



2024:DHC:4995



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **ARB.P. 1268/2023****ESRI R&D CENTER INDIA PRIVATE****LIMITED**

.....Petitioner

Through: Mr. Rajshekhar Rao, Senior Advocate with Mr. Sidharth Sethi, Ms. Pragya Chauhan, Mr. Kunal Saini and Ms. Meherunissa Anand, Advocates

versus

AMBIENCE TOWERS PRIVATE LIMITED & ANR.

.....Respondents

Through: Mr. V. Anush Raajan and Ms. Riya Mittal, Advocates for R-1.
Mr. Hitesh Sachar, Advocate for R2

CORAM:**HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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04.07.2024

1. Respondent 1, Ambience Towers Private Ltd¹ leased out, to the petitioner ESRI R&D Center India Pvt Ltd, 35,965 sq. ft. on the 8th floor of a building at Commercial Plot No. 10, Community Centre, Block B, Shalimar Bagh, New Delhi². According to the petitioner, the premises were not habitable in the condition in which they were leased out to it.

2. Clauses 18.2, 23.1 and 23.2 of the Lease Deed read thus:

¹ "Ambience" hereinafter



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“18.2 In case for any default on the part of the Lessor, the Space, Complex and/or Building is destroyed or becomes inaccessible and unusable to Lessee to carry out its activity, then the Lessee shall have the right to terminate the lease. This right would be available even during Lock in period, if the premises become inaccessible and unusable to the Lessee. The Lessor understands that cure period to rectify the defect is 30 days. However, both Parties agree that the process of rectification would commence within 7 days of occurrence of such defect and in case rectification requires more than 30 days period, both the Parties with their mutual consent may enhance the cure period beyond 30 days.

23.1 In the event of a sale or assignment by the Lessor of all or any part of the Colony/Complex/Building (which may include the Space) the same shall operate to release the Lessor *from any further liability* upon any of the covenants or conditions, express or implied, herein contained in favour of the Lessee and, in such event, the Lessee agrees to look solely to the responsibility of the successor in interest of the Lessor in and to this Lease Deed. All payments and deposits made hereunder shall be transferred to the accounts of the transferee and this Lease Deed shall not be affected by any such sale, and *the Lessee agrees to attorn the lease to the subsequent transferee or assignee so long as subsequent transferee or assignee honors the terms of this Lease Deed.*

23.2. In the event of a sale or assignment by the Lessor of all or any part of the building, the Lessor shall provide a "No objection" letter to the Lessee obtained from the mortgagee confirming it has consented to the terms of the Lease Deed.”

3. It is also an admitted position that the petitioner, as the lessee in respect of the leased area, is not a signatory to any document attorning the lease with Ambience to any other party, including Respondent 2 Tutelage Professionals Pvt Ltd³.

² “The leased area” hereinafter

³ “Tutelage” hereinafter

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4. The lease deed also contained the following clauses regarding resolution of disputes arising between the parties:

“26. SETTLEMENT AND ARBITRATION

26.1. The parties hereto have agreed to amicably settle and/or resolve all disputes and differences arising out of these presents or otherwise concerning the Lease/Occupation/Use of the Space amongst themselves; but in the event any dispute of whatsoever nature is incapable of being resolved amongst the parties hereto amicably then and in that event the parties have agreed to refer all disputes and differences including the construction scope or effect of any of the terms and conditions herein contained or otherwise concerning the Lease/ Occupation/ Use of the Space and/or the determination of any right and/or liability and/or in any way touching or concerning these presents or otherwise concerning the Lease/Occupation/ Use of the Space to the sole Arbitration of an independent mediator to be appointed by mutual agreement of the LESSOR and LESSEE.

26.2. The Arbitrator shall not be entitled to give interim awards and directions, which shall be binding on the parties.

27. JURISDICTION:

27.1. All matters relating to the aforesaid Arbitration and all judicial proceedings in connection therewith and/or otherwise, shall be held in Delhi and the Courts in Delhi and/ or the High Court of Delhi at New Delhi. The High Court of Delhi at New Delhi and the Courts subordinate thereto, alone shall have jurisdiction in these matters regardless of the place of the execution of this Lease Deed.”

5. On 18 November 2022, the leased area was sold by Ambience to Tutelage. Clauses 3, 8 and sub clauses (xv), (xxiv) of Clause 9(a) and Clause 9(b) of the Sale Deed merit reproduction:

“3. The Vendor doth hereby irrevocably sells, conveys, transfers and assigns all its rights, title and interests absolutely and forever in the said Property (fully described in Schedule-I hereto), along with all the rights of ownership, possession together with all fittings and fixtures, connections, plants, lifts, DG Sets, sanctioned electricity load, all privileges, easements, advantages, appurtenances, connections, attached thereto in favour of the

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Vendee, free from all Encumbrances, charges, liens, injunctions, mortgages, gifts, disputes, litigation, prior agreements, for a Total Sale Consideration of Rs. 322,52,26,000/- (Rupees Three Hundred Twenty-Two Crores Fifty-Two Lakhs and Twenty-Six Thousand Only), which shall hereinafter become the sole and absolute property of the Vendee, and Vendee shall enjoy the rights, ownership and privileges attached to the said Property absolutely and forever.

8. That the Vendor has irrevocably sold/ conveyed/transferred absolutely and forever all its rights and interest in the said Property to the Vendee together with all its rights, title, interest, easements, privileges, pathways, passage, benefit and advantages of right and appurtenances thereto and TO HAVE AND TO HOLD the said Property hereby conveyed unto the Vendee along with all the rights, title, interest of the Vendor in or upon the said Property and that no one except the Vendee shall have any rights, title, claims, interest whatsoever in the said Property hereby conveyed or any part thereof.

9. REPRESENTATION AND WARRANTIES

(a) The Vendor hereby assures, represents and declares that :

xv. Save and except the portion of Property leased/licensed to third parties, as per details below, there are no other tenants (protected, permanent or otherwise) or trespassers on the said Property or any part thereof. Vendor shall ensure that the below mentioned leases/licenses shall be attorned in favour of the Vendee as per details mentioned below, in the agreed format/draft of Deed of Attornment as annexed as Annexure B hereto, simultaneously at the time of execution of this Sale Deed.

S.no	Name of Lessee/ Operator	Nature of Document with Details	Details of Premises
1.	ESRI R & D Center India Private Limited	Lease Deed dated 15.01.2021, bearing Registration No. 775.	8th Floor of the Property, having Super Area of 35,645 Sq. Fts.

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2.	Awfis Space Solutions Private Limited	Operating Agreement dated 24.11.2021	7 th Floor of the Property, having Super Built-up Area of 35,645 Sq.fts. (Carpet Area of 21,213 Sq. Fts.)
3.	Smartworks Coworking Spaces Private Limited	Letter of Intent dated 06.05.2022	6 th Floor of the Property, having Chargeable Area of 17,00 Sq. Fts. (Carpet Area of 11,570 Sq. Fts.)

xxiv. The Vendor has been left with no right, title, interest, claim or concern of any nature whatsoever in the said Property and the Vendee has become the absolute owner of the said Property, with full right to use, enjoy, sell, transfer and/or to deal with the same in any manner as absolute owner without any objection/hindrance by the Vendor or any other person claiming through or under the Vendor.

