Act. The said decision was expressly overruled by the Supreme Court in ***Mayavati Trading Pvt. Ltd.*** (*supra*). In that case, the Supreme Court referred to the decision in the case of ***Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited: (2019) 9 SCC 209***, wherein the Supreme Court had referred to the Law Commission Report No. 246 and had concluded that the High Court while considering any application under Section 11(4) to 11(6) of the A&C Act is required to confine itself to the examination of the existence of the Arbitration Agreement and leave all other issues to be decided by the arbitrator.

37. After referring to the aforesaid decision, the Supreme Court concluded 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 : (2019) 2 SCC (Civ) 785] , 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 : (2017) 4 SCC (Civ) 764] — see paras 48 & 59 [**Ed.**: The said paras 48 & 59 of *Duro Felguera, SA* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764, 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 : (2009) 1 SCC (Civ) 117. 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

: (2019) 2 SCC (Civ) 785] as not having laid down the correct law but dismiss this appeal for the reason given in para 3 above."

38. In ***SBP & Co. v. Patel Engineering Ltd. and Anr.: (2005) 8 SCC 618,*** the Supreme Court had indicated the matters required to be decided by the Chief Justice / his designate in an application under Section 11 of the A&C Act. The relevant extract of the said decision is set out below:

> "38. It is true that finality under Section 11(7) of the Act is attached only to a decision of the Chief Justice on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) of that section. Sub-section (4) deals with the existence of an appointment procedure and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-section (6) deals with the Chief Justice appointing an arbitrator or an Arbitral Tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same. The finality, at first blush, could be said to be only on the decision on these matters. 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. It is difficult to understand the finality referred to in Section 11(7) as excluding the decision on his competence and the locus standi of the party which seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

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."

39. The said decision was rendered in the context of Section 11 of the A&C Act as it existed prior to the amendments introduced in 2015. In ***Mayavati Trading Pvt. Ltd.*** (*supra*), the Supreme Court thus concluded that the same stood legislatively overruled by the introduction of sub-section (6A) in its later decision. The Supreme Court in its later decision in ***Vidya Drolia*** (*supra*) concurred with the aforesaid view and held that "*Mayavati Trading Pvt. Ltd., in our humble opinion, rightly holds that Patel Engg. Ltd. has been legislatively overruled and hence would not apply even post omission of sub-section (6A) to Section 11 of the Arbitration Act*".

40. It is relevant to note that in ***Garware Wall Ropes Limited*** *(supra)*, the Supreme Court had referred to the Law Commission Report No. 246 as well as the Statement of Objects and Reasons of enacting of the Arbitration and Conciliation Act, 1996 and had observed as under:

> "14. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that

> the Law Commission felt that the judgments in *SBP & Co.* [*SBP & 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 : (2009) 1 SCC (Civ) 117] required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator."

41. At this stage, it would also be relevant to refer to the decision of the Supreme Court in ***National Insurance Company Limited v. Boghara Polyfab Private Limited: (2009) 1 SCC 267***. In that case, the Supreme Court had, *inter alia*, considered the import of doctrine of Competence - Competence, which finds statutory expression in Section 16 of the A&C Act, in the context of issues that arise at a prereferral-stage. The Supreme Court had identified and classified the preliminary issues that may arise at the pre-referral stage, into three categories. The first category of cases comprised of issues that are required to be decided by the court (Chief Justice/his designate). The second category of issues could be decided by the court (Chief Justice/his designate) or could be left to the Arbitral Tribunal. And, the third category of issues are required to be left exclusively for the Arbitral Tribunal to decide. Paragraph 22 of the said decision is relevant and is set out below:-

> "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.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (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."

42. In a recent decision in the case of ***Vidya Drolia v Durga Trading Corporation: (2021) 2 SCC 1***, the Supreme Court referred to the earlier decision in ***Boghara Polyfab (P) Ltd.*** (supra) and observed as under:-

> "138. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have *erga omnes* effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.

