IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: September 01, 2022

\+ ARB.P. 1010/2021

OYO HOTELS AND HOMES PVT. LTD ..... Petitioner

Through: Mr. Prashanto Chandra Sen, Sr. Adv. with Ms. Kanika Tandon and Mr. Sumant Nayak, Advs.

versus

AGARWAL PACKERS AND MOVERS LIMITED ..... Respondent

Through: Mr. Jeevesh Nagrath, Ms. Kirti Mewar, Mr. Arjun Gaur and Mr. Aayush Kumar, Advs.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition has been filed under Section 11(6) and Section 11(8) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'A&C Act, 1996') with the following prayers:

> *"In view of the above submissions, the petitioner humbly prays before this Hon'ble Court that this Hon'ble Court be pleased to-*
>
> *i. Appoint a Sole Arbitrator for adjudication of disputes / claims between the Petitioner and the Respondent arising out of the Services Agreement and / or;*

ii. Pass any such orders that this Hon'ble Court may deem fir and proper in the facts and circumstances of the present case."

2. It is a case wherein the petitioner is a company registered under the Companies Act of 1956 which holds a long-standing business in the managing hospitality sector. It is submitted that with the investment of considerable time and monies, the petitioner has developed a unique and distinctive system to provide high quality accommodation services.

3. The respondent is a private limited company involved in the business of providing material transportation, warehousing and logistics movements.

4. It is submitted that in the year 2020, respondent approached the petitioner representing that it has the requisite expertise, experience, and resources to provide services like dismantling, material packing, transportation and warehouse storage. Thereafter, based on the respondent's representation a Service Agreement (herein referred as "Agreement") dated June 26, 2020, was entered into by parties, i.e., petitioner and respondent.

5. As per the Service Agreement dated June 26, 2020, the respondent was to perform certain *"services"*. As per the Agreement, the services were in relation to end-to-end dismantling, packing and transportation of materials from identified OYO branded hotel properties located at various locations across India and storing them in the respondent's warehouses. Further, the Agreement stated the obligations of the respondent to include transportation and storage of

the goods/inventory of the petitioner at the respondent's warehouses and thereafter raising invoices on the petitioner in relation thereto. At the time when the Agreement commenced, the respondent picked up goods of the petitioner and stored the same in its warehouses located at various locations in different cities. Consequently, emails dated July 11, 2020 and August 22, 2020 sent by the respondent confirmed the quantities of the material so picked.

6. Mr. Prashanto Chandra Sen, the learned Senior Counsel appearing for the petitioner stated that the petitioner is aggrieved by the failure of performance of the Agreement dated June 26, 2020, by the respondent. The respondent failed to comply with Clause 3.5 in Annexure I of the Agreement. The respondent under the said provision was obligated to keep written records and report the progress of the services. Furthermore, at the time of taking delivery of goods, the respondent was indebted to store them in accordance with the provisions of the Agreement dated June 26, 2020 as well as undertake all necessary documentation associated with it, like receipt, storage and handling as per the Agreement.

7. It is submitted that the respondent in violation of the terms of the Agreement dated June 26, 2020, had altered the inventory list of goods of the petitioner thereby showing a shortfall of goods worth ₹2,29,00,000/-. In other words, these goods worth ₹2,29,00,000/-, which were transported and stored in respondent's warehouse were missing from the inventory list of goods supplied.

8. Moreover, the issue of goods missing from respondent's warehouse was raised by the petitioner on multiple occasions. In this

regard, references were sent by the petitioner via emails dated September 24, 2020 and September 25, 2020. Thereafter, correspondences were exchanged between parties whereby the respondent disputed the shortage of inventory and alleged the tally of items going inward and coming outward was notional.

9. Consequently, the petitioner served a legal notice dated October 27, 2020, to the respondent for recovery of goods to the tune of ₹2,29,00,000. The petitioner reiterated the specific clauses in the Agreement to the petitioner and called upon the respondent to (a) ensure compliance of the terms and conditions of the Agreement; (b) cure the deficiency in services provided; (c) restore petitioner's goods worth ₹2,29,00,000 or alternatively compensate the petitioner for the loss caused to it on account of negligence of the respondent by paying the aforesaid amount to the petitioner and (d) release the goods of the petitioner lying at Gurgaon warehouse, within 15 days from the date of receipt of the legal notice.

10. In response to the legal notice, the respondent carried out a joint stock verification and followed up with the same by an email dated January 05, 2021, and confirmed that stock reconciliation was carried out and accordingly, asked the petitioner to lift all its stocks lying at the respondent's warehouses located at Hyderabad, Chennai, Kolkata and Palwal.

11. Mr. Sen submitted that the respondent's request to the petitioner to lift all lying stocks post reconciliation clearly shatters its previous claims and that there was no storage of petitioner's inventory with the respondent and that shortage was only a notional one.