(b) All or any other charges, fees, cess or taxes, duties, dues, demands, liabilities and outgoing charges such as electricity bills, water bills, property taxes/cess, utility bills, vendors payments, etc, in relation to the said Property, has been borne and paid by the Vendor up to the date of the registration of the Sale Deed and thereafter the same shall be borne and paid by the Vendee. However, if the payments are required to be made by the Vendee in respect to such charges, fees, cess or taxes, duties, dues, demands, liabilities and outgoing charges such as electricity bills, water bills, property taxes/cess, utility bills, vendors payments, etc. after the execution of Sale Deed, then all amounts paid by the Vendee (for the period prior to the registration of Sale Deed), Vendee shall raise a demand to that effect upon the Vendor and Vendor shall pay the same to the Vendee immediately of the receipt of such demand.”

6. On 9 May 2023, the petitioner addressed a Notice of Default to both the respondents. In view of the fact that the leased area had been

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further sold by Ambience to Tutelage, the notice stated that it was being addressed to both the respondents. The notice alleged that the leased area was not habitable and that the columns in the leased area did not possess the requisite compressive strength and would require repair. As neither Ambience nor Tutelage took any steps in this regard, the notice alleged that the petitioner had to spend considerable amounts in attempting to make the leased area habitable. It was further pointed out that the Enforcement Directorate had also issued a Public Notice stating that the entire building at Commercial Plot No.10 had been attached by it in relation to an investigation into the affairs of the Ambience Group. In these circumstances, the notice alleged that the petitioner was not in a position to enjoy the leased area. The petitioner, therefore, invoked Clause 18.2 of the lease deed which entitled the petitioner to terminate the lease deed, if the leased area became unusable for the petitioner. Alleging that Ambience was in fundamental breach of its obligations under the lease deed, and had failed to provide the usable leased area to the petitioner despite repeated representations in that regard, the petitioner stated that it intended to terminate the lease deed. The respondents were therefore called upon to cure the defaults in the leased area within 60 days, by providing a habitable and usable access to the leased area and reimbursing to the petitioner the amount of ₹ 1,29,01,487.90, stated to have been incurred by the petitioner in executing the repairs in the leased area. Failure, on the part of the respondents, to cure the defaults within 60 days, it was said, would constrain the petitioner to issue a notice for cancellation of the lease deed.

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7. The period of 60 days, provided in the notice, expired on 9 July 2023. Neither of the respondents, however, took any step towards curing the defaults indicated by the petitioner. The petitioner, therefore, addressed a second communication to both the respondents on 10 July 2023, alleging that the respondents continued to be in breach of their obligations to provide a habitable and usable access to the leased area to the petitioner and to reimburse the amounts spent by the petitioner in repairing the premises. The respondents were, therefore, put on notice that failure, on their part, to cure the notified defects within 30 days would result in *ipso facto* cancellation/termination of the Lease Deed. The notice also asserted that the petitioner was entitled to recover, from the respondents, the security deposit of ₹ 1,92,48,300/-, maintenance security deposit of ₹ 47,05,140/- and any other amounts due to the petitioner, apart from ₹ 1,29,01,487.90 incurred by the petitioner in repairing the leased area.

8. According to the petitioner, as the notified defects were not cured by the respondents, the lease deed stood terminated on 10 August 2023. The petitioner in the circumstances, addressed a communication dated 10 August 2023 to Tutelage, handing over thereunder the vacant, physical and actual possession of the leased area to Tutelage.

9. Simultaneously, the petitioner addressed a Notice of Demand to both the respondents, calling upon them to pay, to the petitioner, a total amount of ₹ 14,63,44,072.29 towards cost of repairs and reworks carried out by the petitioner and agreed to be repaid by Ambience, as

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well as other costs incurred by the petitioner, and compensation for the losses suffered by the petitioner. The respondents were called upon to pay the aforesaid amount within 30 days, failing which the petitioner stated that it would seek recourse to appropriate legal remedies.

10. Ambience responded on 11 September 2023, denying all liabilities in the matter in view of the sale of the leased area to Tutelage on 18 November 2022, with concomitant transfer of all its rights and obligations. The situation thus reached a stage, according to the petitioner, where it was left with no option but to seek recourse to the remedies available in law.

11. In accordance with the protocol envisaged by Clause 26.1 of the Lease Deed, the petitioner addressed a notice to the respondents on 12 September 2023 calling upon them to settle the matter amicably.

12. This attempt also failed. The petitioner, thereupon, issued a notice to the respondents under Section 21⁴ of the Arbitration and Conciliation Act, 1996⁵ on 3 October 2023, proposing resolution of the disputes between the petitioner and respondents by arbitration. The petitioner suggested the name of Hon'ble Ms. Justice R. Banumathi, a retired Judge of the Supreme Court of India, to arbitrate on the issue.

⁴ **21. Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

⁵ "The 1996 Act", hereinafter



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13. On 2 November 2023, Ambience replied, denying all liability in the matter. There has been no response from Tutelage to the Notice of Arbitration dated 3 October 2023.

14. It is in these circumstances that the petitioner has approached this Court under Section 11(6)⁶ of the 1996 Act, requiring the Court to appoint an Arbitrator to arbitrate on the disputes between the petitioner and respondents.

15. Both the respondents have filed counter-affidavits by way of response to the writ petition and the petitioner has filed rejoinders thereto.

Rival Submissions

16. I have heard lengthy arguments from both sides. The petitioner was represented by Mr. Rajshekhar Rao, learned Senior Counsel assisted by learned Counsel Mr. Sidharth Sethi, Ms. Pragya Chauhan, Mr. Kunal Saini and Ms. Meherunissa Anand. Mr. V. Anush Raajan appeared for Ambience and Mr. Hitesh Sachar represented Tutelage.

Opening submissions of Mr. Raj Shekhar Rao

⁶ (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.



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17. Mr. Rao submits that Clause 23.1 of the Lease Deed dated 15 January 2021 releases Ambience only from “further liability”. Moreover, Clause 23.1 recorded the consent of Ambience to attorn the lease to Tutelage provided Tutelage honoured the terms of the Lease Deed. He submits that no such document, attorning the lease to Tutelage, was ever signed by his client. Ambience, therefore, continues to remain liable to the petitioner.

18. At the same time, possession of the leased area was handed over by Ambience to Tutelage. Ambience also transferred the security deposit paid by the petitioner to Tutelage. Any direction for refund of the security deposit would, therefore, have to be issued to Tutelage. Moreover, inasmuch as the petitioner continued to remain in the leased area for nearly 9 months after the sale thereof to Tutelage, the issue of the extent to which Ambience, or Tutelage, or both, would be liable to the petitioner, also fell for determination.

19. Thus, submits Mr. Rao, both respondents have necessarily to be impleaded as parties in the arbitral proceedings, and it would be for the learned arbitrator to adjudicate on the situs of liability.

Submissions of Mr. Raajan in reply

20. Mr. V. Anush Raajan, appearing for Ambience, draws my attention to paras 2.5 and 2.6 of the present petition, which read thus:

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“2.5 Subsequent to the execution of the Lease Deed, the Petitioner was informed on 5 December 2022 that Respondent No 1 had sold the Leased Area to Respondent No 2 in November 2022 and that:

- (i) all payments on deposits made by the Petitioner under and in terms of the Lease Deed had been transferred by Respondent No. 1 to Respondent No. 2;
- (ii) Respondent No. 1 had assigned all its rights and obligations under the Lease Deed to Respondent No. 2.