43. In order to address the controversy in the present petition, it would be essential to reconcile the decisions of the Supreme Court in ***Mayavati Trading Pvt. Ltd.*** (*supra*) and ***Vidya Drolia*** (*supra*). As noticed above, in ***Mayavati Trading Pvt. Ltd.*** (*supra*), the Supreme Court had overruled its earlier decision in the case of ***Antique Art Exports (P) Ltd.*** (*supra*) as not laying down the correct law. In addition, the Court had also indicated that the decision of the Supreme Court in ***SBP & Co.*** (*supra*) had been legislatively overruled by the introduction of sub-section (6A) and Section 11 of the A&C Act. The Supreme Court had also referred to the observations made in its earlier decision in ***Garware Wall Ropes Limited*** (*supra*), wherein the Court had observed that the judgment in ***SBP & Co.*** (*supra*) and ***Boghara Polyfab Private Limited*** (*supra*) require a relook.

44. In ***Mayavati Trading Pvt. Ltd.*** (*supra*) the Court had expressly held that the existence of the Arbitration Agreement would require to be understood in the narrow sense as laid down in its decision in ***Duro Felguera, S.A. v. Gangavaram Port Ltd.: (2017) 9 SCC 729***. In that case, the Supreme Court had observed 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.

xxxx xxxx xxxx

> **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 : (2009) 1 SCC (Civ) 117] . 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."

45. However, as noticed above, in ***Vidya Drolia and Ors.*** (*supra*), the Supreme Court had adopted the categories of issues referred to in ***Boghara Polyfab Private Limited*** (*supra*). A careful reading of paragraph 138 of the decision in the case of ***Vidya Drolia*** (*supra*) indicates that the Supreme Court had also clearly held that "*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 would be left to arbitration*." Thus, clearly all issues relating to existence of an Arbitration Agreement are not required to be decided by the Court while examining the questions as to the existence of the Arbitration Agreement.

46. It would also be relevant to refer to the following observations from the concurring opinion of Ramana J. in ***Vidya Drolia's*** case. He had expressed that "*Post the 2015 Amendment, judicial interference at*

*the reference stage has been substantially curtailed… 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*."

47. The next question to be considered is the extent of examination. The above observations make it amply clear that the said examination is limited to forming a *prima facie* view as to the existence of the Arbitration Agreement.

48. In this context, it is also relevant to refer to certain recommendations made by the Law Commission in its 246th Report as most of the recommendations were accepted and led to enactment of the Arbitration and Conciliation (Amendment) Act, 2015. The Commission had recommended as under:

> "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.* [*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.'"

49. The statement of objects and reasons appended to the Arbitration and Conciliation (Amendment) Bill, 2015, *inter alia*, explicitly state that the enactment is " (vi) *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".*

(emphasis supplied)

50. It clearly follows from the above that this Court is not required at this stage to give a conclusive finding as to the existence of an arbitration agreement between the parties. In one sense, the Court would require to take a negative view if it finds that *ex facie* there is no Arbitration Agreement between the parties, and accordingly, the Court would reject the application under Section 11 of the Act. However, in all other cases where an arguable case is made out by the applicant, the parties are required to be referred to arbitration.

51. In ***Vidya Drolia*** (*supra*), the Supreme Court had also explained the scope to *prima facie* examination in the context of Section 8 and 11 of the A&C Act. The relevant extract of the said decision is set out as under:

> **132.** 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* [*Nirmala J. Jhala* v. *State of Gujarat*, (2013) 4 SCC 301 : (2013) 2 SCC (L&S) 270] , this Court had noted : (SCC p. 320, para 48)
>
> > "*48.* '*27.* … 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.' [**Ed.** : As observed in *Martin Burn Ltd.* v. *R.N. Banerjee*, AIR 1958 SC 79, p. 85, para 27.] "

**133.** 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 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, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.

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

SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.

**135.** The test of "good arguable case" has been elaborated by the England and Wales High Court in *Silver Dry Bulk Co. Ltd.* v. *Homer Hulbert Maritime Co. Ltd.* [*Silver Dry Bulk Co. Ltd.* v. *Homer Hulbert Maritime Co. Ltd.*, 2017 EWHC 44 (Comm)] , 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 Section 18(3). It remains for consideration whether it should do so as a matter of discretion."

* * * *

**140.** Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral

Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes."

* *

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

147.1. In *Garware Wall Ropes Ltd*. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)

> "29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found

> that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , as followed by us."

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

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

doubt is with a minor, lunatic or the only claim seeks a probate of a will.

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

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

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

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective

intervention is acceptable as it does not obstruct but effectuates arbitration.

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

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India [Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 : (2014) 3 SCC (Cri) 712] , this Court has observed : (SCC p. 642, para 191)

> "191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one

> who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."

