IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 22, 2023

\+ ARB.P. 163/2022

ANTIQUE ART EXPORT PVT LTD. ..... Petitioner
Through: Mr. Manish Kaushik and Mr. Ajit Singh, Advs.

versus

UNITED INDIA INSURANCE COMPANY LIMITED .... Respondent
Through: Mr. Amit Kumar Singh, Ms. K. Enatoli Sema, Ms. Chubalemla Chang and Mr. TavikatoAchumi, Advs.

AND

\+ ARB.P. 164/2022

ANTIQUE ART EXPORT PVT LTD ..... Petitioner
Through: Mr. Manish Kaushik and Mr. Ajit Singh, Advs.

versus

UNITED INDIA INSURANCECOMPANY LIMITED ..... Respondent
Through: Mr. Amit Kumar Singh, Ms. K. Enatoli Sema, Ms. Chubalemla Chang and Mr. Tavikato Achumi, Advs.

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

J U D G M E N T

V. KAMESWAR RAO, J

1. These petitions have been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996, ('Act of 1996', for short), for appointment of an Arbitrator to adjudicate the disputes between the parties

herein with the following prayers:

"***<u>ARB. P. 163/2022</u>***

That in the facts and circumstances mentioned hereinabove, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to;

a. Appoint an Arbitrator to adjudicate the disputes between the parties arising out of Standard Fire and Special Perils Policies bearing Policy No(s). 040700/11/13/11/00000194 & 040700/11/13/11/00000195 which contains arbitration as agreed; or in the alternative

b. Confirm the Appointment of (Retd.) Justice V.K. Shali, as Ld. Sole Arbitrator appointed between the parties by this Hon'ble Court vide Orders dated 30.05.2017 in view of the mandate of Hon'ble Supreme Court in M/s Mayavati Trading Pvt. Ltd. Vs Pradyuat Deb Burman (Civil Appeal No, 7023 of 2019;

c. Pass any other or further order(s) that this Hon'ble Court may deem fit in the facts and circumstances of this case;

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b. Confinn the Appointment of (Retd.) Justice V.K. Shali, as Ld. Sole Arbitrator appointed between the parties by this Hon'ble Court vide Orders dated 30.05.2017 in view of the mandate of Hon'ble Supreme Court in M/s.

Mayavati Trading Pvt. Ltd. Vs Pradyuat Deb Burman (Civil Appeal No. 7023 of 2019;

c. Pass any other or further order(s) that this Hon'ble Court may deem fit in the facts and circumstances of this case;"

2. The petitioner is a Company namely Antique Art Export Private

Limited, engaged in the business of manufacturing, selling and exporting carpets, rugs etc. The petitioner has been availing insurance policies from respondent, United India Insurance Company Limited (herein "respondent Company"). It is the case of the petitioner that it was approached by the respondent company through its Administrative Officer, Mr. Pramod Arora for renewal of expiring policies on terms and conditions to cover its Factory situated at 78, Kilo Mile Stone, Karhans Village, Main Gt Road, Samlakha, Panipat. The insurance policies since inception in 1991 are being renewed and the applicable premium were being paid regularly.

3. The petitioner availed/renewed Standard Fire and - Special Peril Policies bearing Policy No.(s)- 040700/11/13/11/00000194, 040700/l l/13/11/00000195 and 040700/11/13/1100000391, under which insurance cover was provided against fire, lightning, natural disasters respectively. The total amount ₹ 18.02 crore were under the policies of insurance cover. These insurance policies were availed on June 29, 2013 and October 09, 2013, respectively.

4. On September 25, 2013, the first fire (First Fire Incident) took place in the Factory of the petitioner, situated at 78, Kilo Mile Stone, Karhans Village, Main GT Road, Samalakha, Panipat, due to short circuit. As per the petitioner, it had suffered huge financial losses, crippling its business and bringing the entire business operations to a standstill. After the first fire incident, representatives of the Surveyor visited the factory of the petitioner and inspected the factory. Thereafter, on October 25, 2013, second fire took place in the factory of the petitioner. The incident of fire and the loss incurred thereof by the petitioner were reported to the respondent company, who appointed M/s Protocol Surveyors & Loss Assessors Pvt. Ltd. as the Surveyors and Assessors ('Surveyor', for short)

for both the claims of the petitioner.

5. The respondent company sent an e-mail to the petitioner with intimation that it had approved the claim for an amount of ₹ 2,81,44 413/-, on account of fire incident dated October 25, 2013 towards full and final settlement. With regard to the first fire incident the claim was settled for ₹2,20,36,840/-. It was the case of the respondent that the both the claims were accepted by the petitioner without any demur or protest, resulting in discharge of claims in respect of the incidents dated September 25, 2013 and October 25, 2013. Thereafter, on July 27, 2016 the petitioner herein, claimed fraud, coercion and undue influence.