2.6 As such, the Respondent No. 2 stepped into the shoes of Respondent No. 1 with effect from November 2022 and became the successor in interest to the Respondent No. 1. Respondent No. 2 is entitled to all rights which were enforceable by the Respondent No. 1 under the Lease Deed and is bound by all obligations that Respondent No. 1 was bound by, without any further act or deed. Being the assignee and successor interest of Respondent No. 1, Respondent No. 2 is also bound by the arbitration clause contained in the Lease Deed and is a necessary party for the proper, fair and final adjudication of the disputes between the parties.”

Mr. Raajan submits that the petitioner was, therefore, always aware of the sale of the leased area to Tutelage. No live dispute, therefore, he submits, survives between the petitioner and Ambience. The petitioner cannot, therefore, forcibly involve Ambience in the proposed arbitral proceedings. He relies on paras 25 and 28 of *N.T.P.C. Ltd v. SPML Infra Ltd*⁷ to submit that a Court which is seized with an application under Section 11(6) of the 1996 Act has also to examine whether a live arbitral dispute exists between the parties.

Submissions of Mr. Hitesh Sachar

21. Mr. Hitesh Sachar, appearing for Tutelage, on the other hand,

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echoes Mr. Rao's submission that Clause 23.1 of the Lease Deed only insulates Ambience from "further liability". Inasmuch as the allegation of the petitioner against Ambience relates to a period prior to the sale of the leased area to Tutelage, Mr. Sachar submits that Ambience continues to remain liable towards the petitioner and, in fact, Tutelage has no liability in that regard. He also draws attention to paras 3, 4 and 11 of the Legal Notice dated 9 May 2023 addressed by the petitioner to the respondents, which read thus:

"3. As per the terms of the Lease Deed, Ambience was obliged to provide the Leased Area to ESRI in a habitable, accessible condition to enable ESRI to be able to use it for its activities. Ambience had also represented that the Leased Area was structurally sound and in good condition. Even otherwise, in law also, providing habitable access to the leased area is a fundamental obligation of the lessor.

4. However, it is an admitted fact and a matter of record that till date (i.e. even after 2.5 years of execution of the Lease Deed), Ambience/Tutelage has failed to provide a habitable or usable Leased Area to ESRI. This fact has been documented in various communications, photographs and reports of third-party vendors/consultants. Pertinently, on 29 August 2022, Ambience had categorically acknowledged that the compressive strength on all columns in the Leased Area and Building failed to meet the appropriate requirements which would require repair.

11. Therefore, by way of this notice, ESRI is notifying the defaults/breaches of Ambience/Tutelage and as a last opportunity, calling upon Ambience/Tutelage to cure the defaults within a period of 60 days by:

- a. Providing a habitable and usable access to the Leased Area to ESRI;
- b. Reimbursing the amount of INR 1,29,01,487.90 incurred by ESRI in executing repair works for water leakage and accommodating Landlord's structural remediation work within the Leased Area."

Mr. Sachar points out that, in para 3 of the Legal Notice, the

⁷ (2023) 9 SCC 385

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petitioner's clear allegation was against Ambience, in failing to provide the leased area to the petitioner in a habitable and accessible condition. Even in paras 4 and 11, he submits that the petitioner's allegation continues to remain against Ambience. The claims of the petitioner in para 11, he submits, have also to be met by Ambience, not by Tutelage.

22. Mr. Sachar also places reliance on para 15, 16 and 19 of the reply tendered by Ambience to the Notice of Demand dated 10 August 2023 of the petitioner:

“15. As per the terms of the lease deed, ESRI is liable to pay Ambience INR 5,77,44,900/- towards arrears of Rent between May 2021 and November 2022, Late Charges for each month of delay applied to every month between May 2021 to November 2022 applicable to rent arrears up to the date of issuance of the present letter in terms of Clause 2.4., in the amount of INR 2, 19,43,062/-, Maintenance charges amounting to INR 1,41,15,420/-. Our Client has several times passed on the relevant information regarding outstanding payments to ESRI, however, the same have not been paid till date is admitted.

16. The present letter may be treated as a notice issued in terms of Clause 14.1.1 of the Lease Deed and you are hereby called upon to forthwith pay INR 9,38,03,382/- as of 15th August 2023. You will note that the above demanded amount will carry interest@ 18% per annum up to the date of payment, if the demanded amount is not paid within the 30 days of receipt of the present letter and a cure period of 30 days.

19. On several occasions, including but not limited to the emails from Sim Saran, Senior Real Estate Attorney of 01.11.2022 and emails from Mr. Rohit Singh of India Operations, ESRI that ESRI even as of November 2022 was in occupation of the Leased Area and was running its operations from the premises. All the requests of ESRI to delay the rent commencement on one pretext or the other, viz. water seepage in July 2022 or the structural integrity improvements and reports, were denied by Ambience and demands were raised on several occasions. However, ESRI on one hand occupying the Leased Area merely used the reason of improvement works to be done by Ambience in terms of the

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Leased Deed refused to pay the Rent, Maintenance and Other Charges.”

The counter claims of Ambience, therefore, he submits, are also against the petitioner. The contractual liability, if any, therefore, is between the petitioner and Ambience. He further submits that there has never been any attornment of the lease by the petitioner to Tutelage.

23. Mr. Sachar therefore submits that it is not Ambience, but Tutelage, which is being unnecessarily dragged into arbitral proceedings.

Mr. Rao's submissions in rejoinder

24. Advancing submissions by way of rejoinder to the submissions of Mr. Raajan and Mr. Sachar, Mr. Rao submits that, inasmuch as the leased area was sold by Ambience to Tutelage on 18 November 2022, and, on 10 August 2023, possession of the leased area was handed over by the petitioner to Tutelage, both respondents have necessarily to be made parties in the arbitral proceedings, and it would be for the arbitrator to adjudicate as to the actual situs of liability.

25. Mr. Rao alludes to the following e-mail dated 29 August 2022 addressed by Ambience to the petitioner, to submit that Ambience cannot seek to escape its liability merely on the ground that it had sold the leased area to Tutelage along with all rights and obligations:

“Dear Sim,

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Please find attached the structural report for ND testing done by TPC, Structural consultants and structural designers of the Ambience Tower Shalimar Bagh Building.

To our astonishment the compressive strength of some columns on the eighth floor is not at par as per the latest design parameters. TPC on the basis of the ND test and the design analysis have suggested certain strengthening and retrofitting details which are to be followed from ground up. (Drawings and details attached).

We are aligning our teams to have the changes executed at site. Kindly keep your teams informed.

We appreciate your patience and support.

Regards,

Archna Dhingra

9999916026

General Manager Head Leasing & Marketing
Ambience Group”

This e-mail, he submits, was written much before the leased area was sold by Ambience to Tutelage. Ambience cannot, therefore, plead indifference in the matter.