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

nothing more, nothing less. Reference to decisions in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Ltd. case [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court in Narbheram Power & Steel (P) Ltd. [Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] and Hyundai Engg. & Construction Co. Ltd. [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in Vulcan Insurance Co. Ltd. [Vulcan Insurance Co. Ltd. v. Maharaj Singh, (1976) 1 SCC 943] Similarly, in PSA Mumbai Investments Pte. Ltd. [PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary

> jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.

52. In ***Sanjiv Prakash v. Seema Kukreja and Ors: Civil Appeal No. 975 of 2021, decided on 06.04.2021,*** the petitioner and the respondents had entered into a Memorandum of Understanding (MoU) in relation to their company, ANI Media Pvt. Ltd. (ANI), which *inter alia*, constituted a succession and management scheme. In 1996, Thomson Reuters Corporation Pte. Limited approached the petitioner for a long term equity investment in the Company and accordingly, a Shareholders Agreement (SHA) and a Share Purchase Agreement (SPA) were entered into between the parties, wherein Thomson Reuters acquired 49% shares of ANI. Clause 28 of the SHA specified that the said agreement would supersede any or all prior agreements, understandings and arrangements. Dispute arose between the parties regarding transfer of certain shares of ANI. The Petitioner contested the same as being violative of the Companies Act, 2013, as well as the MoU and accordingly, filed a petition under Section 11 of the A&C Act for appointment of an arbitrator in accordance with the arbitration clause contained in the MoU. The Delhi High Court held that the SHA being a comprehensive agreement between all the shareholders had novated the MOU and thus, the arbitration clause had perished with it. The said decision was carried in appeal before the Supreme Court. The respondents contended that the MoU was superseded after its clauses

were incorporated in the Articles of Association of ANI. They relied on the decisions of the Supreme Court in ***Kishorilal Gupta*** (supra), ***Damodar Valley Corporation*** (supra); and ***Young Achievers*** (supra) amongst other decisions. The Supreme Court noted the above and also referred to the relevant passages from the decision in ***Vidya Drolia*** (supra) as referred in the recent decisions in ***Pravin Electricals Pvt Ltd. Vs Galaxy Infra and Engineering Pvt. Ltd.: 2021 SCC Online SC 190*** and ***Bharat Sanchar Nigam Ltd. V Nortel Networls India Pvt. Ltd.: 2021 SCC Online SC 207*** and held as under:

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

> 10. The impugned judgment was wholly incorrect in deciding that the plea of doctrine of kompetenz-kompetenz and reliance on Section 11(6A) of the 1996 Act, as expounded in Duro Felguera (supra) and Mayavati Trading (supra) were not applicable to the case in hand. Apart from going into a detailed consideration of the MoU and the SHA, which is exclusively within the jurisdiction of the arbitral tribunal, the learned Single Judge, while considering clause 28 of the SHA to arrive at the finding that any kind of agreement as detailed in clause 28.2 between the parties shall stand superseded, does not even refer to clause 28.1. No consideration has been given to the separate and distinct subject matter of the MoU and the SHA. Also, Kishorilal Gupta (supra) and Damodar Valley Corporation (supra) are judgments which deal with novation in the context of the Arbitration Act, 1940, which had a scheme completely different from the scheme contained in Section 16 read with Section 11(6A) of the 1996 Act.

53. At this stage, it would be relevant to refer to the decision in the case of ***Oriental Insurance Company Limited and Anr v. Dicitex Furnishing Limited: (2020) 4 SCC 621***. The said decision was rendered in the context of the unamended provisions of Section 11 of the A&C Act. Concededly, the extent of inquiry under Section 11 prior to the introduction of sub-section (6A) was wider. In the aforesaid case, the respondent had contended that it was coerced into executing a discharge voucher as dictated by the appellant as it was in urgent need to meet its mounting liabilities. The Bombay High Court found the said dispute to be genuine and had referred the parties to arbitration. The Supreme Court had while dismissing the appeal held as under:

