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

% *Date of Decision: 27th May, 2025*

\+ ARB.P. 655/2025

PARADISE PLASTICS ENTERPRISES LIMITED .....Petitioner

Through: Mr. Himanshu Maan, Ms. Nancy Thapar, Ms. Anjali Mathur and Ms. Sonia Kumari, Advocates.

versus

JRG AUTOMOTIVE INDUSTRIES INDIA PVT. LTD & ORS. .....Respondents

Through: Mr. Apoorv Sarvaria and Ms. Yashika Sarvaria, Advocates for R-1.
Mr. Dharmendra Rautray, Advocate for R-2 to 5.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

I.A. 10552/2025 *(Exemption)*

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

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3. This petition is filed on behalf of the Petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

4. Case of the Petitioner as set out in the petition is that Respondents are

part of the same group of companies known as JRG Group and engaged in the business of manufacturing plastic automotive components, comprising of moulded and painted interior and exterior parts of two-wheelers and four-wheelers etc. In June, 2023, Mr. Pawan Goyal, approached Mr. Parth Gandhi, wholetime Director of the Petitioner company for investment in the business through a Joint Venture. On 28.07.2023, Petitioner received the Non-Disclosure Agreement, signed by authorised representative of Respondent No. 1 and the same was signed by Petitioner and Respondent No. 5 on behalf of Respondent No. 1. Basis the assurances given, Petitioner shared all proprietary and confidential information data with the Respondents.

5. It is further stated that in September, 2023 Mr. Pawan Goyal on behalf of Respondent No. 3 signed an MoU/LOI with the Petitioner, showing himself as the Managing Director of the said company. Later, parties entered into a Share Subscription Agreement (SSA) and Share Holders Agreement (SHA), both dated 08.12.2023. However, Petitioner began to realise that Mr. Pawan Goyal was neither holding any position nor was authorised to sign the Agreements. When the Respondents failed to fulfil their obligations under the two Agreements, Petitioner also realised that they had obtained all confidential information of the Petitioner, including customers' and other relevant data to conduct the Financial and Legal Due Diligence of the Petitioner company.

6. Since disputes had arisen on account of default and breach of obligations by the Respondents, Petitioner sent a notice under Section 21 of 1996 Act invoking the Arbitration Clauses 10 and 21 in the SSA and SHA respectively. Respondents were called upon to pay the due amounts within

15 days, failing which Petitioner would take recourse to arbitration. Petitioner also proposed the name of its nominee Arbitrator and asked the Respondents to nominate their Arbitrator. Since there was a failure to appoint the Arbitrator, Petitioner approached this Court.

7. Issue notice.

8. Learned counsels, as above, accept notice on behalf of the respective Respondents.

9. Learned counsel for Respondents No. 2 to 5, on instructions, fairly and candidly does not dispute the existence of the Arbitration Agreements in the SSA and SHA. The only objection is that since Respondents No. 2 to 5 are non-signatories to both the Agreements, they cannot be referred for arbitration.

10. Responding to this objection, learned counsel for the Petitioner submits that Respondents are part of the same Group of Companies i.e., JRG Group. Respondents No. 4 and 5 are the Directors and responsible and in control of the companies. There is an evident relationship between the Respondents within the Corporate Group structure as also with the underlying contractual obligations and the nature of transactions undertaken between the parties are composite. In this background, Respondents No. 2 to 5 cannot disassociate themselves from the disputes and/or arbitration for adjudication of these disputes.

11. Heard counsels for the parties.

12. It is no longer *res integra* that a referral Court under Section 11 of 1996 Act only undertakes a limited enquiry into the existence of the Arbitration Agreement. In the present case, parties do not dispute that both SSA and SHA incorporate Arbitration Clauses providing for reference of

disputes arising therefrom to arbitration. The only objection raised by the Respondents No. 2 to 5 is that they are non-signatories to the Arbitration Agreements incorporated in the SSA and SHA. The question whether the referral Court can enter into the exercise of determining whether a non-signatory is bound by the Arbitration Agreement need not detain this Court as law on this is now fairly well settled by the Supreme Court and I may allude to the judgments on this aspect.

