

\$~8, 9, 10 and 11

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

+ **ARB.P. 347/2019**

M/S GREEN EDGE

INFRASTRUCTURE PVT. LTD.

..... Petitioner

Through Mr. Abhimanyu Bhandari, Ms. Rukhmani Bobde, Mr. Aarush Bhatia, Mr. Amit Kumar Srivastava, Ms. Shalaka Garg and Ms. Suditi Singh, Advs.

Versus

MAGIC EYE DEVELOPERS

PRIVATE LIMITED & ORS.

..... Respondents

Through Mr. Krishnendu Datta, Sr. Advocate with Mr. Shaunak Kashyap and Ms. Trisha Nagpal, Advs.

+ **ARB.P. 753/2020 and I.A. 12015/2020**

MAGIC EYE DEVELOPERS PVT. LTD

..... Petitioner

Through Mr. Krishnendu Datta, Sr. Advocate with Mr. Shaunak Kashyap and Ms. Trisha Nagpal, Advs.

versus

GREEN EDGE INFRASTRUCTURE

PVT. LTD. & ORS.

..... Respondents

Through Mr. Abhimanyu Bhandari, Ms. Rukhmani Bobde, Mr. Aarush Bhatia, Mr. Amit Kumar Srivastava, Ms. Shalaka Garg and Ms. Suditi Singh, Advs.

+ **O.M.P.(I) (COMM.) 26/2019**

M/S GREEN EDGE

INFRASTRUCTURE PVT. LTD.

..... Petitioner

Through Mr. Abhimanyu Bhandari, Ms. Rukhmani Bobde, Mr. Aarush Bhatia, Mr. Amit Kumar Srivastava, Ms. Shalaka Garg and Ms. Suditi Singh, Advs.

versus

MAGIC EYE DEVELOPERS
PRIVATE LIMITED & ORS.

..... Respondents

Through Mr. Shaunak Kashyap, Ms. Trisha Nagpal and Mohd. Hamza, Advs.

+ O.M.P.(I) (COMM.) 114/2020 and I.A. 4064/2020, I.A. 4065/2020, I.A. 4066/2020, I.A. 4661/2020

MAGIC EYE DEVELOPERS PVT LTD. Petitioner

Through Mr. Shaunak Kashyap, Ms. Trisha Nagpal and Mohd. Hamza, Advs.

Versus

GREEN EDGE INFRA PVT. LTD & ORS. Respondents

Through Mr. Abhimanyu Bhandari, Ms. Rukhmani Bobde, Mr. Aarush Bhatia, Mr. Amit Kumar Srivastava, Ms. Shalaka Garg and Ms. Suditi Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

%

25.03.2021

ARB.P. 347/2019

ARB.P. 753/2020

O.M.P.(I) (COMM.) 26/2019

O.M.P.(I) (COMM.) 114/2020

1. Arguments in these petitions were heard together and are being disposed of by this common judgment.

Facts and contentions

2. M/s. Magic Eye Developers Pvt Ltd. (“Magic Eye”) owns 11.29 acres of freehold land at Sector 106, Gurgaon. In connection with the said land, four agreements were executed between the parties, viz. the first Shareholder Agreement dated 4th July, 2012, the second Shareholder Agreement dated 24th July, 2013, the first Memorandum of Understanding dated 24th July, 2013 and the second Memorandum of Understanding dated 9th August, 2013, which for the sake of felicity, would be referred to, hereinafter as “SHA-1”, “SHA-2”, “MOU-1” and “MOU-2”, respectively. Mr. Abhimanyu Bhandari, learned counsel for M/s. Green Edge Infrastructure Pvt. Ltd. (“Green Edge”), submits that these agreements were interlinked. It is an admitted position that, while SHA-1, SHA-2 and MOU-1 contained arbitration clauses, and MOU-2 did not. The Arbitration clause in SHA-1 and SHA-2, with which alone these petitions are concerned, read thus:

In SHA-1

“27.3 Arbitration

Subject to Clause 28.1 and 28.2, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and be finally and exclusively settled by arbitration i in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. Such dispute shall be referred to a sole arbitrator appointed mutually by the Promoters and GEPL.”

In SHA-2

“7.6 Arbitration

All disputes and differences under or arising out of this Agreement shall be referred to and settled by the arbitration of a sole arbitrator to be jointly appointed by the Parties. All proceedings in any such arbitration shall be conducted in English. The Arbitration shall take place in New Delhi and shall be governed by the Arbitration and Conciliation Act, 1996 or other law relating to arbitration in force in India at the relevant time. Any Award rendered upon such arbitration shall be a reasoned award in writing and shall be final, conclusive and binding on the Parties.”

3. Though para 1 of Arb.P. 347/2019 filed by Green Edge invokes the arbitration clauses in SHA-1, SHA-2 and MOU-1, Mr. Bhandari restricts his claim, during arguments, to reference of the dispute to arbitration in accordance with Clause 27.3 of SHA-1. According to Mr. Bhandari, the dispute forming subject matter of Arb.P. 347/2019 and OMP (I) (COMM) 26/2019 would fall within the comprehensive scope of Clause 27.3 of SHA-1. Mr. Krishnendu Datta, learned Senior Counsel appearing for Magic Eye, submits, *per contra*, that the dispute raised by Green Edge in Arb.P. 347/2019 and OMP (I) (COMM) 26/2019, are expressly limited, by Green Edge itself, to MOU-2, which does not contain any arbitration clause and is not, therefore, arbitrable in nature.