"2**6.** An overall reading of Dicitex's application [under Section 11(6)] clearly shows that its grievance with respect to the involuntary nature of the discharge voucher was articulated. It cannot be disputed that several letters — spanning over two years—stating that it was facing financial crisis on account of the delay in settling the claim, were addressed to the appellant. This Court is conscious of the fact that an application under Section 11(6) is in the form of a pleading which merely seeks an order of the court, for appointment of an arbitrator. It cannot be conclusive of the pleas or contentions that the claimant or the party concerned can take in the arbitral proceedings. At this stage, therefore, the court which is required to ensure that an arbitrable dispute exists, has to be prima facie convinced about the genuineness or credibility of the plea of coercion; it cannot be too particular about the nature of the plea, which necessarily has to be made and established in the substantive (read : arbitration) proceeding. If the court were to take a contrary approach and minutely examine the plea and judge its credibility or reasonableness, there would be a danger of its denying a forum to the applicant altogether, because rejection of the application would render the finding (about the finality of the discharge and its effect as satisfaction) final, thus, precluding the applicant of its right event to approach a civil court. There are decisions of this Court (*Associated Construction* v. *Pawanhans Helicopters Ltd.* [*Associated Construction* v. *Pawanhans Helicopters Ltd.*, (2008) 16 SCC 128] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] which upheld the concept of economic duress. Having regard to the facts and circumstances, this Court is of the opinion that the reasoning in the impugned judgment [*Dicitex Furnishing Ltd.* v. *Oriental Insurance Co. Ltd.*, 2015 SCC OnLine Bom 5055] cannot be faulted.

> **27.** In view of the foregoing discussion, the appeal is held to be unmerited; it is dismissed, without order as to costs."
>
> [emphasis supplied]

54. It is relevant to bear in mind the aforesaid note of caution struck by the Supreme Court: a detailed examination as to the disputes by this Court would undoubtedly prejudice one or the other party. In the aforesaid context, it is clear that once it is apparent that the parties had entered into an agreement to refer the disputes to arbitration, the dispute whether the same has been discharged by a settlement is required to be liberally construed in favour of relegating the parties to arbitration. Unless the Court comes to the conclusion that the dispute raised by the claimant with regard to the validity of the settlement is bereft of any merit; is not *bona fide;* or is a frivolous one, the Court must relegate the parties to resolve the disputes in arbitration.

55. It is also relevant to bear in mind that the decision whether to refer the parties to arbitration is concerned with only the forum where the disputes are required to be agitated. In case where the Courts finds that the arbitration agreement does not exists, the parties would nonetheless be entitled to agitate the disputes before Civil Courts. In this perspective, once it is established that the parties had entered into an arbitration agreement, the Courts must lean in favour of relegating the parties to that forum. Once it established that the parties had entered into an Arbitration Agreement, the question whether the contract (including the arbitration clause) stood discharged by accord and satisfaction must be considered with the perspective whether the same

is established without any detailed adjudicatory exercise. Thus, unless the Courts concludes that the said disputes are *ex facie* unmerited and frivolous, the parties must have their say before the agreed forum.

56. Bearing the aforesaid principles in mind, the Court may briefly examine the disputes between the parties. According to NTPC, the parties had voluntarily by free consent entered into a Settlement Agreement and thereby discharged the Contract Agreement. SPML claims that the Settlement Agreement was not voluntary but it was compelled to execute the same as NTPC had most unjustifiably withheld the release of the bank guarantees even though the Contract Agreement stood fully performed by SPML.

57. There appears to be no dispute that the Contract Agreement was performed. According to NTPC, it had issued the necessary certificates and had also tendered payment of ₹1,40,00,000/- which SPML had accepted. Nonetheless, NTPC had not released the Bank Guarantees. SPML had filed a Writ Petition before this Court seeking release of the Bank Guarantees. Although it had secured an interim order restraining NTPC from invoking the Bank Guarantees, SPML continued to run the risk that the proceedings may be protracted. In the meanwhile, the non-fund based facilities granted to SPML continued to be blocked. Undeniably, the same would have constrained SPML in its business. The question whether the said constraint was sufficient to compel SPML to accede to NTPC's demand would be a matter for SPML to establish before the forum adjudicating the said dispute.

58. The recitals of the Settlement Agreement dated 27.05.2020 record that SPML had approached NTPC for resolving the disputes and in this regard various communications were exchanged on 08.11.2019, 13.11.2019, 25.11.2019 and 24.12.2019 and thereafter, the parties had arrived at a settlement through mutual consultation.