13. Recently, the Supreme Court in ***ASF Buildtech Private Limited v. Shapoorji Pallonji and Company Private Limited, (2025) SCC OnLine SC 1016***, referring to and relying on an earlier judgment of the Supreme Court in ***Cox and Kings Limited v. SAP India Private Limited and Another, (2024) 4 SCC 1***, held that from the said decision it is discernible that the entire exercise of determining whether a non-signatory is bound by an Arbitration Agreement, in contradistinction to the narrow question of the existence of the Arbitration Agreement, necessitates a far more expansive enquiry. It was observed that this enquiry transcends the limited question of mere existence as it entails an interpretation of the scope and contours of the principal agreement, an assessment of the commercial understanding between the parties, examination of the nature and purpose underlying the principal contract and the character of the transactions and conduct of the parties vis-à-vis, the object and wisdom of the parties underlying contractual agreement. Such an exercise mandates a detailed and comparative evaluation of the substantive provisions of both the principal and supplementary agreements and not merely of the Arbitration Agreement or Clause, in isolation.

14. It was further held that by no stretch of imagination can the issue

whether non-signatory is bound by the Arbitration Agreement be characterised as one that is either significant or *sine qua non* to the determination of the existence of the Arbitration Agreement. The former necessitates a substantive examination of the entire contractual relationships, whereas the latter is a limited exercise directed only at confirming the formal validity of the Arbitration Agreement itself. Such a question is not one of 'existence' of the Arbitration Agreement, but one of interpretation and scope of the principal agreement. The Supreme Court observed that once the referral Court identifies an Arbitration Agreement that satisfies the formal requirements of Section 7 of 1996 Act, the existence of the Arbitration Agreement is established, even though its binding nature *qua* the non-signatory may not be established. The question whether a non-signatory is bound by the Arbitration Agreement involves a more nuanced determination of parties' intentions etc., and the broader context of the Agreement and as held in ***Cox and Kings (supra)***, 'existence of Arbitration Agreement' and 'veritable party to the Arbitration Agreement' are two separate and independent enquiries. It was further held that even if it is assumed that the referral Court in its jurisdiction under Section 11 of 1996 Act has the discretion to determine whether a non-signatory is a veritable party to the Arbitration Agreement or not, by virtue of ***Cox and Kings (supra)***, the referral Court should not only refrain but rather loathe the exercise of such discretion and this exercise should be left to the Arbitral Tribunal, which can delve into factual and circumstantial evidence along with the legal aspects to decide this issue. The Supreme Court emphasised on the hands off approach of referral Court on this issue underscoring that once the Arbitral Tribunal stands constituted, it becomes automatically open to all parties to raise any preliminary objection, including one touching on the impleadment of a non-signatory party and/or whether the non-signatory party qualifies as a veritable party to the Arbitration Agreement.

15. It was further held by the Supreme Court that the Arbitral Tribunal would be the appropriate forum for deciding this issue and this approach is necessitated by the inherent complexity involved in deciding this question, determination of which hinges upon a multiplicity of factual aspects and demands a high threshold of satisfaction based on a cumulative and holistic evaluation of the entire factual matrix. Such an intricate and evidence driven exercise makes the Arbitral Tribunal the most appropriate forum to adjudicate, as it possesses the institutional advantage of conducting a comprehensive scrutiny of all evidences and materials adduced by the parties. Significantly, the Supreme Court also highlighted the legislative intent underlying Section 11 of 1996 Act, more particularly sub-Section (6A), which is expeditious disposal of applications for appointment of Arbitrators and held that this legislative objective militates against the referral Courts undertaking any elaborate or detailed factual enquiry, which would inevitably delay proceedings and therefore, prudence dictates that referral Courts confine themselves to a *prima facie* examination of the existence of the Arbitration Agreement and leave substantive determinations such as binding nature of non-signatories to the Arbitral Tribunal.