4. Mr. Bhandari advances the following submissions in order to demonstrate the interconnection between the aforesaid four agreements, and to buttress his contention that the dispute raised by Green Edge is amenable to arbitration under Clause 27.3 of SHA-1:

(i) The dispute is related to 11.29 acres of freehold land at

Sector 106, Gurgaon.

(ii) SHA-1 dated 4th July, 2012 dealt with *inter se* relations between Green Edge and Magic Eye in relation to development of the aforesaid land at Sector 106, Gurgaon in view of 20% equity shareholding held by Green Edge in Magic Eye, for which purpose the agreement required Green Edge to lead the process for obtaining requisite licences/NOCs, from various nodal agencies, for commercialization of the land. SHA-1, points out Mr. Bhandari, also provided for facilitation charges, in the form of built up area consisting of ten flats equivalent to 7600 sq. ft. of area in the land, to be provided to Green Edge in view of the aforesaid services provided to Magic Eye. The consideration received from the balance land would, under SHA-1, be required to be shared between Green Edge and Magic Eye in the ratio of 1:4, in keeping with the 20% equity shareholding of Green Edge in Magic Eye.

(iii) SHA-2 was in connection with the 20% equity shareholding held by Green Edge in Magic Eye, and provided for sale of the said 20% shareholding, consisting of 2000 equity shares, to M/s. RKS Buildtech Pvt. Ltd. (Respondent No. 2 in Arb. P. 347/2019, referred to, hereinafter as “RKS Buildtech”), at a value of ₹ 6267 per share, and further, for sale of 42,00,000 preference shares owned by Green Edge to RKS Buildtech @ ₹ 10/- per share.

(iv) MOU-1 dealt with 4.062 acres out of the total 11.29 acres, in respect of which licences for development for a commercial colony had not been obtained. Admittedly, the said MOU does not substantially impact the dispute in these petitions. It is not necessary, for the purposes of this judgment to advert in detail, therefore to the said MOU.

(v) MOU-2 dated 9th August, 2013 was in connection with a proposed MOU dated 7th June, 2013. MOU-2 read thus:

“Memorandum of Understanding

B/w: S.K. Hooda on behalf of Green Edge Infrastructure Pvt. Ltd. (or GEI) & Ashish Bhalla on behalf of Magic Eye Developers Pvt. Ltd. (or MEDPL)

Whereas,

- MEDPL has agreed to provide 36,762 sq. ft. of Saleable area from its mixed use project in Sector 106, Gurgaon as Free of Cost as per MOU mailed on 7 Jun 2013.
- This MOU elaborates the manner in which the benefit shall be passed to GEI.

1. *Now, MEDPL hereby agrees to allot 8,400 sq. ft. of Saleable area as Condos from Phase 1, as per Schedule 2, at a BSP of Rs.4,180 and other charges as per payment plan to GEI. The Consideration received from GEI as per payment plan shall be refunded as facilitation charges (covering BSP, PLC and Car Park charges).*

2. MEDPL shall allot the balance area, i.e. 28,372 as 2X, ie, 56,724 sq. ft. of Saleable area, at a discounted BSP i.e. the BSP shall be half of employee BSP, as

detailed in Schedule 1, to GEI on the condition that GEI in turn agrees to sell this area (as per Schedule 1) back to MEDPL (or its associate/group company) on the following condition:

I. MEDPL (or its associate/group company) shall sell this area (as per Schedule 1) in the open market.

II. MEDPL (or its associate) shall pay 50% of Net Revenue earned from the sale of this area (as per Schedule 1) to GEI in a mutually agreed manner. The consideration shall be paid in parts, as and when received from the customer(s) on periodical basis.

3. Both parties agree that the net revenue shall be calculated in the following manner:-

NET REVENUE =

Gross Revenue from the customer against sale of area as per Schedule 1

Less:

Amount payable by GEI to MEDPL as per BSP detailed in Schedule 1

Service tax/VAT/WCT/other taxes as recoverable from customer

Brokerage/incentives payable against sale of this area

Government Charges like EDC, IDC, etc. Payable by the customer

Security Deposit, IFMS, or any other kind of maintenance fee or deposit payable by the customer

Sd.

On behalf of
M/s Magic Eye Developers Pvt. Ltd.

Sd.
M/s Green Edge Infrastructure Pvt. Ltd.”

(vi) On 12th February, 2019, Green Edge, through counsel, wrote to Magic Eye and the other respondents in the present proceedings, setting out the dispute between them. It was averred/alleged, in the said communication, that

- (a) Green Edge had purchased 2000 equity shares, totalling to 20% of the total share capital of Magic Eye in 2010,
- (b) in response to a request from a letter, Green Edge advanced Magic Eye a loan of ₹ 7 crores in 2012,
- (c) out of the said amount, ₹ 2,80,00,000/- remained outstanding, to be paid by Magic Eye to Green Edge, and
- (d) on 22nd May, 2012, a Development Agreement was executed, between Magic Eye and M/s. Spire Developers Pvt. Ltd. (“Spire Developers”) (Respondent No. 3 in Arb. P. 347/2019), with respect to the aforesaid area of 11.62 acres located at Sector 106, Gurgaon, whereby and whereunder development rights, in respect of around 8 acres out of said land were granted by Magic Eye to Spire Developers, against consideration of ₹ 65 crores, along with built up area comprising 20% of the total saleable area of free of cost.
- (e) consequent thereupon, SHA-1 was executed between Green Edge (as the holder of 2000 equity shares and 42,00,000 preference shares in Magic Eye), Magic Eye, RKS Buildtech and Spire Developers, whereunder Magic Eye agreed to allot