12. Mr. Sen submitted that, as per mutual understanding between the parties, all goods were to be released to the petitioner but the respondent failed to confirm the pick-up of goods from its warehouse in Hyderabad. This was highlighted by the petitioner vide emails dated January 28, 2021 and January 29, 2021. Furthermore, goods worth ₹2.29 crore were to be released to the petitioner, however, the respondent sent emails dated February 02, 2021, February 06, 2021 and February 10, 2021, refuting that goods which were pending were released from the end of the petitioner.

13. Mr. Sen contended that the said goods have disintegrated over a period of time and the petitioner is not in a position to use the goods, therefore, the petitioner is entitled for compensation. He stated that the non-delivery of the goods by the respondent within a reasonable time has also caused considerable loss to the petitioner. The loss is not directly relatable to the value of such goods but also to the value it had to the petitioner's business.

14. He submitted that despite the receipt of the legal notice, multiple stock reconciliations and assurances given by the respondent that, the goods will be delivered to the petitioner, the respondent has failed to do the same. This non-performance of obligation by the respondent has given rise to disputes between the parties in the present case.

15. According to Mr. Sen, Clause 12.2 of the Service Agreement dated June 26, 2020, provides for resolution of disputes through arbitration. Clause 12.2 is reproduced as under:

"12.2 In the event of a dispute arising out of or in relation to

> *any matters set forth under this Agreement, the Parties will attempt to resolve the dispute through mutual discussions, failing which, either Party may by written notice refer the dispute for arbitration. The dispute will then be finally settled by arbitration conducted by a Sole Arbitrator in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any amendments made thereof. The seat of such arbitration shall be New Delhi."*

16. Consequently, in terms with the above procedure / Clause 12.2, the petitioner issued a notice of invocation of dispute on July 20, 2021 (hereinafter referred to as 'Notice of invocation of arbitration'), and requested the respondent to take steps for amicable settlement in a timebound manner failing which arbitration proceedings shall commence between the parties by appointing a Sole Arbitrator.

17. The respondent replied to the notice dated July 20, 2021 vide its communication dated August 06, 2021, wherein the respondent refuted the contents of the "Notice of invocation of arbitration".

18. In addition, Mr. Sen stated that the arbitration clause 12.2 of the Agreement has not been denied by respondent in its reply dated August 06, 2021. He further submitted that, though the respondent has refuted the contents of the Notice of invocation of arbitration, it is settled law that once existence of arbitration clause is admitted by the parties, the parties must be referred to arbitration and the jurisdiction to deal with the objections raised by the parties lies with the Arbitral Tribunal.

19. Mr. Sen is also of the view that it is trite law that once a notice for invocation of dispute has been received by the respondent,

arbitration is deemed to have commenced as per Section 21 of the A&C Act, 1996. Therefore, the petitioner is approaching this Court seeking appointment of a Sole Arbitrator in terms of Clause 12.2 of the Agreement dated June 26, 2020.

20. Mr. Sen in his rejoinder affidavit stated that an Agreement dated February 28, 2020, was prepared to record the terms and conditions of the services and the relationship between the parties. But post the commencement of operations and the recording of the February 28, 2020. Agreement, a country wide lockdown was imposed from March 22, 2020, due to the outbreak of COVID-19, and in view of the same, reconciliation of the material/goods that was actually picked up, was not carried out by the parties.

21. He submitted that the Agreement dated February 28, 2020, which was prepared to record the terms and conditions of the services and the relationship between the parties was agreed to be merged into a subsequent Agreement by the parties. The intention of the parties to stick to the terms and conditions of the said Agreement were clear and adhered to. He has stated that on resumption of operations, the petitioner faced issues with regard to respondent's storage services particularly with respect to contractual pricing and billing. Therefore, the petitioner decided to re-deploy the inventory from the existing warehouse to petitioner's properties and other storage units/warehouses of the respondent by third week of June, 2020.

22. He also stated that due to the issues faced by the petitioner, it was decided that there was a mutual understanding to merge the terms of the prior Agreement dated February 28, 2020 into a subsequent

Agreement, (i.e., June 26, 2020) which shall be given effect to in order to clearly record the obligations, rights and liabilities of each party including other general terms and conditions to properly govern the relationship between the parties. Accordingly, the Agreement was executed between the parties on June 26, 2020 with the effective date from July 01, 2020. The same was never disputed by the respondent; as can be inferred from email dated July 23, 2020.

23. He contended, apart from the reply filed by the respondent, the respondent during the entire duration between February 2020 to 2021 has never refuted or sought to refute the understanding arrived at between the parties that; the prior Agreement of February 28, 2020 entered between the parties has been merged into the present Agreement dated June 26, 2020.