6. Thereafter, the petitioner approached this Court in ***Arbitration Petition Nos. 104/105 of 2017,*** seeking appointment of Arbitrator to adjudicate the disputes with respect to the claims. This court vide order dated May 30, 2017, allowed the Petition and appointed a sole arbitrator, namely, (Retd.) Justice V.K.Shali.

7. The respondent company herein, filed Special Leave Petitions against the order dated May 30, 2017. The Supreme Court in ***United India Insurance Company Limited v. Antique Arts Exports Pvt Ltd., Civil Appeal Nos. 3284/2019 and 3285/2019, ('Antique Art Export' for short)*** vide a Common Judgment and Order dated March 28, 2019, allowed the appeals and held that, no arbitrable dispute subsists between the parties and set aside the order passed by this court appointing the Arbitrator. Aggrieved by the said Judgment and Order, the petitioner sought review of the same. The Review Petitions were dismissed by the Supreme Court in ***Antique Arts Exports Pvt. Ltd. v. United India Insurance Co. Ltd., Review Petition No(s). 1406/07 of 2019 ('Antique Arts Exports[2]'***, for short) vide common Order dated July 10, 2019.

8. It is stated the Judgment passed by the two Judge bench of the Supreme Court of India in ***Antique Art Export (supra)***, was overruled by the three Judge bench of the Supreme Court vide Judgment dated September 05, 2019 in ***M/s. Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman*** in ***Civil Appeal No. 7023 of 2019.***

9. In view of the law laid down by the three Judge bench of the Supreme Court in ***M/s. Mayavati Trading Pvt. Ltd. (supra)***, the petitioner approached this Court seeking benefit of law as laid down in the said Judgment again praying for the appointment of an Arbitrator.

10. Mr. Manish Kaushik, the learned counsel for the petitioner state that, despite being well aware about the genuineness of the claims, the appointed surveyor of the respondent company did not process the claims of the petitioner and kept delaying the same in violation of various legal precedents and IRDAI (Insurance Regulatory and Development Authority of India) Circulars and Regulations. He also stated that the respondent company further attempted to delay and willfully delay the processing of the claims by appointing an Investigator being, M/s.JSR Surveyors (P) Ltd. (hereinafter referred as the 'Investigator'), who did not visit the factory for the longest time. The said investigator acting through its Director, Mr. S.K. Agarwal, was appointed only after the second fire incident, which took place in the factory of the petitioner on October 25, 2013.

11. He stated that the petitioner has suffered major losses with respect to burning of raw materials being finished and semi-finished goods etc. and was in dire financial straits. He also stated that the petitioner requested the respondent company; its surveyor and investigator to release the interim payment vide numerous letters and correspondences. However,

there was no response to the same on the part of the respondent company.

12. He submitted that the petitioner vide its letter dated August 11, 2014, clarified every issue/query raised by the surveyor and the investigator along with all documents, records etc. Thereafter, the respondent company did not communicate to the petitioner about the status of the claims for over two and half years. He stated that, despite petitioner regularly requesting the respondent company for the Preliminary and Final Survey Reports, it was only provided to the petitioner on August 26, 2016. He also stated that the petitioner was forced into signing a discharge voucher by the respondent company by the use of unfair coercive bargaining power in their favor.

13. He submitted that the petitioner realized from the Final Survey Reports dated July 29, 2015, that the Surveyor had vide his Interim Report dated February 20, 2014 had recommended that an on-account payment of ₹ 1.65 crore be released to the petitioner. However for reasons best known to the respondent company, the advice of the surveyor was totally neglected. He stated that the respondent company withheld the Final Survey Report for more than a year, which is in clear violation of the IRDAI Regulations and Circulars.

14. He stated that, for the first fire claim a payment of ₹3, 46, 41,970/- and for the second fire claim, payment of ₹ 6,33,48,302/- were approved by the surveyor vide their office memo dated August 04, 2015. However, for the sole motive of minimizing the claim amount of the petitioner, the respondent company, belatedly appointed another Investigator and acted in collusion with the said Investigator.

15. He stated that, one of the main reasons behind being compelled into signing the discharge voucher was that the petitioner was suffering from

severe financial burden and the insurance claim was pending for settlement with the respondent company for a very long time. The handling of the claim of the petitioner clearly depicts mala-fides and unfairness on the part of the respondent company. He stated that petitioner was compelled, forced and coerced to pre-sign and submit a discharge voucher dated June 24, 2016 to the respondent company as a condition for release of money amounting to ₹ 2,20,36,840/- in lieu of settlement of claim for first fire that took place on September 25, 2013, against the total claim of ₹ 5,12,49,241/-. He stated that the petitioner was also compelled to pre-sign and submit a discharge voucher dated May 05, 2016 for the second fire that took place on October 25, 2013 to the respondent company as a condition for release of money amounting to the tune of ₹ 2,81,44,413/- in lieu of settlement of claim against the claim of ₹ 10,68,03,939/-.