Green Edge the built up area comprising ten flats in lieu of the facilitation charges provided by Green Edge for obtaining licences, NOCs, approvals etc,

(f) pursuant thereto, Magic Eye *vide* email dated 7th June, 2013, forwarded to Green Edge a draft MOU, for consent by Green Edge, which provided, *inter alia*, for sale, by Green Edge, of its 2000 equity shares and 42,00,000 preference shares in Magic Eye to RKS Buildtech at fair market value and for allotment, by Magic Eye, to Green Edge, of 36815 sq. ft. saleable area out of the project,

(g) pursuant thereto, SHA-1 was executed on 24th July, 2013 between Green Edge and RKS Buildtech with Magic Eye as the confirming party, which provided for sale of the aforesaid 42,00,000 preference shares and 2000 equity shares, held by Green Edge in Magic Eye, to RKS Buildtech,

(h) on the same day, i.e. 24th July, 2013, MOU-1 was executed between Green Edge and RKS Buildtech with Magic Eye as a confirming party,

(i) RKS Buildtech failed to make payment, to Green Edge against 2000 equity shares held by Green Edge in Magic Eye, though payment was made against the 42,00,000 preference shares, as a result of which the terms of SHA-2 remained unfulfilled,

(j) Magic Eye, at this stage, requested Green Edge to release ₹ 2,42,08,000/- against the allotment of 8400 sq. ft. of saleable area in Phase I of the project, out of the total saleable area of 36,762 sq. ft. in favour of Green Edge, in accordance with the

proposed MOU dated 7th June, 2013, against which Magic Eye agreed to refund ₹ 2,42,08,000/- against the allotment of 8400 sq. ft,

(k) In order to give effect to the proposed MOU dated 7th June, 2013, MOU-2 was executed between Green Edge and Magic Eye on 9th August, 2013, whereunder Magic Eye agreed to allot the balance 28,372 sq. ft. of saleable area, out of 36,762 sq. ft. to Green Edge free of cost, in consideration wherefor Green Edge agreed to provide 56,815 sq. ft. to Magic Eye to sell in the open market, and

(l) MOU-2 further covenanted for Magic Eye to refund, to Green Edge, the aforesaid amount of ₹ 2,42,08,000/- in due course as facilitation charges.

As a result, the notice dated 12th February, 2019 asserted, in paras 16 to 20 and 23 to 28, thus:

“16. It is submitted that in terms of the said MOU-2, saleable area of 8,400 sq. ft in Phase - 1 was allotted by Addressee No. 1 in favour of Our Client in October, 2013 and thereafter a sum Rs. 2,42,08,000/- (Rupees Two Crores Forty Two Lakhs and Eight Thousand Only) was transferred by Our Client and its directors Major (Retd.) Surendra Kumar Hooda and Mrs. Sharda Hooda, as they then were, in favour of Spire Developers Pvt. Ltd. (which later was amalgamated in Addressee No.1) from October, 2013 to February, 2015, which was to be refunded to Our Client in terms of MOU-2 as facilitation charges. It is pertinent to mention that the said sum of Rs. 2,42,08,000/- (Rupees Two Crores Forty Two Lakhs and Eight Thousand Only) continues to be outstanding even as on date.

17. It is submitted that Our Client thereafter from time to time kept requesting the Addressees to fulfil their obligations arising out of and in terms of the said SHA-1, SHA-2,

Proposed MOU, MOU-1, MOU-2, however the said Addressees kept shirking their responsibilities on one pretext or the other. It is pertinent to mention that Our Client also requested the Addressee No.1 on multiple occasions to expedite the said Project and allot the said GEPL Area in favour of Our Client in terms of the said MOU-2.

18. It is submitted that thereafter in the usual course, on perusal of the Annual returns of the Addressee No.1 Company for the year 2016 by the Directors of Our Client on May 15th, 2017, the Directors of Our Client were shocked to notice that 2000 equity shares of the Addressee No.1 Company held by Our Client had illegally and in collusion with Addressee No.2 been transferred by Mr. Ashish Bhalla in favour of Addressee No.2. It is submitted that neither Our Client nor its authorized representatives ever signed any share transfer form nor authorized the sale of the said shares in favour of Addressee No, 2.

19. On 02.08.2018, Our Client discovered the launch of the 'Longevity at Plaza -106', Phase 2 of the said Project on the said Land. The said "Longevity at Plaza – 106" continues to be vigorously and widely advertised by the Addressee No.1 even on its website and even otherwise through brochures etc.

20. It is submitted that thereafter Our Client vide its notice dated 29.10.2018 invoked Clause 2 read with Schedule 1 of MOU-2 and sought allotment of the said GEPL Area. However, to the utter shock and surprise of Our Client, the Addressee No.1 vide its reply dated 09.11.2018 through a onetime offer sought a payment of Rs. 11,87,43,350/- (Rupees Eleven Crores Eighty even Lacs Forty Three Thousand Three Hundred and Fifty only) on or before 19.11.2018 for allotment of the said GEPL Area.

