

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

AP/63/2025
MS. SAROJ DEY
VS
MR. ASHIM GHOSHAL

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 18th December, 2025.

Appearance:-

Mr. Snehashis Sen, Advocate
Mr. Abhishek Banerjee, Advocate
Ms. Debasmita Nandi, Advocate
... for the petitioner.

Mr. Diptomoy Talukder, Advocate
Mr. Supriyo Ghosh, Advocate
... for the respondent.

1. Affidavit in opposition is taken on record. Mr. Banerjee submits that no reply is necessary.
2. The petitioner seeks appointment of an arbitrator to adjudicate the dispute between the parties which arose out of the infrastructure user agreement dated November 25, 2023. Clause 13 of the said agreement deals with settlement of dispute by arbitration and the same is quoted below:-

“13. Any dispute and/or differences arising out of this Agreement shall be referred to the arbitration by a sole arbitrator to be mutually appointed by the parties, whose decision shall be final and binding on both the Parties and such arbitration shall be conducted as per the provisions of the Arbitration and Conciliation Act, 1996 and/or any amendment made thereunder from time to time. The place of arbitration shall be within

Kolkata and only the Courts at Kolkata shall have the jurisdiction in the matter.”

3. The petitioner contends that the respondent was granted leave and licence to occupy Flat No.2A measuring a total super built area of 1350 square feet situated on the second floor of the building at Premises No.29, Panditiya Place, Kolkata, for residential purpose. The leave and licence agreement was executed on November 25, 2023. The same was valid for a period of 11 months i.e. from December 1, 2023 till October 31, 2024. Along with the leave and licence agreement, the subject infrastructure user agreement was also executed on November 25, 2023. The said agreement was in respect of use and enjoyment of infrastructure facilities, common areas, car parking space etc. in the ground floor. According to the said user agreement, the respondent was required to pay a monthly charge of Rs.23,000/- and the same was payable in advance within 7th of the current month. Delay in payment would carry an interest of 2% per month. The dispute arose when arrears of the user charges had not been liquidated by the respondent. By a letter dated September 24, 2024, the respondent was called upon to vacate the property and hand over peaceful possession on and from November 1, 2024. The respondent was also called upon to clear all electricity charges for the electricity consumed up to October 31, 2024. It is the specific case of the petitioner that the leave and licence expired by efflux of time on October 31, 2024. The respondent did not vacate the premises. The respondent did not pay the arrear user charges. The petitioner filed an application under Section 9 of the

Arbitration and Conciliation Act, 1996, seeking a direction upon the respondent to secure the sum allegedly payable towards the user charges. An ad interim order was passed by the competent court directing the respondent to secure the amount due. The petitioner contends that, as of today, the dues are more than Rs.5 lakh. A notice invoking arbitration was issued on January 24, 2025. The respondent denied the request of the petitioner to refer the dispute to arbitration, on the ground that a civil suit for declaration of tenancy of the respondent, was pending.

4. Mr. Talukder, learned advocate for the respondent, submits that this is not a fit case for reference to arbitration. The dispute involved between the parties is covered by the provisions of the Transfer of Property Act. The petitioner cannot evict the respondent without taking recourse to the Transfer of Property Act. The respondent had already filed a civil suit for declaration of the tenancy in respect of the property in question and for permanent injunction restraining the petitioner from interfering with the respondent's use and enjoyment of the property in question. He relies on a decision of the Madras High Court in ***Arb. O.P. (Com. Div.) No.678 of 2023 [Mr. T. Rajesh Prasad, Partner of M/s. R. K. Properties v. Mr. K. Saji Kumar]*** and submits that the application under Section 11 of the Arbitration and Conciliation Act, 1996 is premature. He submits that the issue whether the suit should continue before the learned civil court, or the parties should be referred to arbitration, must be decided by the competent civil court. The referral court should reject the application at this stage. Parallel proceedings cannot be allowed to continue. The

petitioner has a remedy under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996 and can always approach the civil court for reference. Instead of availing of the said statutory provision, the petitioner has directly approached the High Court, for appointment of an arbitrator.