24. Mr. Sen submitted that the Agreement, clearly in Clause 17.6, states that the agreement is an entire Agreement between the parties and it supersedes any prior Agreement / understanding / correspondence and that the scope of work of the respondent under the Agreement was:- *"storing of the material in the warehouse at agreed locations."* Therefore he stated that the Clause 17.6 clearly envisages the respondent's obligation and other terms and conditions in relation to the storages of goods / inventory that were picked up prior to the Agreement, i.e., June 26, 2020.

25. Mr. Sen has relied upon the following judgments, in support of his submissions (for the proportions highlighted):

(i) ***Olympus Superstructures Private Limited v. Meena Vijay Khetan & Ors., (1999) 5 SCC 651;*** to contend

that when there are disputes and differences between the main agreement and the subsequent agreements, general arbitration clause will govern the issue.

(ii) ***Shree Vishnu Constructions v. The Engineer in Chief Military Engineering Service & Ors., Special Leave to Appeal (C) No. 5306 of 2022;*** to contend that the Court shall decide and dispose of the application for appointment of an Arbitrator within a period of six months.

(iii) ***Vidya Drolia & Ors. v. Durga Trading Corporation, (2021) 2 SCC 1;*** to demonstrate the test for determining the arbitrability of the subject matter.

(iv) ***Sanjiv Prakash v. Seema Kukreja & Ors., (2021) 9 SCC 732;*** to contend that a deeper consideration, whether or not an arbitration agreement exist should be left to the Arbitrator to decide.

(v) ***Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr., (2018) 15 SCC 678;*** to contend that the dispute between the parties regarding multiple agreement could be decided only by referring the agreement to the Arbitrator, ***and***

(vi) ***Geo Miller & Company Private Limited v. Rajasthan Vidyut Utpadan, (2020) 14 SCC 643,*** to contend that the existence of a dispute is essential for appointment of an Arbitrator.

26. Mr. Jeevesh Nagrath, learned counsel appearing for the respondent, stated that it is expressly stated in the terms of the Agreement dated June 26, 2020, that;-

> *"1.1 This Agreement shall come into force from 01.07.2020 ("Commencement Date") and shall expire on 30.06.2021, unless Terminated earlier as per provision of clause 8 ("Term ")"*

Therefore, any allegation of oral understanding is contrary and barred by the provisions of Sections 91 and 92 of the Indian Evidence Act, 1872. Moreover, under clause 17.6 of the Agreement it is expressly agreed that the Agreement contains the entire Agreement between the parties and it supersedes any prior Agreement / correspondence / understanding.

27. Mr.Nagrath submitted that the respondent has not provided any service to the petitioner under the Agreement and no service at all has been provided by the respondent to the petitioner after June 30, 2020. Since, no service has been provided under the Agreement, no invoice was raised by the respondent.

28. He contended that the petitioner has failed to produce any document/invoice pertaining to the services rendered, after July 01, 2020, and the email communication between the parties were with regard to the services provided by the respondent prior to July 01, 2020. He also states that, most of the invoices were also issued prior to July 2020, though some invoices were raised in July 2020 but they were for services that were provided prior to July, 2020. The last invoice is dated July 27, 2020, which is for the transportation done on May 01, 2020. The rate charged for the services in the invoices is also

not as per the amount mentioned in the Agreement.

29. He submitted that there was no written Agreement between the petitioner and the respondent except the Lorry Receipt / Goods Consignment note issued under the Carriage by Road Act, 2007 and that the petitioner has wrongly and falsely tried to mislead this Court by trying to portray, as if the services were provided under the Agreement, which specifically mentions that it is effective for the period after July 01, 2020, i.e., the Agreement does not mention that it covers the past services. Thus, the arbitration Agreement contained in the Agreement will not apply to disputes that pertain to services provided prior to the date on which the said Agreement became effective.

30. He submitted that the petitioner has invoked arbitration by a legal notice dated July 20, 2021, making therein wrong and false allegations. The respondent via an interim letter dated August 06, 2021, stated inter-alia, as under:

> *"6. My client denies that the disputes or claims are arbitrable and / or that your client has any right to invoke arbitration and / or nominate the sole arbitrator or to make any claim against my client. Therefore, such assertion and attempt by your client is denied and is not acceptable. "*

Thereby, the respondent has at the first instance itself denied and disputed the invocation of arbitration and arbitrability of the alleged disputes. He also stated that an interim reply denying the arbitrability of the disputes was sent with a caveat that a detailed reply will be sent

later as the respondent was gathering information.

31. He stated that the respondent had provided services under an oral Agreement, pursuant to which the Goods Consignment Note / Lorry Receipt were issued for each location, hotel and consignment separately and separate invoices were raised for the same. He stated that each of these constituted a separate and distinct contract and the services were completed prior to the signing of the Agreement dated June 26, 2020, which was to operate and come into effect from July 01, 2020. The billing was done by referring to each of these Goods Consignment Note / Lorry Receipt.