23. It is however stated that Clause 27.3 of the said SHA-1 provides that in event of any disputes having arisen between the parties, the same shall be settled by Arbitration under the provisions of Arbitration and Conciliation Act 1996 and such disputes shall be referred to the Sole Arbitrator to be appointed mutually by Our Client and the

Addressees. The said Clause 27.3 is reproduced herein below:

27.3 Arbitration

Subject to clause 28.1 and 28.2, any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and be finally and exclusively settled by arbitration i in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996. Such dispute shall be referred to a sole arbitrator appointed mutually by the Promoters and GEPL.

The Venue of Arbitration shall be New Delhi. The language of the arbitration shall be English.

The existence of any dispute or difference or the initiation or continuance of the arbitration proceedings shall not postpone or delay the performance by the Parties of their respective obligations under this Agreement. It is agreed that the arbitrator shall also determine and make an award as to the costs of the arbitration proceedings. Any award of the arbitrations shall be final, conclusive and binding on each of the Parties.”

24. It is further submitted that MOU-1 also provides for an Arbitration Clause wherein it was agreed that all disputes and difference arising out of the said agreement shall be settled by the arbitration of a Sole Arbitrator to be jointly appointed by the parties. The said arbitration clause is reproduced herein below:

"Arbitration

All disputes and differences under or arising out of this Agreement shall be referred to and settled by the arbitration of a sole arbitrator to be jointly appointed by the Parties. All proceedings in any such arbitration shall be conducted in English. The Arbitration shall take place in New Delhi and shall be governed the Arbitration and Conciliation Act, 1996 or other law

relating to arbitration in force in India at the relevant time. Any award rendered upon such arbitration shall be a reasoned award in writing and shall be final, conclusive and binding on the Parties."

25. It is further submitted that Clause 7.6 of the said SHA-2 also provides that all disputes and difference arising out of the said agreement shall be settled by the arbitration of a Sole Arbitrator to be jointly appointed by the parties. The said Arbitration Clause is reproduced herein below:

7.6 Arbitration

All disputes and differences under or arising out of this Agreement shall be referred to and settled by the arbitration of a sole arbitrator to be jointly appointed by the Parties. All proceedings in any such arbitration shall be conducted in English. The arbitration shall take place in New Delhi and shall be governed by the Arbitration and Conciliation Act, 1996 or other law relating to arbitration in force in India at the relevant time. Any Award rendered upon such arbitration shall be a reasoned award in writing and shall be final, conclusive and binding on the Parties."

26. It is submitted that all the above mentioned agreements being SHA-I, SHA-2, Proposed MOU, MOU-1 and MOU-2 are intrinsically intertwined and interconnected and form part of the same transaction between the same parties. It is pertinent to mention that the said agreements being SHA-1, SHA-2, Proposed MOU, MOU-1 and MOU-2 entered into between the parties pertain to the same said Project on the said Land. As several parties are involved in a single commercial project through several agreements, hence all the Addressees are covered by the Arbitration Clauses stipulated in the said SHA-1, SHA-2 and MOU-1.

27. It is apparent that that in view of the above stated factual matrix, It is clear that disputes and differences have cropped up between the parties in terms of their obligations arising out of the said SHA-1, SHA-2, Proposed MOU, MOU-1, MOU-2, We as per the instructions received from Our Client, in terms of the said Agreements and as per the provisions of Arbitration & Conciliation Act, 1996, hereby

appoint Mr. Badar Dureez Ahmed (Former Chief Justice, Jammu & Kashmir High Court) to act as a Sole Arbitrator, who is an independent and impartial person and whose decision shall be final and binding upon the parties, to decide the claims / disputes of Our Client as stated herein above.

28. Kindly note that if Our Client does not receive any reply/response from you the above mentioned Addressees to this notice within a period of 30 days, it shall be presumed that you have accepted / got no objection to the appointment of the said Arbitrator to adjudicate upon the claim of Our Client as aforesaid. In case no consensus is reached between the parties in this respect, Our Client shall be constrained to approach the concerned Hon'ble Court for appointment of a Sole Arbitrator to adjudicate upon the claim of Our Client, entirely at your risk, cost and consequence. Please take this notice accordingly.”

5. It is apparent that, in the aforesaid legal notice, Green Edge has asserted, in categorical and unequivocal terms, that the reciprocal rights and liabilities between the parties, under SHA-1, SHA-2, MOU-1 and MOU-2 were interlinked. The paragraphs extracted, hereinabove, from the said communication also belie the submission of Mr. Krishnendu Dutta, learned Senior Counsel for Magic Eye, that the aforesaid notice invoked arbitration only in the context of MOU-2. It is apparent that the notice invoked the arbitration clauses under SHA-1, SHA-2 and MOU-1 (though, Mr. Bhandari restricted his case, during arguments, to Clause 27.3 in SHA-1), and also invoked the liabilities and obligations under all the agreements.

6. Mr. Dutta vehemently sought to oppose the very maintainability of Arb. P. 347/2019, on the premise that Green Edge had predicated its entire claim under MOU-2, which did not contain any arbitration clause. He submitted, in this context, that the notice invoking

arbitration was issued only under MOU-2. This, as I have already noticed hereinabove, is not the case. Besides, Mr. Dutta, relied on para 13 of Arb. P. 347/2019, which reads thus (with the portion on which Mr. Dutta placed reliance, being italicised):