5. Heard learned advocates for the respective parties. The fact that the parties agreed to resolution of the disputes arising out of the user agreement by an arbitrator, is available from the records. I do not find any averment by the respondent that the agreement is not in existence. Rather, in the plaint, the respondent has also relied upon such agreement. Under such circumstances, this Court is of the view that at this stage, the referral court should not go beyond satisfying itself as to the existence of the arbitration clause. The scope of the referral court has been decided by Hon'ble Apex Court.
6. The Hon'ble Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spg.***, reported in ***(2024) 12 SCC 1***, clarified that, the scope of enquiry at the stage of appointment of arbitrator was only with regard to existence of an arbitration clause. Paragraphs 113 and 114 are quoted below:-

“113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In ***Re: Interplay (supra)*** that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a prima facie arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration

proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a time bound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]” (Emphasis supplied)”

114. In view of the observations made by this Court in *In Re: Interplay* (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia* (supra) and adopted in *NTPC v. SPML* (supra) that the jurisdiction of the referral court when dealing with the issue of “accord and satisfaction” under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *In Re: Interplay* (supra).”

7. ***Ajay Madhusudan Patel and Ors. v. Jyotrindra S. Patel and Ors.***,

reported in **(2025) 2 SCC 147**, the Hon’ble Apex Court held as follows:-

76.5. In *Interplay*, *In re [Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1]* the position taken in *VidyaDrolia [VidyaDrolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549]* was clarified to state that the scope of examination under Section 11(6) should be confined to the “existence of the arbitration agreement” under Section 7 of the 1996 Act and the “validity of an arbitration agreement” must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Therefore, substantive objections pertaining to existence and validity on the basis of evidence must be left to the Arbitral Tribunal since it can “rule” on its own jurisdiction.

76.6. *Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754]* cautioned that the courts delving into the domain of the Arbitral Tribunal at the Section 11 stage run the risk of leaving the claimant remediless if the Section 11 application is rejected. Further, it was stated that a detailed examination by the courts at the Section 11 stage would be counterproductive to the objective of expeditious disposal of Section 11 application and simplification of pleadings at that stage.

76.7. *Cox& Kings [Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680]* specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration

proceedings. While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the Arbitral Tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal and can be decided under its jurisdiction under Section 16.”

8. In the decision of **ASF Buildtech Private Limited v. Shapoorji Pallonji and Company Private Limited** reported in **(2025) 9 SCC 76**, the Hon’ble Apex Court held as follows:-

“72. The next chapter in the saga of scope and ambit of Section 11 of the 1996 Act came in the form of the seven-Judge Bench decision of this Court in *Interplay Between Arbitration Agreements under Arbitration Act, 1996 & Stamp Act, 1899*, *In re [Interplay Between Arbitration Agreements under Arbitration Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1]* wherein one of us (J.B. Pardiwala, J.) as part of the Bench, undertook a comprehensive analysis of Section(s) 8 and 11, respectively, of the 1996 Act and, inter alia, made poignant observations about the nature of the power vested in the courts insofar as the aspect of appointment of arbitrator is concerned. It held that the Referral Court, be it the High Court or the Supreme Court under Section 11 of the 1996 Act **shall** examine only the existence of a prima facie arbitration agreement and not any other issues. The relevant observations read as under: (SCC pp. 96-97 & 104, paras 196-97 & 220)

“196. The corollary of the doctrine of competence-competence is that courts may only examine whether an arbitration agreement exists on the basis of the prima facie standard of review. The nature of objections to the jurisdiction of an Arbitral Tribunal on the basis that stamp duty has not been paid or is inadequate is such as cannot be decided on a prima facie basis. Objections of this kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. Obligating the court to decide issues of stamping at the Section 8 or Section 11 stage will defeat the legislative intent underlying the Arbitration Act.

197. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain

the domain of the Arbitral Tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). ...

220. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. The other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the Referral Court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a time-bound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators.”

(emphasis in original and supplied)

9. In the matter of ***Hindustan Petroleum Corporation Limited v. BCL Secure Premises Pvt. Ltd.*** reported in **2025 SCC OnLine SC 2746**, the Hon’ble Apex Court held as follows:-

“27. As was held in In Re: Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, since the scope of referral court has to be within the parameter of Section 11 (6-A), the exercise carried thereon is “examination of the existence of an arbitration agreement”. While “examination” does not contemplate a laborious or a contested inquiry there is an obligation in the referral court to “inspect and scrutinize” the dealings, if any, between the parties. Para 167 of *Interplay* (supra) reads as under:—

“167. Section 11(6-A) uses the expression “examination of the existence of an arbitration agreement”. The purport of using the word “examination” connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression “examination” does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, *The Law Lexicon* (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can “rule” on its jurisdiction, including the existence and validity of an arbitration agreement. A “ruling” connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements,

whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234]”

(Emphasis supplied)

28. This principle was reiterated lucidly in *SBI General Insurance Company Limited v. Krish Spinning*, wherein this Court (speaking through one of us, J.B. Pardiwala J.) observed as under:—

113. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

114. The use of the term “examination” under Section 11(6-A) as distinguished from the use of the term “rule” under Section 16 implies that the scope of enquiry under Section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the Arbitral Tribunal to “rule” under Section 16. The prima facie view on existence of the arbitration agreement taken by the Referral Court does not bind either the Arbitral Tribunal or the Court enforcing the arbitral award.