26. After having been sold the leased area, Tutelage, too, made no effort to rectify the defects in the premises. This is why the petitioner was compelled to issue a Notice of Default to the respondents to terminate the lease. Mr. Rao points out that, in the Notice of Default addressed by the petitioner to the respondents on 9 May 2023, the petitioner had claimed not only provision of a habitable and usable access to the leased area but also reimbursement of the amount of ₹ 1,29,01,487.90 spent by the petitioner in executing repair of the leased area. Inasmuch as Tutelage had purchased the leased area with all

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rights and obligations, the question would fall for consideration as to the extent to which Tutelage would be liable for the monetary claim of the petitioner. It would be for the learned arbitrator to adjudicate on this issue. For this purpose, Mr. Rao further refers me to the following paras from the Notice of Demand sent by the petitioner to the respondents on 10 August 2023:

“3. In terms of clause 18.2 of the Lease Deed, Ambience/Tutelage is obliged to refund the following refundable deposits to ESRI within 30 days of the termination of the Lease Deed (i.e. by 9 September 2023):

3.1 Interest free refundable security deposit equivalent to 6 months’ rent amounting to ₹ 1,92,48,300; and

3.2 Maintenance Security Deposit amounting to ₹ 47,05,140.

4. In addition to the above, in view of the fundamental breaches/default committed by Ambience/Tutelage, ESRI is also entitled to receive the below amounts incurred by:

4.1 Cost of Repairs and Reworks carried out by ESRI and agreed to be reimbursed by Ambience

4.1.1 It is an admitted fact that ESRI has spent considerable amounts in attempting to make the Leased Area habitable and usable. An amount of ₹ 1,29,01,487.90 was incurred by ESRI in executing repair works for water leakage and to accommodate structural remediation work within the Leased Area. Though Ambience had admitted its liability to reimburse such amount to ESRI, it has failed to do so to date, despite repeated requests.

4.2 Other costs incurred by ESRI

4.2.1 ESRI had installed certain enhancements and fit outs over the Leased Area and had to expend substantial amounts towards the same. On termination of the Lease Deed, whatever could be removed, has been removed by ESRI with a view to mitigate its losses. However, it is not possible and/or feasible to remove certain enhancements made to the Leased Area by ESRI. An indicative (and not exhaustive) list of the enhancements that cannot be removed from the Leased Area is set out in Annexure-1 to

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the present notice. At the same time, since these are being left behind, Ambience/Tutelage will obviously benefit from these enhancements that have been installed at ESRI's cost. However, for ESRI, these are sunk costs, attributable solely to the breaches by Ambience/Tutelage. Consequently, Ambience/Tutelage is also liable to pay these sunk costs to ESRI. ESRI is in the process of quantifying the exact sunk costs incurred by it towards the enhancements that cannot be removed and the quantification will be submitted in due course.

27. Mr. Rao also refers me to the reply dated 11 September 2023 by Ambience to the said notice, and points out that though, in the said reply, Ambience has disowned all liabilities *vis-a-vis* the petitioner regarding determination of lease and its sequelae, it has nonetheless answered the claim of damages for the period during which the ownership of the property continued to be with Ambience, i.e. prior to sale of property to Tutelage. Thus, he submits that Ambience cannot completely disclaim liability in the transaction. Mr. Rao has also placed reliance on para 163 of the judgment of the Constitution Bench of the Supreme Court in *Cox and Kings Ltd v. SAP India Pvt Ltd*⁸.

28. Mr. Rao submits that, in view of Section 16(1)⁹ of the 1996 Act, which incorporates the *kompetenz-kompetenz* doctrine, the issue of the relevant parties to an arbitral dispute goes to the very root of the competence of the Arbitral Tribunal, and must be left to the Arbitral Tribunal.

⁸ (2024) 4 SCC 1

⁹ 16. Competence of arbitral tribunal to rule on its jurisdiction. –

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and



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Analysis

Scope of jurisdiction of the referral court under Section 11(6) and Section 11(6A)

29. The first aspect to be examined is the scope of inquiry by the referral court under Section 11(6) of the 1996 Act.

30. Sub-section (6A)¹⁰ was introduced in Section 11 by Section 6(ii) of the Arbitration and Conciliation (Amendment) Act 2015¹¹. Section 3(v) of the Arbitration and Conciliation (Amendment) Act, 2019¹² omits sub-section (6A) from Section 11. Section 3(v) of the 2019 Amendment Act, however, is yet to be enforced and, therefore, Section 11(6A) continues to remain on the statute book and in force. This position stands recognized in para 161 of *Cox and Kings*:

“161. In 2015, the Arbitration Act was amended to insert Section 11(6-A). The said provision reads as follows:

“11. (6-A) The Supreme Court, or as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, *confine to the examination of the existence of an arbitration agreement.*”

(emphasis supplied)

By virtue of non obstante clause, Section 11(6-A) has set out a new position, which takes away the basis of the position laid down in *SBP & Co. v. Patel Engg. Ltd.*¹³ In 2019, Parliament passed the

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

¹⁰ (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

¹¹ “The 2015 Amendment Act” hereinafter

¹² “The 2019 Amendment Act” hereinafter

¹³ (2005) 8 SCC 618

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Arbitration and Conciliation (Amendment) Act, 2019 omitting Section 11(6-A). However, the amendment to Section 11(6-A) is yet to be notified. Till such time, Section 11 as amended in 2015 will continue to remain in force.”

(Italics in original; underscoring supplied)

Evolution of the law – the decisions in *Boghara Polyfab, Master Construction Co., New India Assurance Co. Ltd, Duro Felguera, Antique Art Exports, Mayawati Trading* and *Vidya Drolia*

31. Prior to the insertion of sub section (6A) in Section 11, the view of the Supreme Court with respect to the issues which could be examined by a referral court, seized with a petition for referring a dispute to arbitration, was more expansive. In *National Insurance Co. Ltd v. Boghara Polyfab Pvt Ltd*¹⁴, the Supreme Court held that, where it was contended that no arbitrable dispute survives as the dispute stood discharged by accord and satisfaction, the referral court had to examine the issue. Following the decision in *Boghara Polyfab*, the Supreme Court further held in *U.O.I. v. Master Construction Co.*¹⁵, that where reliance was placed on a discharge voucher, no claim certificate or settlement agreement as evidence of discharge of the claim, the referral court had to *prima facie* examine the credibility of the allegations before referring the dispute to arbitration. Further in *New India Assurance Co. Ltd v. Genus Power Infrastructure Ltd*¹⁶, the Supreme Court held that where fraud, coercion, duress and undue influence was alleged, the party raising the allegations had to, *prima facie*, substantiate the allegations by

¹⁴ (2009) 1 SCC 267

¹⁵ (2011) 12 SCC 349

¹⁶ (2015) 2 SCC 424

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evidence.

32. Apparently of the view that a referral court ought not to enter into these aspects, which should be left for decision by the Arbitral Tribunal, the legislature, by the 2015 Amendment Act. introduced sub-section (6A) in Section 11 of the 1996 Act. Section 11(6A), plainly read, strictly confines the scope of examination by a referral court exercising referral jurisdiction under Section 11(6) to the existence of an arbitration agreement. This position was explicitly elucidated, by the Supreme Court, in *Duro Felguera, S.A. v. Gangavaram Port Ltd*¹⁷, by ruling that the jurisdiction of the referral court was, following the insertion of Section 11(6A), “limited to examining whether an arbitration agreement exists between the parties – nothing more, nothing less”.

33. A two Judge Bench of the Supreme Court in *United India Insurance Co Ltd v. Antique Art Exports Pvt. Ltd*¹⁸, even after the introduction of Section 11(6A) and the decision in *Duro Felguera* held, nonetheless, that a plea of discharge of the debt by accord and satisfaction, if urged, would have to be examined by the referral court under Section 11(6). This view was, however, reversed by a Bench of three Hon’ble Judges of the Supreme Court in *Mayawati Trading Pvt Ltd v. Pradyut Deb Burman*¹⁹, which again reiterated the principle in *Duro Felguera* that, post the insertion of sub-section (6A) in Section 11, the referral court had to confine the scope of its

¹⁷ (2017) 9 SCC 729

¹⁸ (2019) 5 SCC 362

¹⁹ (2019) 8 SCC 714

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examination to the factum of existence of an arbitration agreement, and not peregrinate beyond that.