“13. That the cause of action first arose on 07.06.2013 when the proposed MOU dated 07.06.2013 was formalized by way of a Memorandum of Understanding dated 09.08.2013 between the Petitioner and Respondent no. 1, the cause of action arose when the Respondent no. 1 failed to act/comply in accordance to their obligations as envisaged under the SHA-1, the cause of action further arose on 15.05.2017 when the Directors of Petitioner on the perusal of the Annual Report of the Respondent No. 1 Company came to know that the 2000 (comprising 20% shareholding) shares of the Respondent no. 1 Company held by the Petitioner were illegally transferred by Mr. Ashish Bhalla in collusion with other Respondents in favor of Respondent no. 2. The cause of action then arose on 02.08.2018 when the Respondent advertised its-'Longevity at Plaza - 106' project to public at large. *That the cause of action further arose when the Petitioner vide its notice dated 29.10.2018 invoked Clause 2 read with Schedule 1 of the said MOU-2 and sought for the allotment of the said **GEPL** Area (free of cost as agreed between the Parties) despite of which the same was refused by the Respondents vide its reply dated 09.11.2018 and 21.11.2018. further, the cause of action is still continuing since Respondents is vigorously and widely advertising of its Project even today on its website and even otherwise through brochures, advertisements, etc. That the cause of action is still subsisting as on 12.02.2019 when the Petitioner served a Notice invoking arbitration clauses under Arbitration and Conciliation Act, 1996 on the Respondent which was received to them on 14.02.2019, to which no reply was preferred by the Respondents. The cause of action is still continuing till the time an independent and impartial arbitrator is appointed by this Hon'ble Court.”*

7. Mr. Dutta also drew my attention to the synopsis accompanying Arb. P. 347/2019, which read thus:

“That the Petitioner has been constrained to file the said Petition as the said Respondent No.1 acting through Mr. Ashish Bhalla, is attempting to usurp an area of 56,724 Sq. ft. at Revenue Estate of Village Daultabad, Sector 106, Gurgaon, Urban Complex (hereinafter referred to as the "**GEPL Area**") belonging to the Petitioner by refusing to allot the said GEPL Area to the Petitioner and threatening to create third party rights by offering the said GEPL Area to the general public through its 'Longevity Project' launched on 08.08.2018, which Project continues to be advertised vigorously and widely by Respondent No.1 even today.

That the Respondent No.1 in terms of a Proposed MOU dated 07.06.2013, formalized by way a Memorandum of Understanding dated 09.08.2013, as a part of a disinvestment proposal of the Petitioner from the Respondent No.1 and in lieu of consideration towards the facilitation services provided by the Petitioner to the Respondent No.1 in obtaining requisite licenses for commercial development of the land at Revenue Estate of Village Daultabad, Sector 106, Gurgaon, Urban Complex agreed to allot the said GEPL Area to the Petitioner free of cost.

That the Respondent No.1, despite being made aware of its commitments in terms of the said Proposed MOU dated 07.06.2013 and Memorandum of Understanding dated 09.08.2013 has failed to allot the said GEPL Area to the Petitioner and is attempting to defeat the valid, subsisting and genuine rights of the Petitioner by threatening to alienate and dispose off the said GEPL Area in order to ensure that any arbitration proceedings initiated by the Petitioner to enforce its rights emanating out of the said Proposed MOU dated 07.06.2013 and Memorandum of Understanding dated 09.08.2013 are rendered ineffective and futile.

Hence, this Petition.”

8. I am unable to read para 13 of Arb. P. 347/2019, the synopsis accompanying the said petition, or the notice dated 12th February, 2019, invoking arbitration issued by Green Edge to Magic Eye, as restricting the claim of Green Edge to MOU-2. The reference to

MOU-2, in the said passages, cannot, in my view, be interpreted in the manner canvassed by Mr. Dutta.

9. On the approach to be adopted by the Court, while dealing with a petition under Section 11 of the 1996 Act, the Supreme Court has enunciated the law, clearly and categorically, and without any equivocation whatsoever, in its recent decision in *Vidya Drolia v. Durga Trading Corporation*¹, which I have had an occasion recently, to analyse in *Mahindra Susten Pvt. Ltd v. NHPC Ltd*². The following passages, from *Mahindra Susten*² merit reproduction:

“30. Section 11(6A) of the 1996 Act contains a statutory proscription against a court, exercising jurisdiction under Section 11(6), examining any aspect other than the existence of the arbitration agreement between the parties. A bench of three Hon’ble Judges of the Supreme Court has, in its recent judgement in *Vidya Drolia v. Durga Trading Corpn*, authoritatively delineated the scope and ambit of the jurisdiction of a Court, exercising authority under Section 11 (6), to examine the aspects of existence of the arbitration agreement and arbitrability of the dispute. The *ratio decidendi* of the judgement, on these two aspects, is captured in the following passages:

“121. 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*³, this Court had noted:

¹ 2020 SCC OnLine SC 1018

² MANU/DE/0288/2021

³ (2013) 4 SCC 301

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

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

123. *Prima facie* examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The *prima facie* review at the reference stage is to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are 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*⁴ are of importance and relevance. Similar views are expressed by this Court in *Vimal Kishore Shah v. Jayesh D. Shah*¹⁹ wherein the test applied at the pre-arbitration stage was whether there is a “good arguable case” for the existence of an arbitration agreement. The test of “good arguable case” has been elaborated by the England and Wales High Court in *Silver Dry Bulk Company Limited v. Homer Hulbert Maritime Company Limited*²⁰, 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.”