16. He submitted that the petitioner vide its letter dated July 27, 2016 rescinded to the purported Discharge Voucher as illegal and void and the petitioner in the said letter, called upon the respondent company to pay the balance amounts in respect of the claims, but the letter was never replied to by the respondent company.

17. He contended, there could not have been any Accord and Satisfaction or consensus as, till that date the petitioner was not even supplied with the Survey Reports, Investigation Report. Even the basis and break up under different heads were supplied to the petitioner only on August 26, 2016. He stated that the purported Discharge Voucher does not reflect any accord or satisfaction of the claims of the petitioner. He also stated that the petitioner vide the said letter dated July 27, 2016, called upon the respondent to pay the balance amount of ₹2,92,12,401/- for the

first fire incident and balance amount of ₹7,86,59,526/- for the second fire incident with an interest at 18% per annum but the letter was never replied to by the respondent company.

18. The Petitioner thereafter served a letter dated September 09, 2016, upon the respondent company invoking the arbitration under clause 13 of the Insurance Policy. He stated that the respondent Company failed to agree to the appointment of an Arbitrator.

19. He submitted that, thereafter, the petitioner approached this court under Section 11(6) of the Act of 1996, seeking appointment of arbitrator to adjudicate the dispute with respect to the claim amounts between the parties. This court order dated May 30, 2017, appointed a Sole Arbitrator, namely, (Retd.) Justice V.K. Shali.

20. He stated that the respondent company therein filed a Special Leave Petitions challenging the order dated May 30, 2017 passed by this Court, wherein the Supreme Court vide a Common Judgment and Order dated March 28, 2019, in ***Antique Art Export (supra)***, took a view contrary to section 11 (6)(A), and consequently, the appeals filed by the respondent company were allowed holding that, no arbitrable dispute subsists between the parties and thereby set aside the Orders passed by the this court dated May 30, 2017.

21. He submitted that the petitioner thereafter filed a ***Review Petition No(s). 1406/07*** of ***2019*** before the Supreme Court, seeking review of common Judgment and Order dated March 28, 2019, passed in ***Antique Art Export (supra)***. The said Review Petitions were dismissed by the Supreme Court vide common Order dated July10, 2019.

22. He submitted that, a three judge bench of the Supreme Court in the matter titled ***M/s. Mayavati Trading Pvt Ltd (supra)*** considered the

correct interpretation of Section 11 (6)(A) and the correctness in ***Antique Art Export (supra)***. He stated that while dismissing ***M/s. Mayavati Trading Pvt Ltd (supra)***,the three Judge bench held as under:

> *"(7) Prior to Section 11 (6A), this Court in several judgments beginning with SBP & Co. vs. Patel Engineering Ltd. and Anr.(2005) 8 SCC 618 has held that at the stage of a Sectio11 11 (6)application being filed, the Court need not merely confine itself to the examination of the existence of an arbitration agreement but could also go into certain preliminary questions such as stale claims, accord a11d satisfaction having been reached etc."*
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> *XXXX XXXX XXXX*
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> *10) This being the position, it is clear that the law prior to the2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has take11 place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment as Section 11 (6A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in Para 48 & 59 ill the judgment Duro Felguera, S.A."*
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> *11) We, therefore, overrule the judgment in United India Insurance Company Limited (supra) as not having laid down the correct law but dismiss this appeal for the reason given in Para 3 above."*

23. He stated, that the two Judge bench of the Supreme Court in ***Antique Arts Export (supra)***, has been overruled by the three Judge bench of the Supreme Court in ***M/s. Mayavati Trading Pvt. Ltd. (supra),*** for not having laid down the correct position of law, i.e., in view of Section 11 (6) (A) of the Act of 1996. The Courts while considering an application for appointment of arbitrator under Section 11, are confined to the examination of the existence of an arbitration agreement. He further stated that the existence of arbitration agreement/clause is admitted by the parties

in the present matter and as per the interpretation rendered in ***M/s. Mayavati Trading Co. Pvt. Ltd. (supra),*** the issue of appointment of an arbitrator to adjudicate disputes between the parties is still subsisting. The benefit of the law as laid down in the matter ***M/s. Mayavati Trading Pvt. Ltd. (supra)*** need to be given to the petitioner**.**

24. He submitted that the petitioner is entitled to invoke Arbitration as per clause 13 of the Insurance Policy. He argued that the signing of the Discharge Voucher by the petitioner was done because its rights are protected under Clause 13 of the Insurance Policy and the Parliament has mandated that wherever possible, cases should be referred to arbitration for early disposal.