59. The communication dated 08.11.2019 refers to the Minutes of the Meeting held on that date between the representatives of SPML and NTPC. The Minutes of the Meeting indicates that NTPC had withheld the Bank Guarantees pending recoveries in respect of works executed by SPML on NTPC Bongaigon. NTPC had proposed that, if SPML withdraws the notice for arbitration, NTPC Simhadri will propose to the higher management to expedite release of the bank guarantees. SPML on the other hand had requested NTPC to make an additional payment of ₹1,37,24,411/- on account of (a) revocation of the liquidated damages of ₹86,19,871/-; (b) payment of additional works amounting to ₹35,92,200/-; and (c) payment for alleging wrongful deduction amounting to ₹15,12,340/-. It was NTPC's stand that the contract closure process had been concluded and the only pending issue was release of the Bank Guarantees, and therefore, no further payments could be made. This was not agreeable to SPML.

60. On 13.11.2019, SPML sent a letter, the contents of which are reproduced below:-

"Dear Sir,

With reference to the discussion with our Contracts Head Mr S. Bhattacharya on 08.11.2019 and also subsequent Minutes drawn on the same day.

We understand that unless and until the Notice of Arbitration is withdrawn NTPC will not release the following bank guarantees:

| Nature of BG | BG No. | Name of the Bank | Opening Date of BG | BG Amount (Rs.) |
|---|---|---|---|---|
| ADVANCE | C040ILG002609 | Punjab National Bank | l-Aug-09 | 19,199,725 |
| ADVANCE | 0040ILG001309 | Punjab National Bank | 0l-Jul-09 | 25,494,501 |
| PBG | 0040ILGO0I109 | Punjab National Bank | 0l-Jul-09 | 22,631,532 |
| PBG | 0040ILG001209 | Punjab National Bank | 0l-Jul-09 | 82,363,368 |

As we are loosing huge opportunities in submitting tenders due to non-release of above Bank Guarantees, we are therefore agreeing to withdraw our arbitration notice to safeguard our company's future subject to release of above BGs by NTPC within 30th November, 2019 and if the above BGs are not released within 30th November, 2019 we shall proceed with the Arbitration and shall claim the consequential looses due to non-release of BGs among others.

We therefore earnestly request you to look into the matter judiciously and release the Bank Guarantees forthwith. We are hopeful for a favourable response in the matter.

This is without prejudice to our other rights and contentions under the contract.

Thanking you,

For SPML Infra Ltd."

61. The above letter does expressly state that SPML was losing opportunities and therefore, had agreed to withdraw the arbitration notice to safeguard the company. But the same was subject to the release of the Bank Guarantees by 30.11.2019. SPML had also stated that it would proceed with arbitration and claim consequential losses if the Bank Guarantees were not released.

62. On 25.11.2019, SPML sent a letter, the contents of which read as under:-

"Dear Sir,

We have received your letter no: SMPP/TS/2019/SPML/1329 dated 18th November, 2019.

We have completed the above mentioned contract and also received the Completion Certificate for the same issue by NTPC.

Therefore we do not find any reason why our Bank Guarantees are still being hold by NTPC without any cogent reasoning.

We have already issued the letter as asked by you and in all fairness NTPC should release the BGs for which we are suffering multifolds:

1. Paying huge Bank Commission charges.

2. Paying margin money of 25% amounting to Rs.3.74 Crore approx.

3. Loosing on new business opportunities as our limits are blocked due to these BGs and also unable to submit new tender.

We again request you to release the BGs otherwise you may refer to our letter no: 0218/NTPC-Simadri/SPML/MKC/155 dated 23rd July, 2019 wherein we have nominated Hon'ble Justice (Retd.) Dr. Satish Chandra, former Judge of Hon'ble High Court of Allahabad as our Nominee Learned Arbitrator in the matter to have the disputes and claims adjudicated by way of arbitration as envisaged in the contract. The details address and contracts have already been shared in the mentioned letter and we are now requesting you to nominate a person as your nominee Learned Arbitrator as a step towards the formation of the three member Learned Arbitral Tribunal for adjudication of the disputes arising out of the subject contract as per the terms and conditions of the contract.

This is without prejudice to our other rights and contentions under the contract."

Thanking you,

For SPML Infra Ltd."

63. SPML followed the aforesaid communication by another letter dated 05.12.2019 once again requesting NTPC to nominate its Arbitrator so that an Arbitral Tribunal could be constituted. This request was once again reiterated by SPML by its letter dated 20.12.2019.