124. Appropriate at this stage would be a reference to the judgment of the Delhi High Court in *NCC Ltd. v. Indian Oil Corporation Ltd*⁵ wherein it has been held as under:

“59.1 In my view, the scope of examination as to whether or not the claims lodged are Notified Claims has narrowed down considerably in view

⁴ (2005) 7 SCC 234

⁵ Judgement dt 8th February, 2019 in Arb P 115/2018

of the language of Section 11(6A) of the 1996 Act. To my mind, once the Court is persuaded that it has jurisdiction to entertain a Section 11 petition all that is required to examine is as to whether or not an arbitration agreement exists between the parties which is relatable to the dispute at hand. The latter part of the exercise adverted to above, which involves correlating the dispute with the arbitration agreement obtaining between the parties, is an aspect which is implicitly embedded in sub-section (6A) of Section 11 of the 1996 Act, which, otherwise, requires the Court to confine its examination only to the existence of the arbitration agreement. Therefore, if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps, the Court may decline the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then, the best course would be to allow the arbitrator to form a view in the matter.

59.2 Thus, unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned court hearing the Section 11 petition should follow the more conservative course of allowing parties to have their say before the arbitral tribunal.”

125. The nature and facet of non-arbitrability could also determine the level and nature of scrutiny by the court at the referral stage. Stravos Brekoulakis has differentiated between contractual aspects of arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which he feels should be left to the arbitral tribunal. John J. Barcelo III, referring to some American decisions had divided the issue of non-arbitrability into procedural and substantive objections.

The procedural questions are 'gateway questions' which would presumptively be for the arbitrator to decide at least at the first stage. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab Private Limited*²². The first category of issues, namely, whether the party has approached the ***National Insurance Co. Ltd v. Boghara Polyfab Pvt Ltd, (2009) 1 SCC 267*** appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory 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. 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.

126. 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.

127. The Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the arbitral tribunal should first decide the disputes and rule on nonarbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings. Appropriate in this regard, are observations of the Supreme Court of Canada in **Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin**²³ (2007) 2 SCR 801, which read:

“85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must

refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

86. *Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."*

130. As observed earlier, ***Patel Engineering Ltd.***²⁴ explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. ***Mayavati Trading Private Ltd.***²⁵, in our humble opinion, rightly holds that ***Patel Engineering Ltd.*** has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. ***Mayavati Trading Private Ltd.*** has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the Section, as originally enacted, was facsimile with Article 11 of the UNCITRAL Model of law of arbitration on which the Arbitration Act was drafted and enacted. Referring to the legislative scheme of Section 11, different interpretations, and the Law Commission's Reports, it has been held that the omitted sub-section (6-A) to Section 11 of the Arbitration Act would continue to apply and guide the courts on its scope of jurisdiction at stage one, that is the pre-arbitration stage. Omission of sub-section (6-

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

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

unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law. We would proceed to elaborate and give further reasons:

(i) In **Garware Wall Ropes Ltd.**²⁶, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, *albeit* the observations made and quoted above with reference to ‘existence’ and ‘validity’ of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing paragraph 29 thereof:

“29. This judgment in **Hyundai Engg. Case**²⁷ is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of

an arbitration agreement is answered by this Court's understanding of the expression "existence" in *Hyundai Engg. case*, as followed by us.”;

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

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

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

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

(v) *Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in*

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

(vi) Exercise of power of *prima facie* judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

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

(viii) Exercise of *prima facie* power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In **Subrata Roy Sahara v. Union of India**²⁸, this Court has

observed:

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

(ix) Even in *Duro Felguera*²⁹, Kurian Joseph, J., in paragraph 52, had referred to Section 7(5) and thereafter in paragraph 53 referred to a judgment of this Court in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*³⁰ to observe that the analysis in the said case supports the final conclusion that the Memorandum of Understanding in the said case did not incorporate an arbitration

clause. Thereafter, reference was specifically made to **Patel Engineering Ltd.** and **Boghara Polyfab Private Limited** to observe that *the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Paragraph 48 in Duro Felguera specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Paragraph 59 is more restrictive and requires the court to see whether an arbitration agreement exists - nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties - nothing more, nothing less. Reference to decisions in Patel Engineering Ltd. and Boghara Polyfab Private Limited was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.*

(x) In addition to **Garware Wall Ropes Limited case**, this Court in **Narbheram Power and Steel Private Limited³¹** 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. Ltd³²**. Similarly, in **PSA Mumbai Investments PTE. Limited³³**, this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the

disputes. Accordingly, the reference to the arbitral tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

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

132. 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**,³⁴ 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.

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

137. 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.

138. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:

(a) Ratio of the decision in **Patel Engineering Ltd.** on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23.10.2015) and even post the amendments vide Act 33 of 2019 (with effect from 09.08.2019), is no longer applicable.

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

(c) The general rule and principle, in view of

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

(d) *Rarely as a demurrer the court may interfere at the Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is nonexistent, 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.”*

(Emphasis supplied)