115. The aforesaid approach serves a twofold purpose — firstly, it allows the Referral Court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the Arbitral Tribunal to rule on the issue of existence of the arbitration agreement in depth.”

(Emphasis supplied)

10. The other contention of Mr. Talukder that, since the dispute is between a landlord and a tenant, the same shall be governed by the Transfer of Property Act, is not accepted. In this case, the dispute is with regard to unpaid user charges. This does not, prima facie, appear to be connected to the reliefs claimed in the suit. Moreover, landlord-tenant disputes under the Transfer of Property Act are arbitrable. Reference is made to the decision of ***Vidya Drolia and Others v. Durga Trading Corporation***, reported in **(2021) 2 SCC 1**, paragraph 79 whereof is quoted below:-

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

11. This Court finds that the respondent has raised a question on jurisdiction of the learned arbitrator which the learned arbitrator can rule on. Section 16 of the said Act provides thus:-

“16. Competence of arbitral tribunal to rule on its jurisdiction.—

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

- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
- (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely

because that he has appointed, or participated in the appointment of, an arbitrator.

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

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

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

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

12. Jurisdictional question is a technical and legal issue which requires clarity when applied to facts of the case. The said Act, is based on the UNCITRAL Model of Law. Entirely a new regime was brought in with the object to promote arbitration in commercial and economic matters. An alternative dispute resolution mechanism is one of the primary objects of the said Act. It was brought in to reduce and minimize the supervisory role of courts. Accordingly, statutory powers were also vested on the arbitral Tribunal to deal with and decide jurisdictional issue of non-arbitrability. The principles of separation and competence competence were incorporated in the law, while the courts retained the power to give a second look at the post award stage. Thus, this court holds that the issue of jurisdiction and arbitrability raised by Mr. Talukdar should be raised

before the learned Arbitrator. This court has, prima facie, satisfied itself as to the existence of the arbitration clause.

13. With regard to the other contention of Mr. Talukdar that, the petitioner should approach the civil court under sections 5 and 8 of the said Act, this court finds that the summons with regard to the suit has not yet been served. The suit has been fixed for furnishing requisites. More than a year has passed since the suit has been filed. Records reveal that the notice under section 21 of the said Act was issued by the petitioner invoking the arbitration clause. The petitioner was not aware of the suit. In the reply to the said notice, the respondent disclosed the pendency of the suit. Till date, no summons have been served upon the respondent and the suit is still at the stage of furnishing requisites by the plaintiff/respondent.
14. Section 8(3) of the said Act provides that, pendency of an application under Section 8 will not be an impediment towards continuation of the arbitration proceeding. Thus, the decision of the Madras High Court referred to by Mr. Talukder does not appear to be good law.
15. Reference is further made to the decision in the case of **TRL Krosaki Refractories Ltd. vs Lindsay International Private Limited** decided in **A.P. No. 969 of 2017**, wherein it was held that pendency of a suit would not be a bar to the appointment of an arbitrator.
16. Having considered the rival contentions of the parties, this court is of the view that the jurisdiction of this court is limited only to the satisfaction that there exists an arbitration clause. The objections raised by Mr.

Talukdar with regard to the jurisdiction and arbitrability can be raised before the learned Arbitrator. In any event, whether the suit and the arbitral proceeding are on the self-same cause of action or not or whether the causes of action can be separated, must be decided by the learned Arbitrator. The learned Arbitrator is at liberty to frame the issues on those aspects.

17. Under such circumstances, Mr. Satyam Mukherjee, learned Advocate, Bar Library, [Mob. No. 8017382322] of this Court, is appointed as the arbitrator to resolve the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his remuneration, in terms of the Schedule of the Act.
18. AP/63/2025 is accordingly disposed of.

(SHAMPA SARKAR, J.)