64. On 21.12.2019, SPML sent a letter, the contents of which are set out below:-

> "Dear Sir,
>
> In furtherance of the aforementioned letters, meetings and the telephonic conversation held on 21.12.2019, between Mr B. Venkateshwarlu Addl. General Manager of NTPC and our Mr S. Bhattacharya Contracts Head SPML Infra Ltd.
>
> Since we are hard pressed for blockage of huge sum of Rs.14,96,89,126 for non-release of the following BGs; we under financial duress are inclined to withdraw our arbitration notice as requested by you subject to release of below BGs by NTPC latest by 20.01.2019 [ corrected as 20.01.2020 by a subsequent letter dated 24.12.2019].
>
> Details of the Bank Guarantees which you have agreed to release are:

| Nature of BG | BG No. | Name of the Bank | Opening Date of BG | BG Amount (Rs.) |
|---|---|---|---|---|
| ADVANCE | C040ILG002609 | Punjab National Bank | l-Aug-09 | 19,199,725 |
| ADVANCE | 0040ILG001309 | Punjab National Bank | 0l-Jul-09 | 25,494,501 |

| | | | | |
|---|---|---|---|---|
| PBG | 0040ILGO0I109 | Punjab National Bank | 0l-Jul-09 | 22,631,532 |
| PBG | 0040ILG001209 | Punjab National Bank | 0l-Jul-09 | 82,363,368 |

This is without prejudice to our other rights and contentions under the contract.

Thanking you,

For SPML Infra Ltd."

65. It is apparent from the above that SPML had indicated that it was facing financial constraints on account of NTPC withholding the Bank Guarantees. NTPC on the other hand does not appear to have provided any substantial grounds for withholding the same. It however, continued to persist with SPML that it would release the Bank Guarantees if SPML withdraws the disputes.

66. SPML had invoked the arbitration clause and had sought reference of disputes to arbitration. It had also approached this court. Thus, it would be difficult for SPML to establish that it was economically coerced to enter into the Settlement Agreement. However, this Court is unable to accept that the dispute whether the Contract Agreement stood discharged/novated in terms of the Settlement Agreement, is *ex facie* untenable, insubstantial or frivolous.

67. The contention that the reference to arbitration is premature as the parties have not exhausted the processes under the dispute resolution mechanism inasmuch as, the parties were required to first attempt to

resolve the disputes amicably is unmerited. If they were unsuccessful in doing so, they were to refer it to an Adjudicator. And, if the disputes still remained unresolved, the same could be referred to arbitration.

68. By a letter dated 15.05.2019, SPML had called upon NTPC to pay an amount of ₹72,01,53,898/- against its claims within the period of fifteen days. Since the said demand was not met, SPML had by its letter dated 12.06.2019 requested the Chairman *cum* Managing Director of NTPC to appoint an adjudicator within thirty days in terms of Clause 6.1.3 of GCC. It is SPML's case that since an adjudicator was not appointed, SPML invoked the Arbitration Clause and by its letter dated 23.07.2019, it nominated its arbitrator and called upon NTPC to nominate an arbitrator so that an Arbitral Tribunal could be constituted.

69. NTPC responded to the said letter on 29.08.2019 suggesting that the parties could sit across the table and sort out the disputes amicably or in the alternative, refer the same to Experts Settlement Council. However, NTPC did not appoint an arbitrator. NTPC suggested that the parties should resolve their disputes amicably and pursuant thereto, certain discussions were held.

70. Clearly, in these circumstances, the present application cannot be rejected by relegating the petitioner to once again seek reference of the disputes before an adjudicator. SPML had requested NTPC to appoint an adjudicator but NTPC had not done so. Thus, the contention that the present petition is pre-mature as the parties have not referred the disputes to an adjudicator, is unmerited.

71. In view of the above, this Court considers it apposite to allow the present petition.

72. Accordingly, this Court appoints Justice Manmohan Singh, a former Judge of this Court (Mobile No.9717495001) as NTPC's nominated Arbitrator. Both the Arbitrators (learned Arbitrator appointed by SPML and by this Court) shall jointly appoint the Presiding Arbitrator in terms of the Arbitration Clause (Clause 6.2.4 of the GCC). This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

73. The petition is disposed of in the aforesaid terms.

**VIBHU BAKHRU, J**

**APRIL 08, 2021**
**RK/MK**