32. Mr. Nagrath denied that the respondent approached the petitioner in the year 2020 making any alleged representation. According to him, the petitioner is falsely and wrongly trying to portray as if the parties started any relationship under the Agreement dated June 26, 2020.

33. He also denied that the services under the Agreement ever commenced and / or that the emails dated July 11, 2020 and August 22, 2020, were in relation to the services provided under the said Agreement dated June 26, 2020.

34. He also stated that as per the record, no inventory of the petitioner is available with the respondent at any location. The said emails pertaining to services which were provided for the period were prior to the Agreement dated June 26, 2020, and are not covered by the terms and conditions of the said Agreement. The petitioner has not filed a single email which pertains to any services provided after July 01, 2020, i.e. the date mentioned in clause 1.1 of the Agreement from

which the Agreement was to become effective.

35. He stated that the petitioner has wrongly and illegally invoked Arbitration under the Agreement dated June 26, 2020, by making wrong and false allegations to mislead this Court. Due to COVID -19 pandemic and the sudden disruption of all works and employees being unavailable, the information was provided by the clerical employees based on what was informed by the petitioner. He submitted that, on a complete reconciliation of records, there is no inventory with the respondent. It is also evident from the records filed along with the interim reply that the said dispute cannot be the subject matter of arbitration proceedings.

36. That apart, he submitted that no services were availed and/or provided to the petitioner by the respondent under the Agreement, so there is no question of any alleged failure or applicability of clause 3.5 and Annexure I. He denied that there is any missing inventory or shortage of goods as alleged or otherwise. There is no breach and/or violation of any terms of the Agreement by the respondent as no services were ever provided under the same. There is no shortage of goods worth ₹2,29,00,000/- or any part thereof, as alleged or otherwise. The entire inventory that was picked up from the hotels physically has been handed over to the petitioner.

37. He submitted that the emails dated September 24, 2020 and September 25, 2020 do not pertain to any services under the Agreement dated June 26, 2020. He stated that the petitioner is mixing two separate and distinct Agreements to mislead this Court and thereby wrongly and illegally invoke arbitration. The correspondences

exchanged between the petitioner and respondent was for another contract/transaction wherein the petitioner alleged shortage of goods. It is not denied that the respondent sent an email dated January 05, 2021. He stated that however, the said email is not in respect of any services under the Agreement dated June 26, 2020, and it is being read out of context and on stand-alone basis is incorrect.

38. Mr Nagrath denied that the alleged goods of the petitioner were disintegrated, that there was any neglect by the respondent, that any goods of the petitioner are with respondent, that there is any non delivery by the respondent, that petitioner is entitled to any alleged compensation, that any loss has been caused by the respondent to the petitioner and the goods were not returned by the respondent in the same condition in which they were received. He stated that no loss has been caused by the respondent to the petitioner and all the goods of the petitioner have been returned in the same condition in which they were received. Therefore, none of the above issues pertain to the Agreement dated June 26, 2020, under which the Arbitration is sought can be invoked.

39. That apart, he submitted that, the clause clearly states that *"In the event of a dispute arising out of or in relation to any matters set forth under this Agreement.......”*. The petitioner has raised the alleged disputes before this Court which does not pertain to the said Agreement. Since no service was provided under the Agreement, the arbitration clause contained in the same is not applicable and is being wrongly referred to and relied by the petitioner. He submitted that the Agreement does not mention that it covers the past services under

clause 1.1. In fact, services prior to July 01, 2020 are excluded.

40. He stated that the submission of Mr.Sen that the said Agreement is applicable even to past services prior to July 01, 2020, is contrary to the plain terms of the said Agreement. He stated that the petitioner has not filed any document to show that any service has been provided by the respondent after July 01, 2020, and that payment has been made as per rates/ charges under the said Agreement. He stated that merely because an arbitration Agreement exists in a separate and subsequent contract does not mean that dispute even for the period prior to that Agreement will automatically get covered by the said arbitration clause.

41. He also stated that it is admitted and undisputed position of facts:

a. That there was no written Agreement for the services provided prior to 01.07.2020.
b. That there is no arbitration Agreement for the services provided prior to 01.07.2020.
c. That no service has been provided by the respondent to the petitioner after 30.06.2020.