34. Another Bench of three Hon'ble Judges of the Supreme Court, in *Vidya Drolia v. Durga Trading Corporation*²⁰, examined the entire legal position and held thus:

“133. Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.

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

138.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.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public

²⁰ (2021) 1 SCC 1



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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.

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.

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 *SBP & Co. v. Patel Engg. Ltd.* on the scope of judicial review by the court while

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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.”

The decision in *NTPC*

35. All these decisions were considered by a two Judge Bench of

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the Supreme Court in *NTPC Ltd v. SPML Infra Ltd*²¹, on which Mr. Sachar places reliance. The appeal in *NTPC* arose from a decision rendered by this Court. NTPC and SPML Infra²² executed a contract for installation services in a power project situated at Vishakhapatnam. SPML furnished bank guarantees to the tune of ₹ 14,96,89,136/- to secure NTPC. NTPC issued a Completion Certificate on 27 March 2019, but withheld the bank guarantees. On SPML inquiring about the reasons for withholding the bank guarantees, NTPC referred to certain pending liabilities and disputes with SPML with respect to other projects. SPML protested, stating that NTPC had no jurisdiction to link the bank guarantees to other liabilities of SPML. Following this, SPML raised a demand of ₹ 72,01,53,899/- on NTPC. NTPC, naturally, did not release the bank guarantees, resulting in SPML filing WP (C) 7213/2019 before this Court for a direction to NTPC to release the bank guarantees forthwith.

36. Pending the writ petition, NTPC and SPML entered into a settlement agreement on 27 May 2020, whereunder NTPC agreed to release the withheld bank guarantees and SPML agreed to withdraw WP (C) 7213/2019 and also not to initiate any other proceedings, including arbitration. The bank guarantees were, therefore, released by NTPC on 30 June 2020, and SPML withdrew WP (C) 7213/2019 on 21 September 2020. SPML, however, thereafter, repudiated the settlement agreement and filed a petition under Section 11(6) of the

²¹ (2023) 9 SCC 385

²² “SPML”, hereinafter



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1996 Act before this Court, seeking appointment of an arbitrator to arbitrate on the disputes with NTPC. It was alleged, in the said petition, that SPML had been forced to enter into the settlement agreement dated 27 May 2020 by duress and coercion. It was alleged that the retention of the bank guarantees by NTPC had left SPML with no option but to agree to sign the settlement agreement. Submitting that NTPC had failed to appoint an arbitrator despite repeated requests by SPML, SPML requested this Court to step in and appoint an arbitrator in exercise of its power under Section 11(6) of the 1996 Act.

37. Responding to the writ petition, NTPC submitted, *inter alia*, that no dispute survived between the parties in view of the settlement agreement dated 27 May 2020, in compliance of which NTPC released, to SPML, the bank guarantees and SPML withdrew WP(C) 7213/2019. The claim of SPML, therefore, stood discharged by accord and satisfaction. The allegations of duress and coercion were categorically denied as false and attempt to wriggle out of the settlement agreement. NTPC, therefore, prayed that SPML's petition under Section 11(6) of the 1996 Act be rejected outright.

38. This Court held, on SPML's plea of duress and coercion and NTPC's response thereto, that it was unable to accept NTPC's contention that the dispute as to whether the contract between NTPC and SPML stood discharged/novated by the settlement agreement dated 27 May 2020 was untenable, insubstantial, or frivolous. This Court, therefore, allowed SPML's petition and appointed a retired Judge of this Court to arbitrate on the disputes.

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39. NTPC appealed to the Supreme Court.

40. The Supreme Court took note of the decisions already cited hereinabove, upto *Vidya Drolia*, as well as a subsequent decision of the Supreme Court in *BSNL v. Nortel Networks (India) (P) Ltd*²³. Having examined all these decisions, the Supreme Court held the position of law to be thus:

“25. **Eye of the Needle:** The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant’s privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable...

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the

²³ (2021) 5 SCC 738



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referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable³⁰. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources³¹. Further, as noted in *Vidya Drolia (supra)*, if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court³². Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in *DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd*²⁴.”

41. The Supreme Court went on, thereafter, to apply these principles to the facts before it and held on facts thus:

“44. A simple narration of the bare facts, as indicated above, leads us to conclude that the allegations of coercion and economic duress are not bona fide, and that there were no pending claims between the parties for submission to arbitration. The Respondent’s claim fits in the description of an attempt to initiate “ex facie meritless, frivolous and dishonest litigation”. We will endeavour to give reasons for our conclusion.

45. The whole dispute revolves around the solitary act of the Appellant, NTPC, in not returning the Bank Guarantees despite the successful completion of work. This continued even after SPML issued the No-Demand Certificate and NTPC released the final payment. These undisputed facts led to the institution of the Writ Petition before the Delhi High Court. There were no allegations of coercion or economic duress compelling SPML to withdraw any pending claims under the subject contract as a condition for the return of the Bank Guarantees. On the contrary, the only allegation by SPML was with respect to NTPC’s “illegal” action of interlinking the release of the Bank Guarantees with some other contracts. This was precisely the argument before the High Court, and, in fact, this submission is recorded by the High Court while issuing notice and injuncting NTPC. This fact clearly indicates that the plea of coercion and economic duress leading to the Settlement Agreement is an afterthought.

46. We will now examine whether the allegations of coercion and economic duress in the execution of the Settlement Agreement

²⁴ (2021) 16 SCC 743



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are bona fide or not. This inquiry has a direct bearing on the arbitrability of the dispute. It was during the subsistence of the Writ Petition and the High Court's interim order, when SPML had complete protection of the Court, that the parties entered into the Settlement Agreement. This agreement was comprehensive. It inter alia provided for (i) the release of Bank Guarantees by NTPC, (ii) the withdrawal of SPML's Writ Petition, (iii) restraining NTPC from filing contempt proceedings against SPML for letting the Bank Guarantees expire, and finally, (iv) restraining SPML from initiating any proceedings under the subject contract, including arbitration. The Settlement Agreement also recorded that there were no subsisting issues pending between the parties.

47. The plea of coercion and economic duress must be seen in the context of the execution of the Settlement Agreement not being disputed, and its implementation leading to the release of the Bank Guarantees on 30.06.2020 also not being disputed. Almost three weeks after the release of the Bank Guarantees, a letter of repudiation was issued by SPML on 22.07.2020. This letter was issued about two months after the Settlement Agreement was executed and in fact during the subsistence of the Writ Petition. After reaping the benefits of the Settlement Agreement, the Writ Petition was withdrawn on 21.09.2020. It is thereafter that the present application under Section 11(6) of the Act was filed. The sequence of events leads us to conclude that the letter of repudiation was issued only to wriggle out of the terms of the Settlement Agreement.

48. The foregoing clarifies beyond doubt that the claims sought to be submitted to arbitration were raised as an afterthought. Further, SPML's allegations of coercion and economic duress in the execution of the Settlement Agreement lack bona fide. They are liable to be knocked down as ex facie frivolous and untenable.