16. The Supreme Court also underscored an additional and equally compelling consideration in taking this approach. It was observed that power exercised by referral Courts under Section 11 of 1996 Act is judicial in nature. Any premature adjudication or opinion by the referral Court would

not only usurp the Arbitral Tribunal's role as the forum of first instance for dispute resolution but could also cause irremediable prejudice, especially where the referral Court were to refuse impleadment of a non-signatory, there would be no statutory right of appeal to challenge such a refusal, whereas a determination by the Arbitral Tribunal on this aspect under Section 16 of 1996 Act will be amenable to challenge under Section 37 of 1996 Act. Relevant paragraphs from the judgment in ***ASF Buildtech (supra)*** are as follows:-

> *"**74.** From above, it is manifest that the test for determining the applicability of the 'Group of Companies' doctrine is intrinsically factual in nature, necessitating a close and context-specific inquiry. However, Cox and Kings (I) (supra) did not merely stop at just establishing the factual nature of such an exercise, but further proceeded to expound, the extent and depth in which the aforementioned factual factors must be determined in the course of such exercise by laying down the threshold standards for determining the applicability of the said doctrine. Placing reliance on one another decision of this Court in Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd., (2022) 8 SCC 42, it held that the test for determining applicability of the 'Group of Companies' doctrine envisages a cumulative and holistic determination of the factual aspects such as the relationship between and among the legal entities within the corporate group structure, their underlying contractual obligations, the commonality of the subject matter and the composite nature of the transactions undertaken, and their overall participation in the project/subject-matter for achieving a common purpose. The relevant observations read as under:—*
>
> > *"110. In Discovery Enterprises (supra), this Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding whether a company within a group of companies is bound by the arbitration agreement:*
> >
> > *"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
> >
> > *(i) The mutual intent of the parties;*
> >
> > *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
> >
> > *(iii) The commonality of the subject-matter;*

(iv) <u>The composite nature of the transactions; and</u>

(v) <u>The performance of the contract.”</u>

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76. *Owing to the intrinsic character of the test — being one that entails a fact- intensive inquiry involving a mixed question of fact and law — and further, given the extensive standard it demands, requiring a comprehensive and holistic appraisal of all material facts and attendant circumstances, it may be safely concluded that the arbitral tribunal is the more appropriate and competent forum to adjudicate upon the issue of whether a non-signatory is bound by the arbitration agreement, as the arbitral as it has the innate advantage of going through all the relevant evidence and pleadings in greater depth and detail than the referral court at the pre-reference stage, and as such is uniquely positioned to undertake such a nuanced determination.*

II. Determining the “existence” viz-à-viz the intention of parties from “express words” of an Arbitration Agreement.

77. *In order to resolve the question whether the issue of a non-signatory being bound by an arbitration agreement could be said to be inextricably intertwined with the determination of the “existence” of the arbitration agreement, it is apposite to once again advert to* Cox and Kings *(I)* ***(supra), more particularly, as to the manner in which it envisages the identification and determination of the binding effect of an arbitration agreement upon a non-signatory, based on the factual aspects delineated by it, as mentioned in the foregoing paragraphs.***

78. Cox and Kings (I) *(supra) observed that the “legal relationship of a non- signatory to a party which is a signatory to the agreement” must be analyzed in the context of the underlying substantive contract which contains the arbitration agreement. This may be ascertained either from the duty or relationship attributed to the non-signatory within the underlying contract or may be inferred from its conduct with respect to such contract. If the underlying contract forms basis for a subject-matter common to both the signatory and the non-signatory or any composite transaction by them, then it would be a positive indicum for inferring the consent of the non-signatory to arbitrate with respect to the subject-matter. Transactions by a non-signatory which are interlinked with the underlying contract in such manner, in the absence of which the performance of the contract may not be feasible, is one another instance for inferring this consent. Placing reliance on* Chloro Controls (supra) *it observed that factors such as “commonality of the subject- matter” or “composite transaction” would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the intention of the parties and their conduct on the other. Amongst* *these, the participation of the non-signatory in the performance of the underlying contract is the most crucial factor to discern the intention of the parties.*

"112. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. The legal relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the signatory and non-signatory parties with respect to such contract. […]

115. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.