42. That Apart, relevant clauses of the Agreement dated June 26, 2020, are:

"a. That the recital (C) of the Services Agreement defines the term "Services". Furthermore, the said recital makes it clear that the petitioner "is desirous of engaging" the "Services", which is something to be done in future. It does not say that the respondent is already providing services and for which this Agreement is being entered into.

b. As per Recital (E) of the Services Agreement, the petitioner has "agreed to avail the Services of the Service Provider and the Service Provider has agreed to provide the Services to OYO". It does not say that the respondent is already providing services and for which this Agreement is being entered into. Rather, it shows that Services would be availed afresh from the Commencement Date of the said Agreement.

c. That the said recital also makes it clear that the intention of the parties was that the Services Agreement dated June 26, 2020 will only govern the Services to be provided by the respondent to the petitioner after the commencement of the Services Agreement. Since, admittedly, no services were provided under the Services Agreement dated 26.06.2020, recourse cannot be made to the arbitration clause contained in the said Services Agreement.

d. As per Clause 1.1, the parties consciously agreed and stipulated that the Services Agreement "shall come into force from July 01, 2020 ("Commencement Date")". The Commencement Date has been consciously fixed by the parties for July 01, 2020 even though the Agreement is signed on June 26, 2020 and on the date of signing services were already being provided by the respondent and which services were provided till June 30, 2020. If it was the intention of the parties to make the Services Agreement applicable to services provided prior to July 01, 2020, then, there was no need for the parties to provide clause 1.1 with a Commencement Date of July 01, 2020. ii. The Agreement was signed in June, 2020 and could have been made effective from the date of signing itself. iii. nothing prevented the parties from including a clause in the Services Agreement to say that this Agreement will cover prior services also. The plain language of clause 1.1 excludes any service or activity prior to July 01, 2020.

e. Furthermore, Clause 2.1 makes it clear that the "Service Provider will provide OYO the Services". Therefore, the Services Agreement was executed by the parties only for

the services to be provided in the future.

f. *Clause 4.1 provides for payment of Services. Admittedly, no bills were raised under Clause 4.1 of the Services Agreement, nor were any payment made under the said clause.*
g. *Clause 12.2 of the Services Agreement provides for reference to arbitration "in the event of a dispute arising out of or in relation to any matters set forth under this Agreement". The arbitration agreement is for the said Agreement alone.*
h. *Clause 17.6 contains the "Entire Agreement" clause. As per the said clause, the Services Agreement contains the entire understanding of the Parties with regard to provision of the "Services". "Services" has been defined in recital (C) of the Services Agreement. Therefore, the "entire agreement" clause is pertaining only to those "Services" which are defined and provided under this Agreement. 3."*

43. He further submitted that the respondent in his reply to the legal notice for invocation of arbitration clearly stated that the disputes are not arbitrable. He also submitted that the email dated July 11, 2020 (filed by the petitioner at page 27 of its documents) clearly record that everything till June 30, 2020, is over and from July 01, 2020, a new chapter will start.

44. Mr Nagrath has relied upon the following judgments for the corresponding propositions:-

A. ***Joshi Technologies International Inc. v. Union of India Ors***. (2015) 7 SCC 728, and ***Thyssen Krupp Materials AG v. Steel Authority of India***, 2018 (1) R.A.J. 396:- Interpretation of an entire agreement clause in a contract.

B. ***Durga Softelcom Pvt. Ltd. v. Aricent Technologies (Holdings) Ltd. & Ors***, 2015 SCC OnLine Del 11592:- Interpretation of the contract; earlier clause will prevail over the latter clause.

C. ***Sanjiv Prakash v. Seema Kukreja***, (2021) 9 SCC 732:- While considering an application under Section 11 of the Arbitration & Conciliation Act, 1996, the Court must examine the existence of valid arbitration agreement and arbitrability of disputes. A totally hands-off approach may be counter-productive.

D. ***Alimenta S.A. ETC. v. National Agricultural Co-operative Marketing Federation of India,*** *1987 1 SCC 615:-* When the incorporation of clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause.

45. Having heard the learned counsel for the parties, the only issue which arises for consideration is whether the dispute is arbitrable as per the terms of the Agreement executed between the parties on June 26, 2020.

46. The plea of Mr. Nagrath is that the Agreement dated June 26, 2020 had come into effect on July 1, 2020 and neither any services have been provided under the said Agreement nor any invoices have been raised, therefore, there is no dispute which is arbitrable under the said Agreement. He qualifies his submission by stating that the alleged claim of the petitioner is with regard to goods which were transported

and stored in the respondent's warehouse prior to the Agreement coming into effect i.e., before July 1, 2020. He did state that some of the invoices were raised in July 2020 but the same were for the services rendered by the respondent prior to July 1, 2020.

47. Mr. Nagrath's plea is also by relying upon different clauses in the Agreement to highlight that the intention of the parties while executing the Agreement was to enter into a contractual relationship in future w.e.f. July 1, 2020 till June 30, 2021 and the arbitration Agreement was to govern the matters set forth in the Agreement which is with regard to services as defined in *Recital (C)* of the Agreement.