10. In *Mahindra Susten*², I have arrived at the following conclusions from the enunciation of law in *Vidya Drolia*¹:

“31. The import of the above passages from *Vidya Drolia*¹⁶ is clear and unmistakable. Section 11(6A) of the 1996 Act has been held to continue to apply, as a guiding principle to be followed by courts at the referral stage, even after its omission. Even while holding that the “arbitrability” of the dispute, along with the aspect of existence of an arbitration agreement between the parties, could be examined, to a limited extent, by the Court exercising jurisdiction under Section 8 or Section 11 of the 1996 Act, the Supreme Court has been circumspect, many times over, in emphasising the limitations of the Court in this regard. It has been made unmistakably clear that, in exercise of its limited scope of authority, to examine the questions of existence of the arbitration agreement and arbitrability of the dispute, at the referral stage, the Court has to be careful not to usurp the jurisdiction of the arbitral tribunal which, ideally, should examine these aspects. The scope of examination by the referral court under Section 11(6), into the aspects of existence of the arbitration agreement, or arbitrability of the dispute, is, strictly, *prima facie*. In other words, it is only if, *prima facie*, the Court finds that no valid arbitration agreement exists, that it would refuse to refer the dispute to arbitration. In undertaking this exercise, the Court should not get lost in thickets, or enter into debatable factual issues. Unless there are good and substantial reasons to the contrary, the Court is required to compel the parties to abide by the arbitration agreement. It is only in the case where the arbitration agreement is “ex facie non-existent or invalid”, or the dispute is ex facie non-arbitrable, that the court would refuse to refer the dispute to arbitration. The intention is “to cut off 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”, and to ensure that “vexatious and frivolous matters get over at the initial stage”. This would also “save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept the plea of non-arbitrability”. “Senseless and ill-considered claims” and “ex facie meritless, frivolous and dishonest litigation” were required to be weeded out, as, “on the other side of a very irresponsible and senseless claim”, there was an innocent sufferer. Certainty, in the mind of the Court, that no valid arbitration agreement exists or that the disputes/subject matter are not arbitrable, is the sine qua non for rejection of

the prayer for referring the dispute to arbitration, whether made under Section 8 or Section 11. The scope of examination at this stage is preliminary and summary and not in the nature of a mini-trial.

32. The Supreme Court also clarified that the “existence” of the arbitral agreement also included, within its scope, the enforceability thereof, as an unenforceable agreement could not be regarded as “existing”. As such, existence and validity were intertwined. An arbitration agreement does not exist if it is illegal or does not satisfy the mandate of the legal requirements. An invalid agreement is no agreement. “Existence” and “validity” were, to an extent, even synonymous. Examples were cited, to clarify the position, as in the case of an agreement with the minor, or a lunatic, or where the only claim was for probate of a will.

33. It has been made further clear that the dispute would be regarded as “non-arbitrable”, at the Section 8 or Section 11 stage, only where the nature of the dispute is ex facie non-arbitrable, or where the dispute does not relate to the arbitration agreement. The situation has to be “chalk and cheese” or, alternatively, “black and white... without shades of grey”. In all other cases, the Section 11 court should follow the more conservative course of allowing the parties to have their say before the arbitral tribunal. Cases where the dispute is, by law, ex facie non-arbitrable, would, for example, be criminal cases, cases involving exercise of sovereign power, cases which, by statutory fiat, are required to be determined by courts, cases in which the cause of action is in rem, or where the subject matter of the dispute affects third parties or has erga omnes effect, requiring centralised adjudication. “On the other hand, issues relating to contract formation, existence, validity and non-arbitrability ... would be factual and disputed and for the arbitral tribunal to decide”. Questions involving mixed issues of fact and law have to be left to the arbitral tribunal.

34. In order to underscore the limitations of the Section 8, or Section 11 Court, in entering into debatable issues of existence of the arbitration agreement or arbitrability, the Supreme Court has emphasised the purpose behind conferring a limited jurisdiction, on the referral court, to examine these aspects. The conferral of such limited jurisdiction is intended

“to prevent wastage of public and private resources”, and to protect parties from being forced to arbitrate when the matter is clearly non-arbitrable. Where, however, *prima facie* review appears to be inconclusive, or inadequate as it requires detailed examination, the matter has to be left for determination by the arbitral tribunal. Parties should not be allowed to use the referral proceedings as a ruse to delay or obstruct resolution of the dispute. Unjustified impairment of the referral proceedings should not be permitted. Even in cases which may fall under one of the limited categories where *prima facie* examination is permitted under Section 8 or Section 11, the Court may, nevertheless, decide that allowing the arbitrator to rule first on her, or his, competence would be best for the arbitration process.

35. This position was alternately expounded, by the Supreme Court, as clarifying that the requirement of the court was “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”. The court was permitted to interfere at the referral stage “only when it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute”, all other cases requiring to be referred to the arbitral tribunal for decision on merits. The position was summed up by holding that “in case 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”.

36. Significantly, the Supreme Court opined that, in the case of pure commercial disputes, the more appropriate principle of interpretation would be one of liberal construction, as there was a presumption in favour of one-stop adjudication.

37. On the aspect of examination of the arbitrability of the dispute at the referral stage, the Supreme Court held that “the court by default would refer the matter when contentions regarding to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs

conduct of arbitration proceedings”, cautioning the court not to usurp the jurisdiction of the arbitral tribunal, but to affirm and uphold the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”

11. Mr. Krishnendu Dutta sought to submit that the present case was one of those rare instances in which the dispute raised by Green Edge was so non-arbitrable in nature that no case for referring the dispute for arbitration could be said to exist. Apart from seeking to submit that the petitioner, in its pleadings, as well as in its notice invoking arbitration, had restricted its claim to MOU-2 (which I have already rejected hereinbefore), Mr. Dutta sought to submit by drawing my attention to the covenants of MOU-2, reproduced in sub para (v) of para 4 (*supra*), that the liability of Magic Eye to allot 56724 sq. ft. to Green Edge arose only from MOU-2 and not from SHA-1 or SHA-2. This being the *summum bonum* of the claim of Green Edge against Magic Eye, Mr. Dutta would seek to submit that the dispute revolved entirely within the peripheries of MOU-2 and was therefore, non-arbitrable in nature, MOU-2 being devoid of any arbitration clause.