116. 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 (supra) 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.

117. 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 (supra), this Court clarified that the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and

<u>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.</u> […]"

118. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the courts and tribunals. The conduct of the non- signatory parties is an indicator of the intention of the non- signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 201698 provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

(a) preliminary negotiations between the parties;

(b) practices which the parties have established between themselves;

(c) the conduct of the parties subsequent to the conclusion of the contract;

(d) the nature and purpose of the contract;

(e) the meaning commonly given to terms and expressions in the trade concerned; and

(f) usages.

(Emphasis supplied)

***79.** What can be discerned from the above is that, the entire exercise of determining whether a non-signatory is bound by an arbitration agreement, in contradistinction to the narrow question of the "existence" of the arbitration agreement, necessitates a far more expansive inquiry. This inquiry transcends the limited question of the mere "existence" as it entails an interpretation of the scope and contours of the principal agreement, an assessment of the commercial understanding between the parties, examination of the nature and purpose underlying the principal contract, and the character of the transactions and conduct of the parties viz-à-viz the object and wisdom of the parties underlying contractual arrangement. Such an exercise mandates a detailed and comparative evaluation of the substantive provisions of both the principal and supplementary agreements, and not merely of the arbitration agreement or clause in isolation.*

80. The determination of the "existence" of an arbitration agreement, by contrast, is confined to examining the formal validity of the arbitration agreement or the arbitration clause itself, where only the arbitration agreement or clause, as the case may be has to be looked into. It does not require delving into the broader legal relationships emerging from the underlying contractual framework. Cox and Kings (I) (supra) specifically mandates a holistic appraisal of the principal and supplementary agreements in tandem with the parties' intention and conduct, thereby demanding an inquiry far more extensive than that required for the mere establishment of the existence of the arbitration agreement.

81. Thus, by no stretch of imagination can the issue of whether a non-signatory is bound by the arbitration agreement be characterized as one that is either significant or sine qua non to the determination of the arbitration agreement's "existence". The former necessitates a substantive examination of the entire contractual relationship, whereas the latter is a limited exercise directed only at confirming the formal validity of the arbitration agreement itself. Such a question is not one of "existence" of the arbitration agreement, but one of interpretation and scope of the principle agreement.

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84. From the above exposition of law, it can be seen that this Court in Cox and Kings (I) (supra) recognized that there exists a fine but pertinent distinction between determining the "existence" of an arbitration agreement and determining the intention of the parties from the "express words" used in the arbitration agreement, when dealing with the question whether a non- signatory is bound by the arbitration agreement or not. The former only deals with determining whether an arbitration agreement exists and is present in the record of agreement or the written materials as delineated under Section 7 sub- section (4)(b) of the Act, 1996. The latter, in contrast, involves construction and interpretation of the "express words" that has been used in such material from the surrounding circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract, and how the arbitration agreement fits within the broader contractual framework.

85. Once the referral court, identifies an arbitration agreement that satisfies the formal requirements of Section 7 of the Act, 1996, either from the record of agreement or the written materials under sub-section (4), the "existence" of the arbitration agreement is said to have been established, even though, its binding nature qua the non-signatory may not be established, as it is entirely possible for a referral court to arrive at finding that prima-facie there exists an arbitration agreement in terms of Section 7 of the Act, 1996 without resolving the question of whether a non-

signatory is bound by such arbitration agreement or not, as it depends on additional factors beyond mere existence.