49. In view of the above-referred facts, which speak for themselves, we are of the opinion that this is a case where the High Court should have exercised the prima facie test to screen and strike down the ex-facie meritless and dishonest litigation. These are the kinds of cases where the High Court should exercise the restricted and limited review to check and protect parties from being forced to arbitrate."

42. Mr. Raajan relies on para 25 of *NTPC* to contend that I, in my referral Court *avatar* in the present case, have necessarily to determine whether both the respondents have to be impleaded as

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parties to the arbitral proceedings, and cannot leave the determination to the arbitrator.

Magic Eye Developers and Lombardi Engineering

43. The scope of examination by the Court in the light of Section 11(6A) and the law that has developed in that regard was also examined by various other decisions, which are not, however, of particular significance to the present case, but may be noticed. In *Magic Eye Developers Pvt Ltd v. Green Edge Infrastructure Pvt Ltd*²⁵, a Bench of two Hon'ble Judges of the Supreme Court examined the extent to which a Section 11(6) referral court could examine the plea of existence of validity of the arbitration agreement. The Supreme Court noted the introduction of Section 11(6A) and the principle stated therein, that the Court could only examine whether an arbitration agreement exists between the parties; nothing more, nothing less. Thereafter, however, the Supreme Court reiterated the view expressed in para 25 of *NTPC* that the referral court was required to enquire as to the parties to the agreement and the applicant's privity to the agreement, and conclusively decide this issue at the referral stage itself. Similarly, held the Supreme Court in para 12 of the report in *Magic Eye Developers*, the dispute regarding the existence of the validity of the arbitration agreement has also to be conclusively determined by the referral court, and cannot be left for decision by the Arbitral Tribunal. Paras 9 to 13 of *Magic Eye Developers* may be reproduced, thus, in this context:

²⁵ (2023) 8 SCC 50



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“9. Thus, post-Arbitration and Conciliation Amendment Act, 2015, the jurisdiction of the court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties – “nothing more, nothing less”. Thus, as per the Section 11(6A) of the Act, it is the duty cast upon the referral court to consider the dispute/issue with respect to the existence of an arbitration agreement.

10. At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of the court under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant’s privity to the said agreement. The said matter requires a thorough examination by the referral court. [para 25 of the decision in NTPC] The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct.

11. So far as the first issue with respect to the existence and the validity of an arbitration agreement is concerned, as the same goes to the root of the matter, the same has to be conclusively decided by the referral court at the referral stage itself. Now, so far as the non-arbitrability of the dispute is concerned, even as per the law laid-down by this Court in the case of Vidya Drolia (supra), the court at prereferral stage and while examining the jurisdiction under Section 11(6) of the Act may even consider prima facie examining the arbitrability of claims. As observed, 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.

12. However, so far as the dispute with respect to the existence and validity of an arbitration agreement is concerned and when the same is raised at pre-referral stage, the referral court has to decide the said issue conclusively and finally and should not leave the said issue to be determined by the arbitral tribunal. The reason is that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter.

13. As observed by the Constitution Bench in the case of *N.N. Global Mercantile Pvt. Ltd.*²⁶, sans an agreement, there cannot be any reference to the arbitration. In the said decision this Court has

²⁶ **N.N. Global Mercantile (P) Ltd v. Indo Unique Flame Ltd, (2023) 7 SCC 1**



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also specifically observed and held that the intention behind the insertion of Section 11(6A) in the Act was to confine the Court, acting under Section 11, to examine and ascertain about the existence of an arbitration agreement. We are of the opinion that therefore, if the dispute/issue with respect to the existence and validity of an arbitration agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any arbitration agreement and/or when there is no valid arbitration agreement at all.”

44. Another Bench of three Hon’ble Judges of the Supreme Court in *Lombardi Engineering Ltd v. Uttarakhand Jal Vidyut Nigam Ltd*²⁷, reiterated the legal position emerging from *Duro Felguera* and *Vidya Drolia*, after referring to the relevant passages from the said decisions:

“29. Following the general rule and the principle laid down in *Vidya Drolia (supra)*, this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals (P) Ltd v. Galaxy Infra and Engineering Private Ltd*²⁸, *Sanjiv Prakash v. Seema Kukreja*²⁹ and *Indian Oil Corpn Ltd v. NCC Ltd*³⁰, the parties were referred to arbitration, as the *prima facie* view in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in *BSNL v. Nortel Networks India Pvt Ltd*, *Secunderabad Cantonment Board v. B. Ramachandraiah and Sons*³¹ and *B & T AG v. Ministry of Defence*³², arbitration was refused as the claims of the parties were demonstrably time-barred.”

²⁷ (2024) 4 SCC 341

²⁸ (2021) 5 SCC 671

²⁹ (2021) 9 SCC 732

³⁰ (2023) 2 SCC 539

³¹ (2021) 5 SCC 705

³² 2023 SCC OnLine SC 657

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Cox and Kings

45. A deeper analysis into the aspect of the parties to arbitration, and the extent to which this could be decided by a referral court under Section 11(6) was undertaken by a constitution Bench of the Supreme Court in ***Cox and Kings***, before which the issue which had arisen for consideration was thus delineated:

“2. Five Judges of this Court are called upon to determine the validity of the "Group of Companies" doctrine in the jurisprudence of Indian arbitration. The doctrine provides that an arbitration agreement which is entered into by a company within a group of companies may bind non-signatory affiliates, if the circumstances are such as to demonstrate the mutual intention of the parties to bind both signatories and non-signatories. This doctrine is called into question purportedly on the ground that it interferes with the established legal principles such as party autonomy, privity of contract, and separate legal personality. The challenge before this Court is to figure out whether there can be a reconciliation between the Group of Companies doctrine and well-settled legal principles of corporate law and contract law.”

46. The following question of law had been referred by a Bench of three Hon’ble Judges of the Supreme Court, for determination by a Larger Bench, in ***Cox and Kings***:

“5.1. (a) Whether the Group of Companies doctrine should be read into Section 8 of the Act or whether it can exist in Indian jurisprudence independent of any statutory provision;

5.2. (b) Whether the Group of Companies doctrine should continue to be invoked on the basis of the principle of "single economic reality";

5.3. (c) Whether the Group of Companies doctrine should be construed as a means of interpreting implied consent or intent to arbitrate between the parties; and

5.4. (d) Whether the principles of alter ego and/or piercing the corporate veil can alone justify pressing the Group of Companies doctrine into operation even in the absence of implied consent.”

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47. After considering a veritable plethora of decisions not only by the Supreme Court of India, but also the law as it exists in France, Switzerland, England, Singapore and the US, the Supreme Court examined in detail the circumstances in which a party who was not a signatory to the arbitration agreement could nonetheless be made a party to the proceedings. The conclusion of the Supreme Court on this issue is to be found in paras 83, 84 and 86 of the report, which read thus:

“83. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions : *first*, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; *second*, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; *third*, it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; *fourth*, in case of non-signatory parties, the important determination for the Courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; *fifth*, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; *sixth*, the requirement of a written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and *seventh*, once the validity of an arbitration agreement is established, the Court or tribunal can determine the issue of which parties are bound by such agreement.

84. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies

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because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the Courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the Courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement.