48. The above pleas of Mr. Nagrath have been contested by Mr. Sen by relying upon clause 12.2 which I have reproduced above. He has also relied upon clause 17.6 which according to him stipulated that the Agreement contains entire Agreement between the parties and it supersedes any prior Agreement / understanding / correspondence and the scope of work of the respondent under the Agreement was for storing the goods in the warehouse at agreed locations. Clause 17.6 of the Agreement reads as under:

> *"17.6 Entire Agreement: This Agreement contains the entire understanding of the parties with regard to provision of the Services and supersedes all previous correspondence / agreements / understanding. Any amendment, modification, change or revision to this Agreement as mutually agreed between the parties hereto shall be made in writing."*

49. It was the submission of Mr. Sen that on February 28, 2020 an Agreement was prepared to record the terms and conditions of the service and relationship between the parties. Post the commencement

of operation and recording of the February 28, 2020 Agreement, a countrywide lock down was imposed from March, 2020 and in view of the same, reconciliation of the material / goods that were actually picked up was not carried out by the parties. In other words, the intent of the parties was to include an arbitration clause, so that the disputes which would arise between the parties would be arbitrable irrespective of the fact that any goods / material transported and stored in the warehouse before that date.

50. No doubt, the Agreement does state that it shall come into effect on July 1, 2020 but the services as defined under the Agreement includes the provision of providing, dismantling material, packing, transportation and warehouse storage. The claim of the petitioner primarily relates to recovery of goods to the tune of ₹2,29,00,000/- which were stored in the respondent's warehouse between the period March 16, 2020 to June 30, 2020 and some of which were not accounted for.

51. It is important to note that the petitioner had notified the issue of shortfall of inventory to the extent of ₹2.29 Crore in the month of September 25, 2020, i.e., after July 1, 2020. The said e-mail dated September 25, 2020 was contested by the respondent vide its e-mail of the same date. The petitioner had vide its notice dated July 20, 2021 invoked clause 12.2 of the Agreement, which is the arbitration clause, thereby nominating a retired Judicial Officer for appointment as a Sole Arbitrator for resolution of the dispute. The said notice was replied to by the respondent on August 6, 2021 wherein the respondent had contested the dispute raised by the petitioner including the arbitrability

of the dispute i.e., the right of the petitioner to invoke the arbitration clause. So it follows that the dispute is in respect of a claim raised by the petitioner after July 1, 2020.

52. The claim though denied by the respondent, is in a sense, a dispute, with regard to the goods stored in the warehouse of the respondent, existing after July 1, 2020. It is this dispute for which a reference is being sought for arbitration. Having said that, the issue with regard to scope of Section 11 of the Arbitration and Conciliation Act, 1996 is no more *res-integra* in view of the Judgment of the Supreme Court in the case of ***Sanjiv Prakash v. Seema Kukreja and Ors. (supra)***, which has been relied upon by both the counsel for the parties. In the said Judgment, the issue was with regard to a Memorandum of Understanding ('MoU', for short) executed in the year 1996 between the members of the Prakash family. The MoU consisted of an arbitration clause, that in the eventuality, any dispute in respect of differences arising in connection with the MoU shall be referred to a Sole Arbitrator in accordance with the provisions of the Arbitration Act of 1940. On April 12, 1996, a shareholder Agreement was executed between the Prakash Family and Reuters whereby the Prakash family divested 49% of its shareholding. The SHA also consisted of an arbitration clause. Admittedly, disputes arose between the family members of the Prakash Family. A petition under Section 11 of the Arbitration and Conciliation Act was filed before this Court. The question arose whether the appellant namely Sanjiv Prakash could have invoked arbitration clause in MoU seeking reference to arbitration in view of the subsequent execution of the shareholders

Agreement between the Prakash family and the Reuters.

53. This court held that the MoU stands novated by the shareholders Agreement and as such dismissed the petition. The Supreme Court was of the following view:

> "*17. By virtue of the Arbitration and Conciliation (Amendment) Act, 2015 ("the 2015 Amendment Act"), by which Section 11(6-A) was introduced, the earlier position as to the scope of the powers of a court under Section 11, while appointing an arbitrator, are now narrowed to viewing whether an arbitration agreement exists between parties. In a gradual evolution of the law on the subject, the judgments in Duro Felguera and Mayavati Trading were explained in some detail in a three-Judge Bench decision in Vidya Drolia v. Durga Trading Corpn. ["Vidya Drolia"]. So far as the facts of the present case are concerned, it is important to extract paras 127 to 130 of Vidya Drolia, which deal with the judgments in Kishorilal Gupta and Damodar Valley Corpn., both of which have been heavily relied upon by the learned Single Judge in the impugned judgment, as follows : (Vidya Drolia case, SCC pp. 107-09, paras 127-30)*
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> > *"127. An interesting and relevant exposition, when assertions claiming repudiation, rescission or "accord and satisfaction" are made by a party opposing reference, is to be found in Damodar Valley Corpn. v. K.K. Kar, which had referred to an earlier judgment of this Court in Union of India v. Kishorilal Gupta & Bros. to observe : (Damodar Valley Corpn. , SCC pp. 147-48, para 11)*
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> > > *'11. After a review of the relevant case law, Subba Rao, J., as he then was, speaking for the majority enunciated the following principles : (Kishorilal Gupta & Bros. case, AIR p. 1370, para 10)*
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> > > > *"10. ... (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."