86. *Once, the "existence" of the arbitration agreement is said to have been established, the condition stipulated in terms of Section 11 sub-section (6A) of the Act, 1996, is said to have been fulfilled, and the referral courts have no option but to refer the dispute to arbitration, notwithstanding whether the intention of a non-signatory as a veritable partly to such agreement is established or not. Apart from the pre-condition of examining the "existence" of an arbitration agreement, Section 11 of the Act, 1996 does not either contemplate or require determination of the "defined legal relationship" in terms of Section 7, nor does it mandate an assessment of the futuro intention of the parties, whether signatories or non-signatories, from the "express words" of the arbitration agreement. This limited inquiry does not extend to the substantive legal consequences or implications of such arbitration agreement. The question of whether a non-signatory is bound by the arbitration agreement is entirely separate from the question of its "existence." The latter is a relatively straightforward, procedural determination based on the formal presence of the agreement, whereas the former involves a substantive and contextual inquiry into the mutual intent of the parties, which may be examined by the arbitral tribunal.*

87. *What follows from this is that, the question whether a non-signatory is bound by the arbitration agreement is completely independent of the question concerning the "existence" of an arbitration agreement. The two inquiries — while related — are distinct in nature and function. The "existence" of an arbitration agreement pertains solely to its formal presence in the contractual documentation, as per the requirements under the Act, 1996 and once established, it obligates the referral of the dispute to arbitration. By contrast, the question of whether a non-signatory is bound by the arbitration agreement involves a more nuanced determination of the parties' intentions, contractual relationships, and the broader context of the agreement, which is not confined to the formal text of the arbitration clause alone.*

88. *Thus, even in the absence of the non-signatory being made a party to the proceedings before the referral court, and where the question of its impleadment has neither been raised nor addressed or left open to the arbitral tribunal by the referral court, the arbitral tribunal would be full empowered to examine this issue in the first instance and determine whether any non- signatory is bound by the arbitration agreement based on the factual circumstances of the case, and if necessary, implead such non-signatory to the arbitration proceedings.*

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90. *This is further fortified from the fact that, Cox and Kings (I) (supra) in* *its subsequent paragraphs, more particularly paragraph no. 164, while discussing the scope of Section 11 of the Act, 1996, distinctively refers to and treats the criterion of "existence of arbitration agreement" and "veritable party to the arbitration agreement", as two separate and independent inquiries, thereby underscoring that the determination of the existence of an arbitration agreement stands apart from the assessment of whether a non-signatory can be bound to it.*

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***92.** Thus, what has been conveyed in so many words by Ajay Madhusudan Patel (supra) is that the inquiry into whether a non-signatory is bound by an arbitration agreement is not, in its essence, an inquiry into the formal or juridical existence of the arbitration agreement itself. It is an exercise of determining the functional concept of consent within the existing arbitration agreement rather than the existence of the arbitration agreement itself. It is to cull out and discern the intention of various parties — whether signatories or otherwise — in relation to their willingness to be bound by the arbitration mechanism embedded in the contract.*

***93.** Put differently, although notionally the exercise of determining 'existence of the arbitration agreement qua the non-signatory', may, on the surface appear to be concerned with the arbitration agreement or clause in question, yet one must be mindful that the actual focus of such exercise lies in determining the existence of consent of the parties through fact patterns to such arbitration agreement or clause and not vice-versa. It is the existence of mutual consent to arbitrate — not the formal existence of the arbitration agreement — that is the heart of this inquiry.*

***94.** There runs no umbilical cord between the exercise of determining the "existence of the arbitration agreement" and determining its "existence qua the non-signatory". The latter is an independent and substantive determination that falls outside the narrow and circumscribed domain of the referral court's singular obligation under Section 11 sub-section (6A) of the Act, 1996 and as such cannot be conflated to be one pertaining to or attacking the "existence" of an arbitration.*

***95.** Even if it is assumed for a moment that the referral court in its jurisdiction under Section 11 of the Act, 1996 has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of Cox and Kings (I) (supra), the referral court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it referral courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. Any* *determination even if prima-facie by a referral court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the referral courts opine that a non- signatory in question is not a veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the arbitral tribunal to decide, as such party can always take recourse to Section 16 of the Act, 1996 and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non- signatory is concerned be borne by the party who vexatiously impleaded it, but the arbitral tribunal would be well within its powers to also impose costs.*

III. Decision of Cox and Kings (II) and Ajay Madhusudan and the scope of Section 11 of the Act, 1996 for joinder of non-signatories to arbitration proceedings.