86. Courts and tribunals across the world have been applying traditional contractual and commercial doctrines to determine the consent of the non-signatory parties to be bound by the arbitration agreement. Generally, consent-based theories such as agency, novation, assignment, operation of law, merger and succession, and third-party beneficiaries have been applied in different jurisdictions. In exceptional circumstances, non-consensual theories such as piercing the corporate veil or alter ego and estoppel have also been applied to bind a non-signatory party to an arbitration agreement. The Group of Companies doctrine is one such consent-based doctrine which has been applied, albeit controversially, for identifying the real intention of the parties to bind a non-signatory to an arbitration agreement.”

48. In para 97, the Supreme Court advocated the interpretation of commercial contracts in a pragmatic manner, keeping in mind commercial realities:

“97..... The Courts must interpret contracts in a manner that would give them a sense of efficacy rather than invalidating the commercial interests of the parties. The meaning of the contract must be gathered by adopting a common sense approach, which should " not be allowed to be thwarted by a narrow, pedantic and legalistic interpretation". Therefore, there is a need to adopt a modern approach to consent, which takes into consideration the circumstances, apparent conduct, and commercial facets of business transactions.”

49. The position which emerges where there are multiple agreements was also examined thus, in paras 121 and 122 of the report:

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“121. In case of a composite transaction involving multiple agreements, it would be incumbent for the Courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in **Canara Bank**³³ observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.

122. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences "in connection with" the main agreement and also disputes "connected with" the subject-matter of the principal agreement. In **Chloro Controls**³⁴, this Court clarified that the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non-signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. Thus, the application of the Group of Companies doctrine in case of composite transactions ensures accountability of all parties who have materially participated in the negotiation and performance of the transaction and by doing so have evinced a mutual intent to be bound by the agreement to arbitrate.”

50. The threshold standard was thus explained:

“127. In **Cox & Kings**³⁵, Surya Kant, J. observed that **Reckitt Benckiser**³⁶ fixed a higher threshold of evidence for the application of the Group of Companies doctrine as compared to earlier decisions of this Court. This Court's approach is **Reckitt Benckiser** is indicative of the fact that the mere presence of a group of companies is not the sole or determinative factor to bind a non-signatory to an arbitration agreement. Rather, the Courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The nature or standard of involvement of the non-

³³ MTNL v. Canara Bank, (2020) 12 SCC 767

³⁴ Chloro Controls India (P) Ltd v. Severn Trent Water Purification Inc., (2013) 1 SCC 641

³⁵ Cox & Kings Ltd v. SAP India (P) Ltd, (2022) 8 SCC 1

³⁶ Reckitt Benckiser (India) (P) Ltd v. Reynders Label Printing (India) (P) Ltd, (2019) 7 SCC 62

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signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence.

128. An arbitration agreement is a distinct and separate agreement from the substantive commercial contract which contains the arbitration agreement. An arbitration agreement is independent of the other terms of the contract, to the extent that nullification of the contract will not lead to invalidation of the arbitration agreement. The concept of separability of the arbitration agreement from the underlying contract ensures that the intention of the parties to resolve the disputes through arbitration does not vanish merely because of a challenge to the legal validity of the underlying contract. To join a non-signatory to arbitration, the decisive question that has to be answered is whether a non-signatory consented to the arbitration agreement, as distinct from the underlying contract containing the arbitration agreement.

132. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under *Discovery Enterprises*³⁷ are applied holistically. For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject-matter would suggest that the claims against the non-signatory were strongly interlinked with the subject-matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject-matter, are not actually

³⁷ **ONGC Ltd v. Discovery Enterprises (P) Ltd, (2022) 8 SCC 42**



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strangers to the dispute between the signatory parties.”

51. Thereafter, the Supreme Court went into the aspect of the standard of determination by a referral court, which was the last issue arising for consideration before it. In para 161, the Supreme Court noted the insertion of sub section (6A) in Section 11 of the 1996 Act by the 2015 Amendment Act, as well as the omission of the said inserted sub section (6A) by the 2019 Amendment Act, and observed that, as the amendment to Section 11 by the 2019 Amendment Act have yet to be notified, Section 11(6A) continues to remain in force.

Thereafter comes para 163, on which Mr. Rao relies:

“163. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.”

52. Following this, in para 166, the Constitution Bench held that, at the referral stage, a Court has only to determine *prima facie* existence of an arbitration agreement and if the issue could not be determined by the referral court, it has to be decided by the Arbitral Tribunal. It was emphasized that “referral court” should not unnecessarily interfere with the arbitral proceedings and, rather, show allow the Arbitral Tribunal to exercise its primary jurisdiction.

53. On the aspect of inclusion of a non-signatory to the arbitral proceedings, the Constitution Bench holds in para 169 thus:

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“169. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. *In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.*”

(Emphasis supplied)

54. Following the above discussion, in para 170 and in its various sub-paras, the Supreme Court has laid down determinative conclusions, of which the following are relevant for the present dispute:

“170.1. The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;

170.2. Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;

170.3. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;

170.4. Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;

170.5. The underlying basis for the application of the Group of

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Companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;

170.12. At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement; and”

55. The resultant position that emerges from a consolidated reading of all these decisions is that, while the legal position as it existed prior to 2015 empowered – rather, required – the referral court could enter into several aspects such as existence of fraud, validity of the contract, discharge of liability by accord and satisfaction and the like, this position does not continue after the insertion of sub section (6A) in Section 11 by 2015 Amendment Act. Inasmuch as the omission of Section 11(6A) by the 2019 Amendment Act is yet to be notified, the sub-section continues to remain in force. Section 11(6A) considerably restricts the scope of inquiry by the referral court under Section 11(6). The referral court is essentially to concern itself with the existence and validity of the arbitration agreement. Peripheral, but connected, issues such as the aspect of limitation, and whether non-signatories to an arbitration agreement can be bound by it, would also fall for determination by the referral court. While examining these issues, the referral court has to adopt a *prima facie* approach and is not to arrive at a conclusive determination. The final arbiter on these issues is, by operation of Section 16, the Arbitral Tribunal, and the jurisdiction of the Arbitral Tribunal in that regard has to be respected. The referral court, however, cannot completely distance itself, while examining

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the existence of validity of an arbitration agreement, from the aspect of whether parties, who are being sought to be included in the arbitral proceedings, are or are not required to be included. If, however, it is not possible from the material on record to arrive at a *prima facie* finding in this regard, then, applying the *kompetenz kompetenz* principle and in view of Section 16 of the 1996 Act, the matter has to be left for determination by the Arbitral Tribunal.

56. It is in the backdrop of these principles and standards that the rival contentions of learned Counsel have to be examined.

On merits

57. If the contention of learned Counsel for both the respondents were to be accepted, the sequitur would be that the petitioner's claims could never be arbitrated, and that is obviously not acceptable. Every arbitrable dispute must be arbitrated, if the arbitral institution is to retain any validity and legitimacy. It is not open to the Court to hold that there exists an arbitral dispute, but it cannot be arbitrated.

58. Indeed, neither of the respondents contends that there is no arbitrable dispute. Each of the respondents contends that the dispute is solely between the petitioner and the other respondent. Ambience contends that the dispute is between the petitioner and Tutelage, whereas Tutelage contends that the dispute between the petitioner and Ambience. The petitioner contends, on the other hand, that the dispute is with both Respondents 1 and 2. The only issue before the



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Court is whether one, or the other, or both the respondents, have to be made parties to the arbitration.