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.'

128. Reference in Damodar Valley Corpn. case 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.

129. 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 the 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.

130. 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-sections (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."

18. *Again, insofar as the facts of the present case are concerned, para 148 of the aforesaid judgment is apposite and states as follows : (Vidya Drolia case, SCC p. 119)*

> *"148. 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."*

(emphasis supplied)

19. *A recent judgment, Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. , referred in detail to Vidya Drolia in paras 15 to 18 as follows : (Pravin Electricals case , SCC pp. 691-98)*

> *"15. Dealing with "prima facie" examination under Section 8, as amended, the Court then held : (Vidya Drolia case , SCC pp. 110-11, para 134)*

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

16. The parameters of review under Sections 8 and 11 were then laid down thus: (Vidya Drolia case , SCC pp. 112-13, paras 138-40)

'138. In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab (P) Ltd. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are

*on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide. [**Ed.** : The Boghara categories are set out in para 96, at pp. 86-87 of Vidya Drolia, (2021) 2 SCC 1. Given that Boghara, (2009) 1 SCC 267 was decided before the 2015 Amendment, it is worthwhile juxtaposing the observations of Ramana, J. in his supplementing opinion hereinbelow, on this issue in paras 225.1, 225.2 and 227 of Vidya Drolia case:"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."This would only appear to emphasise the limited and restricted nature of review by the court at the referral stage even while having resort to the Boghara categories, which must be read in light of the observations made in para 138 of Vidya Drolia case, modifying and limiting them in light of the 2015 Amendment and the fourfold test of non-arbitrability postulated herein.]*

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the

matter is clearly non-arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

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

17. The Court then examined the meaning of the expression "existence" which occurs in Section 11(6-A) and summed up its discussion as follows : (Vidya Drolia case, SCC pp. 115-19, paras 146-47)

'146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in

writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

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

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

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy

mandatory legal requirements. Invalid agreement is no agreement.

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

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

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

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

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first

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

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

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India, 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 , 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. 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. and Boghara Polyfab (P) Ltd. to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in Duro Felguera specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in Patel Engg. Ltd. and Boghara Polyfab (P) Ltd. was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Ltd. case , this Court in Narbheram Power & Steel (P) Ltd. 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 PSA Mumbai Investments Pte. Ltd. , 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.'

18. The Bench finally concluded : (Vidya Drolia case , SCC pp. 120-21, paras 153-55)

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

*154. Discussion under the heading "**Who Decides Arbitrability?**" can be crystallised as under:*

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

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

155. Reference is, accordingly, answered.' "

xxxx xxxx xxxx

21. *Likewise, in BSNL v. Nortel Networks (India) (P) Ltd. another Division Bench of this Court referred to Vidya Drolia and concluded : (BSNL case, SCC pp. 765-66, paras 46-47)*

"46. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading , which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd.

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

22. Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12-4-1996 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 para 148 of Vidya Drolia, 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."

54. From the reading of the above paragraphs of the judgment of the Supreme Court, it is clear that the scope of Section 11 more particularly after Section 11 (6)(A) was introduced, is narrowed down to examining whether an arbitration Agreement exists between the parties.

55. The Supreme Court has in the above judgment referred to its judgment in the case of ***Vidya Drolia & Ors. v. Durga Trading Corporation, (2021) 2 SCC 1***, wherein the Supreme Court held that Court may interfere at Section 8 and 11 stage when it is manifestly and *ex facie* certain that the arbitration Agreement is not 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. It also held that 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. The Court also held it 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.

56. Having noted the position of law, it follows, the issue whether the claim of the respondent was filed within the realm of arbitration clause 12.2, which I have reproduced above, requires detailed consideration which shall include the surrounding circumstances leading to the execution of the Agreement as it is the case of the petitioner that an Agreement dated February 28, 2020 was prepared to record the terms and conditions of the services and relationship between the parties which could not be executed. Later it was decided to merge the terms into a subsequent Agreement. That apart, detailed consideration is also required to decide whether the arbitration clause shall govern the dispute relatable to services rendered after July 01, 2020, or also the dispute arisen after that date for the services rendered earlier.

57. Mr. Nagrath has relied upon the judgments in the case of ***Joshi Technologies International Inc. (supra); Thyssen Krupp Materials AG (supra); Durga Softelcom Pvt. Ltd. (supra), Sanjiv Prakash (supra) and Alimenta S.A. v National Agricultural (1987) 1 SCC 615***.