96. *The aforesaid may be looked at from one another angle. This Court in Cox and Kings (I) (supra) also discussed the role and scope of jurisdiction of the referral courts and arbitral tribunals under Section(s) 11 and 16 of the Act, 1996, particularly in the context of binding a non-signatory to the arbitration agreement. It reiterated that under Section 11, the referral court only has to determine the prima-facie existence of an arbitration agreement. Whereas, the issue of determining parties to an arbitration agreement is quite distinct from "existence" of the arbitration agreement, as such issue goes to the very root of the jurisdiction competence of the arbitral tribunal, and thus, empowered to decide the same under Section 16. Placing reliance on the decision of this Court in Shin-Etsu Chemical Co Ltd. v. Aksh Optifibre Ltd. reported in, (2005) 7 SCC 234, it held that the referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction for deciding such issues. The relevant observations read as under:—*

> *"157. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, <u>Section 11 confines the court's jurisdiction to the existence of the examination of an arbitration agreement.</u>*
>
> *158. 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. <u>Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the</u>*

jurisdiction of the arbitral tribunal. The doctrine of competence competence is intended to minimize 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.

161. The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.125, *this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the tribunal […]"*

(Emphasis supplied)

97. *Cox and Kings (I) (supra) further observed that in case of joinder of non- signatory parties to an arbitration agreement, 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. However, it further clarified that, due to the inherent complexity in determining whether the non- signatory is indeed a veritable party, the referral court should leave this question for the arbitral tribunal to decide as it can delve into the factual and circumstantial evidence along with its legal aspects for deciding such an issue. The relevant observations read as under:—*

"163. […] Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral tribunal to decide whether the non signatory is bound by the arbitration agreement.

164. 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 arbitral tribunal under Section 16."*

(Emphasis supplied)

98. *Thus, even if it is assumed for a moment, that the question whether a non- signatory is a veritable party to the arbitration agreement is intrinsically connected with the issue of "existence" of arbitration agreement, the referral courts should still nevertheless, leave such questions for the determination of the arbitral tribunal to decide, as such an interpretation gives true effect to the doctrine of competence-competence enshrined under Section 16 of the Act, 1996.*

99. *This hands-off approach of referral courts in relation to the question of whether a non-signatory is a veritable party to the arbitration agreement or not was reiterated in Cox and Kings (II), wherein one of us, (J.B. Pardiwala J.), observed that once an arbitral tribunal stands constituted, it becomes automatically open to all parties to raise any preliminary objections, including preliminary objections touching upon the jurisdiction of such tribunal, and to seek an early determination thereof. Consequently, the issue of impleadment of a non-signatory was deliberately left for the arbitral tribunal to decide, after taking into consideration the evidence adduced before it by the parties and the principles enunciated under Cox and Kings (I) (supra).*

100. *Similarly, in Ajay Madhusudan (supra) it was held that since a detailed examination of numerous disputed questions of fact was required for determining whether the non-signatory is a veritable party to the arbitration agreement, the same cannot be examined in the limited jurisdiction under Section 11 of the Act, 1996 as it would tantamount to a mini trial. Accordingly, the arbitral tribunal was found to be the appropriate forum for deciding the said issue on the basis of the evidence that may be adduced by the parties.*

101. *This approach is necessitated by the inherent complexity involved in determining whether a non-signatory qualifies as a veritable party to the arbitration agreement, a determination that hinges upon a multiplicity of factual aspects and demands a high threshold of satisfaction based on a cumulative and holistic evaluation of the entire factual matrix. Such an* *intricate and evidence-driven exercise makes the arbitral tribunal the most appropriate forum to adjudicate the matter, as it possesses the institutional advantage of conducting a comprehensive scrutiny of all evidences and materials adduced by the parties.*