12. Mr. Bhandari contends, in response to the submission of Mr. Dutta, that the allotment of 56724 sq. ft. by Magic Eye to Green Edge, was not an isolated transaction, restricted entirely to MOU-2, but arose from the liabilities emanating from SHA-1, through SHA-2 and MOU-1. All these agreements, therefore, he submits, have to be seen together and the claims of the Green Edge against Magic Eye could not be decided by mere reference to MOU-2, totally ignoring the other three agreements executed between the parties.

13. I am unable to agree with the submission of Mr. Dutta. In my view, it cannot be said that the present case is one in which the dispute, *ex facie*, revolves entirely around MOU-2. The extent to which the other agreements between the parties, i.e. SHA-1, SHA-2 and MOU-1, impact the claim of the Green Edge would have to be examined in detail. This Court cannot finally pronounce one way or the other on this aspect. Besides, the submission of Mr. Bhandari is that Clause 27.3 in SHA-1 is wide and comprehensive in nature, and by use of the expressions, such as “any dispute arising out of or in connection with this agreement” would encompass the claim of his client, even if, to some extent, it is relatable to other agreements executed between the parties. This, submits Mr. Bhandari, arises from the fact that these agreements are interlinked and form a conglomerated and interconnected transaction.

14. Applying the law laid down in *Vidya Drolia*¹, I am of the view that the arbitrability of the dispute raised by Green Edge, *vis-à-vis* the arbitration Clause 27.3 of SHA-1, is an involved issue. Mr. Dutta does not, fairly, dispute the fact that this issue can be addressed by the learned Arbitral Tribunal. I am of the opinion that, given the complexity of the transaction involved, no case for rejecting the request, of Green Edge, to refer the disputes to arbitration, can be said to be made out.

15. In view thereof, I am of the opinion that the prayer of Green Edge, to refer to the disputes in Arb. P. 347/2019, to arbitration, deserves to be granted.

16. Accordingly, I appoint Hon'ble Mr. Justice Nisar Ahmad Kakru, retired Chief Justice of the High Court of Andhra Pradesh and Telangana, as the sole arbitrator to arbitrate on the aforesaid dispute/disputes. All questions of fact in law, including the arbitrability of the disputes raised by Green Edge, and whether they fall within the ambit of Clause 27.3 of SHA-1, are left open to be agitated and decided by the learned arbitrator.

17. The contact details of the learned arbitrator are as under:

Hon'ble Justice Nisar Ahmad Kakru (retired),
Former Chief Justice of the High Court of Andhra
Pradesh & Telangana,
Mobile No. 7382603046
Email ID: officeofformercjhcta@gmail.com

18. The learned arbitrator would be entitled to fees in accordance with the Fourth Schedule to the 1996 Act, or as otherwise fixed by him in consultation with the parties.

19. The learned arbitrator would also furnish the requisite disclosure under Section 12(2) of the 1996 Act within one week on entering of the reference.

20. OMP (I) (COMM) 26/2019 is referred for decision to the learned arbitrator, treating it as an application under Section 17 of the 1996 Act. The Interim order dated 30th January, 2019 passed in OMP (I) (COMM) 26/2019 shall continue to remain in operation and shall abide by the decision of the learned arbitrator in the said petition.

21. Arb. P. 347/2019 and OMP (I) (COMM) 26/2019 stand disposed of in the aforesaid terms with no order as to costs.

22. Insofar as Arb. P. 753/2020 and OMP (I) (COMM) 114/2020 are concerned, learned counsels are *ad idem* that the disputes in Arb. P. 753/2020 could be referred to arbitration and OMP (I) (COMM) 114/2020 could also be referred for decision, by the learned arbitrator, treating it as an application under Section 17 of the 1996 Act. Though Mr. Dutta requested that different arbitrators be appointed to adjudicate on the disputes forming subject matters of Arb. P. 347/2019 and OMP (I) (COMM) 26/2019, and Arb. P. 753/2020 and OMP (I) (COMM) 114/2020, respectively, I am of the opinion that the four agreements are indisputably interconnected though, according to Magic Eye, distinct rights arise from MOU-2. In order to avoid any conflict of awards, it would be appropriate that the dispute forming subject matter of Arb. P. 753/2020 is adjudicated by the same learned arbitrator, who is deciding the dispute forming subject matter of Arb. P. 347/2019. Accordingly, Hon'ble Justice Nisar Ahmad Kakru (retired), is also appointed as the arbitrator to arbitrate on the dispute forming subject matter of Arb. P. 753/2020. OMP (I) (COMM) 114/2020 is also referred for adjudication by said learned arbitrator by treating it as an application under Section 17 of the 1996 Act. The interim order passed by this Court in OMP (I) (COMM) 114/2020 on 1st June, 2020 shall continue to remain in operation and shall abide by the decision of the learned arbitrator. The learned Arbitrator would be entitled to charge separate set of fees for these proceedings and in the

same manner as in the disputes forming subject matter of Arb. P. 347/2019 and would also furnish the requisite disclosure under Section 12(2) of the 1996 Act, separately with respect to the disputes, within one week of entering on the reference.

23. All these petitions are accordingly, disposed of with no orders as to costs. In view of the order passed in the petitions, miscellaneous applications are also disposed of.

C. HARI SHANKAR, J.

MARCH 25, 2021

r.bararia



न्यायमेव जयते