58. Insofar as the judgments in the case of ***Joshi Technologies International Inc. (supra)*** and ***Thyssen Krupp Materials AG (supra),***

are concerned, Mr. Nagrath had relied upon the proposition that the Agreement being the "Entire Agreement", no correspondence / document / understanding, which took place between the parties prior to the signing of the Agreement can be seen / considered. There cannot be any dispute on the said proposition but the consideration of the Agreement executed between the parties being in the exclusive jurisdiction of the Arbitral Tribunal, as held above, the reliance is misplaced.

59. Similarly, even the reliance placed on the judgment of this Court in ***Durga Softelcom Pvt. Ltd. (supra)*** for the proposition that the earlier clause shall prevail over a later clause is also in the realm of interpretation of contract, which is in the exclusive jurisdiction of the Arbitral Tribunal and as such misplaced.

60. In so far as the judgment in the case of ***Alimenta S.A. (supra)*** relied upon by Mr. Nagrath is concerned, the facts in that case are, the parties entered into a contract dated January 12, 1980 for the sale and supply of 5000 / 8000 MT of HPS Groundnut Kernels Jaras. In Clause 11 thereof provides other terms and conditions as per FOSFA–20 contract. The expression FOSFA means, The Federation of Oil, Seeds and Fats Association Limited. Subsequently another contract dated April 3, 1980 was entered between the parties in respect of 4000 MT of Groundnut Kernals Jaras. Clause 9 of subsequent contract provided "all other terms and conditions for supply not specifically shown and covered hereinabove shall be as per previous contract signed between us for earlier supplies of the HPS". The FOSFA-20 contract contains an arbitration clause which *inter alia* stipulated any

dispute arising out of the contract raising any question of law arising in connection therewith shall be referred to arbitration in London (or elsewhere if so agreed) in accordance with the Rules of Arbitration and Appeal of the FOSFA in force on the date of the contract and of which both the parties shall be deemed to be cognizant.

61. It was the case of NAFED in a petition under Section 33 of the Arbitration Act, 1940 that there is no valid arbitration Agreement between the parties.

62. It was also the case of NAFED that when it agreed in clause 11 of the first contract, that the parties would be governed by the terms and conditions of FOSFA-20 contract, it only had in mind such terms and conditions as would govern the relationship between the parties. Further the fact that there was an arbitration clause in FOSFA-20 came as a complete surprise to NAFED. The said petition was opposed by the Alimenta. The Coordinate Bench of this Court held that the arbitration clause in FOSFA-20 was incorporated into the first contract dated January 12, 1980 by virtue of Clause 11 thereof.

63. With regard to the second contract, it was held that it did not make any mention of FOSFA-20 contract and all that was stated in Clause 9 thereof was, all other terms and conditions for supply not specifically shown and covered therein should be as per previous contract signed between the parties for similar supply of HPS. Hence unless those terms and conditions which were referred to are connected with and germane to the supply had been made applicable from the earlier contract, i.e., to say the first contract dated January 12, 1980. It was also observed that the term about the arbitration was

not incidental to supply of goods and it was difficult to read from the provisions of clause 9 of the second contract that the arbitration clause was lifted from there and made a part of the same.

64. The Court allowed the petition under Section 33 of the A&C Act, 1996, in so far as it related to the second contract dated April 3, 1980. It was held that no arbitration Agreement existed between the parties, as such none of them was entitled to seek reference to the arbitration with regard to the first contract and that the same was governed by the arbitration clause as has been incorporated therein from the FOSFA-20 contract.

65. So two appeals were filed before the Supreme Court. The Supreme Court was of the view that the first contract includes terms and conditions of supply and as Clause 9 refers to these terms and conditions of supply, it is difficult to hold that the arbitration clause is also referred to and as such incorporated in the second contract. It was also held that the arbitration clause refers to certain particular terms and conditions, only those terms and conditions are incorporated and not the arbitration clause.

66. Suffice to state, the said Judgment has no applicability in the facts of this case as it is not the case of the respondent that the arbitration clause has been incorporated in the Agreement by way of reference from an earlier Agreement. In other words, the issue which arose for consideration in the Judgment is not an issue for consideration in this case and as such it is distinguishable.

67. Accordingly, this Court appoints Justice R.C. Chopra, a former Judge of this Court, as the Sole Arbitrator (Mobile No. 98180 97777)

who shall adjudicate the disputes between the parties through claims and counter-claims, if any. The fee of the learned Arbitrator shall be regulated in terms of Fourth Schedule of the A&C Act, 1996. He shall give his disclosure under Section 12 of the Act.

68. All the pleas of the parties, both on facts and in law are left open to be decided by the learned Arbitrator.

69. A copy of this order shall be sent to Justice R.C. Chopra (Retd.) through WhatsApp.

70. This petition is disposed of.

V. KAMESWAR RAO, J

SEPTEMBER 01, 2022/*jg*