102. *Furthermore, the legislative intent underlying Section 11 of the Act, 1996 — particularly sub-section (6A) — is to ensure the expeditious disposal of applications for the appointment of arbitrators. This legislative objective militates against referral courts undertaking any elaborate or detailed factual inquiry, which would inevitably delay proceedings. Prudence thus dictates that the referral courts confine themselves to a prima-facie examination of the existence of the arbitration agreement and leave substantive determinations, such as the binding nature of non-signatories, to the arbitral tribunal. An additional and equally compelling consideration is that the power exercised by the referral courts under Section 11 of the Act, 1996 is judicial in nature. Consequently, referral courts must refrain from embarking upon an intricate evidentiary inquiry or making final determinations on matters that are within the jurisdiction of the arbitral tribunal. Any premature adjudication or opinion by the referral court would not only usurp the tribunal's role as the forum of first instance for dispute resolution but could also cause irremediable prejudice. In particular, if the referral court were to refuse impleadment of a non-signatory, there would be no statutory right of appeal available to challenge such a refusal. In contrast, determinations made by the arbitral tribunal — including on issues of jurisdiction and impleadment — are amenable to challenge under Section 16 of the Act, 1996 and, thereafter, under Section 37. Accordingly, the better course of action is for referral courts to refrain altogether from delving, into the issue of whether a non-signatory is a veritable party to the arbitration agreement, and to leave such matters for the arbitral tribunal to decide in the first instance."*

17. From the reading of the aforesaid judgments, it is luminously clear that there is a fine distinction between determining the 'existence' of an Arbitration Agreement and determining whether a non-signatory is bound by the Arbitration Agreement and the latter determination is to be left to the Arbitral Tribunal, once the referral Court examines and comes to a conclusion that there exists an Arbitration Agreement between the parties. The determination of 'existence of the Arbitration Agreement' is enough to refer the dispute to an Arbitral Tribunal even though its binding nature *qua*

the non-signatory may not be established at this stage. In fact, the Supreme Court has held that 'existence of Arbitration Agreement' and 'veritable party to the Arbitration Agreement' are two separate and independent enquiries and the referral Court should not only refrain from entering into adjudicating the second question but rather loathe the exercise of this discretion, assuming for a moment, the referral Court in its jurisdiction under Section 11 of 1996 Act has the discretion to determine this question. The exercise of determining whether non-signatory is a party to the Arbitration Agreement involves a complex enquiry demanding a high threshold of satisfaction based on holistic evaluation of the factual matrix, evidence and contractual stipulations and relationships. Broadly understood, the Supreme Court has held that there is no umbilical cord between the exercise of determining the existence of the Arbitration Agreement and determining the existence *qua* a non-signatory party. The exercise of adjudicating the existence of an Arbitration Agreement *qua* a non-signatory party is, therefore, to be left to the Arbitral Tribunal.

18. In light of the binding dictum of the Supreme Court, I am unable to agree with the Respondents that this Court must enter into the exercise of determining whether Respondents No. 2 to 5 as non-signatories, are bound by the Arbitration Agreement. This exercise is to be left to the Arbitral Tribunal, as and when constituted. It will be open to the Respondents to raise this objection before the Arbitral Tribunal by taking recourse to appropriate remedies under the 1996 Act. Once the existence of the Arbitration Agreement is not in dispute in SSA and SHA, there is no impediment in appointing the Arbitrator.

19. Accordingly, this petition is allowed, appointing Ms. Justice Asha

Menon, former Judge of this Court (Mobile No. 9910384664) as the Sole Arbitrator to adjudicate the disputes between the parties. Fee of the Arbitrator shall be fixed as per Fourth Schedule of 1996 Act.

20. Learned Arbitrator shall give disclosure under Section 12 of the 1996 Act before entering upon reference.

21. It is made clear that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the respective parties are left open.

22. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

MAY 27, 2025
S.Sharma