59. In exercise of its jurisdiction under Section 11(6) and in the light of Section 11(6A) and the law that has developed in that regard, which reached its high watermark in *Cox and Kings*, the Court can examine this issue only on a *prima facie* basis. If, *prima facie*, the Court is able to arrive at a conclusion that either Ambience or Tutelage – but not both – cannot be impleaded in the proposed arbitration, the Court must so hold. While examining the issue, however, the Court must be conscious of the autonomy that vests in the Arbitral Tribunal in this regard. As *Cox and Kings* holds, it is fundamentally for the Arbitral Tribunal to decide who should, or should not, be a party before it. It is always open to a party before the Arbitral Tribunal to contend that it has been unnecessarily roped in, and to seek deletion from the array of parties. It is not, therefore, as though any permanent prejudice results to either of the parties, even if this Court were to refer the dispute between the petitioner and both the respondents to arbitration. The only situation in which any lasting prejudice may result is if the Court were to affirmatively hold that one or the other respondent cannot be impleaded in the arbitral proceedings. If this Court so holds, even *prima facie*, it is bound to inhibit the discretion vested in the Arbitral Tribunal in that regard. Of course, that said, the Court must, while referring the dispute to arbitration, ensure that parties, who are clearly not necessary parties, and are not roped in. This is also a pre-eminent consideration. The Court cannot blindly accept the stand of either party and refer the

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dispute to arbitration, where one or the other party contests its liability to be subjected to arbitral proceedings.

60. The present controversy at hand, has to be examined keeping in mind all these factors.

61. The claims that the petitioner proposes to refer to arbitration included providing of a habitable and usable access to the petitioner to the leased area and reimbursement of the amount incurred by the petitioner in executing repair works in the leased area, apart from compensation for the losses incurred by the petitioner. Paras 3, 4.1, 4.2 and 4.3 of the Notice of Demand dated 10 August 2023 addressed by the petitioner to the respondents involves both the respondents within the ambit of the disputes. Para 4.1 flags a claim of ₹ 1, 29,01,487.90, which is stated to have been spent by the petitioner in making the leased area habitable and usable. The petitioner claims the said amount from Ambience. Para 4.2 includes other costs incurred by the petitioner. The petitioner points that, as this included enhancement made by the petitioner to the leased area which cannot be removed, Tutelage would continue to benefit from the said enhancement installed at the petitioner's costs. The amounts incurred towards these enhancements are, therefore, being sought both from Ambience and Tutelage. As Mr. Rao points out, even after Tutelage purchased the leased area on 18 November 2022, nearly nine months elapsed before the leased area was handed over by the petitioner to Tutelage. During this period, the prejudice to the petitioner continued, and Tutelage made no efforts to redress it. According to

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the petitioner, it continued to be prejudiced by having to hold possession of an inhabitable and unusable area. It had, in the process, to incur expenses towards transportation, loading and unloading fee, moving fee, storage fee, rent, security deposit, incidental expenses and expenses towards architectural services, design services, fit outs, construction registration, installation, structural assessment, security services and transit insurance, apart from other costs. Both the respondents, according to Mr. Rao, would be liable to reimburse these expenses and costs, to one extent or the other, and the extent to which either petitioner would be liable, would have to be arbitrated.

62. It cannot be said, at this *prima facie* stage, without a comprehensive examination of the entire dispute and possibly by leading of evidence, that all these expenses would, if they were found to be payable to the petitioner, have to be borne either by Ambience or by Tutelage, to the exclusion of the other.

63. Inasmuch as the petitioner's primary contention is that Ambience was in breach of its liability to provide, to the petitioner, a leased area in a habitable and usable form, and Clause 23.1 of the Lease Deed dated 15 January 2021 specifically insulates Ambience from "further liability", it would require consideration as to whether, *if* the alleged breach of the lease agreement is found to have actually taken place, Ambience can claim immunity from liability in that regard on the ground that it had sold the leased area to Tutelage on 18 November 2022. This would have to be decided keeping in mind the covenants of the Lease Deed and the terms of sale of the leased area

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from Ambience to Tutelage. It would further have to be examined whether the sale of the leased area by Ambience to Tutelage transferred all obligations by Ambience to Tutelage including the obligations relating to a period prior to 18 November 2022. The effect of the email 29 August 2022 from Ambience to the petitioner, which acknowledges the fact that the compressive strength of certain columns from the eighth floor is not as per the latest design parameters and assures the petitioner that Ambience aligning its teams to have changes executed at the site, would also have to be considered. Inasmuch as the petitioner is seeking damages, and had to continue to remain in possession of the leased area for a considerable period even after 18 November 2022, the extent to which these damages, if payable to the petitioner, would have to be apportioned between Ambience and Tutelage, would also fall for determination.

64. In my opinion, these are all intricate mixed issues of fact, which have to be determined keeping in mind all the attendant facts and circumstances and may require a detailed analysis of the material on record, perhaps by requiring evidence to be led. Applying the principle in the judgments cited earlier, these are not aspects on which this Court can, even *prima facie*, arrive at a conclusion, which would bind the Arbitral Tribunal. The cumulative effect of Clauses 3, 8 and sub clauses (xv), (xxiv) of Clause 9(a) and Clause 9(b) of the Sale Deed dated 18 November 2022, as well as Clause 23.1 of the Lease Deed dated 15 January 2021 would also be required to be examined.

65. Given the law in this regard, I am of the opinion that these

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aspects have necessarily to be left for determination by the Arbitral Tribunal and, within the limited scope of jurisdiction of this Court in view of Section 11(6) read with Section 11(6A) of the 1996 Act, it is not appropriate for this Court to enter into this territory and return any definitive findings thereon, even if they are *prima facie*. The very fact that each respondent is seeking to palm off the liability on the other gives rise to disputed and triable factual issues, which would fall within the exclusive province of the Arbitral Tribunal.

66. I cannot, therefore, concur with the submission either of Mr. Raajan or Mr. Sachar that either of the respondents has unnecessarily been dragged into the arbitral proceedings. While it would be open to both the respondents to convince the learned Arbitral Tribunal that it should be deleted from the array of parties, I am of the opinion that such a request, if made, should be decided by the Arbitral Tribunal, and that within the limited scope of Section 11(6) of the 1996 Act, this Court should not pronounce on this issue.

Conclusion

67. For all the aforesaid reasons, the objections of Ambience and Tutelage, to their proposed inclusion in the arbitral proceedings, are rejected. This shall, however, not inhibit either of the respondents from raising the issue before the learned Arbitral Tribunal. If it is so raised, it shall be decided in accordance with law, uninhibited by any observations in this judgment, which have been made solely for disposing of the present petition under Section 11(6) of the 1996 Act.

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68. As the parties have not been able to arrive at a consensus regarding the Arbitrator to be appointed, this Court respectfully requests Hon'ble Mr. Justice Vipin Sanghi, former Chief Justice of the High Court of Uttarakhand and Acting Chief Justice of this Court (Tel: 9871300037) to arbitrate on the disputes between the parties.

69. The parties shall be at liberty to raise all claims/counter-claims before the learned Arbitrator, who shall decide them in accordance with law.

70. The fees of the learned Arbitrator shall be fixed between the parties in consultation with the learned Arbitrator and shall be shared equally between them.

71. The Arbitrator would submit the necessary disclosure under Section 12 of the 1996 Act within a week of entering on the reference.

72. This petition stands disposed of in the aforesaid terms.

C.HARI SHANKAR, J

JULY 4, 2024

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