25. Furthermore, he submitted that the adjudication by arbitral tribunal is a continuing right, and commences from Section 21 notice under the Act of 1996 and continue till valid and binding award is rendered. The right of appointment of arbitrator and adjudication by Arbitral Tribunal continues on termination of mandate such as under Section 14 or Section 15 and even after setting aside of an award under section 34, when the parties are remanded back to Arbitral Tribunal.

26. He stated that, it has been settled by the Supreme Court that a Full and Final Settlement does not vitiate the arbitration clause and thus, the petitioner is completely entitled to arbitration. In support, he has placed reliance upon ***Damodar Valley Corporation v. K.K. Kar ., AIR 1974 SC 158***, wherein the Supreme Court held that the questions of unilateral repudiation of the rights and obligations under the contract or of a full and final settlement of the contract relate to the performance or discharge of the contract. Far from putting an end to the arbitration clause, they fall within the purview of it. Repudiation by one party alone does not

terminate the contract. It takes two to end it, and hence it follows that as the contract subsists for the determination of the rights and obligations of the parties, the arbitration clause also survives.

27. He has also relied in the matter of ***Union of India (UOI) v. Kishorilal Gupta and Bros., AIR 1959 SC 1362***, wherein the Supreme Court held that a dispute whether the obligations under a contract have been discharged by an accord and satisfaction is no less a dispute regarding the obligations under the contract. Such a dispute has to be settled by arbitration if it is within the scope of arbitration clause and either party wants that to be done.

28. Furthermore, Mr. Kaushik stated that the procedure/judicial process under Section 11 for appointment of arbitrator are not justiciable, particularly in view of Section 11(6)(A), even though the exercise of power is judicial. The forum under Section 11(6) is not a Court, and thus there is no decision on merits while appointing an arbitrator. Since there is no decision on merits, *res judicata* would not apply, furthermore, there can be no *res judicata* on erroneous decision and inherent lack of jurisdiction.

29. He stated that the Section 11 applications are not said to be made to a 'Court' as contemplated under Arbitration and Conciliation Act, 1996, in support of his statement he relied on judgments as under:-

1. ***Rodemadan India Limited v. International Trade Expo Center Limited; AIR 2006 SC 3456;***
2. ***State of West Bengal v. Associated Contractors; AIR 2015 SC 260;***
3. ***Debdas Routh and Ors. v. Hinduja Leyland Finance Limited and Ors.; 2018 4 CALLT57(HC);***
4. ***Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee; Civil Appeal No. 2394-95/2022;***

30. Furthermore, he placed his reliance on ***Khazana Projects & Industries Pvt. Ltd. v. Indian Oil Corporation Limited., FMA No. 2748/2016;*** wherein it was held that a clear proposition of law is that section 42 is not attracted by virtue of the appellant having filed an application under section 11 of the Act before the Delhi High Court since an application under section 11 is not made to a "court" within the definition of section 2(1)(e).

31. He had also placed his reliance on ***Afcons Infrastructure Limited v. Konkan Railway Corporation Limited, Arb. P.No. 10/2019;*** wherein it was held that the Supreme Court or High Court or its delegate while exercising power under section 11 of the Act cannot be equated with the "Court" contemplated by section 42 of the Act, 1996 which has a definite and exhaustive meaning under section 2(1)(e) of the Act, 1996.

32. He stated that the principles of *res-judicata* as envisaged under Section 11, Civil Procedure Code of 1908, can have no applicability in the present case, as under the proceedings of Section 11 (6)(A), there is no final adjudication or determination nor hearing or disposal of the matter on merits. He placed reliance on ***Canara Bank v NG Subbaraya Setty&Anr., Civil Appeal No.4233/2018,*** wherein it is stated there are certain notable exceptions to the application of the doctrine. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is illegal, also cannot be allowed to operate as res judicata."

33. He has also placed reliance on ***Municipal Corporation of Delhi v. Gurnam Kaur, AIR 1989 SC 38;*** wherein it was held that, if a matter is decided was without argument, without reference to the crucial words of

the Rule and without any citation of authority, it is not binding and would not be followed.

34. He stated that the overruled decision does not enjoy the force of law under Article141 of the Constitution of India; rather the latest and larger bench decision of Supreme Court enjoys the force of law under Article 141 of the Constitution of India as held in ***Ramdas Bhikaji Chaudhari v. Sadanand and Ors., AIR 1980 SC 126***, as under;-

> *"5.....It is well settled that whenever a previous decision is over-ruled by a larger bench the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been over-ruled, and the court would have to decide the case according to law laid down by the latest decision of this Court and not by the decision which has been expressly overruled."*

35. He also stated that a wrong interpretation of law or incorrect position of law cannot prejudice any person and the petitioner cannot be prejudiced today for a continuing cause of action by an interpretation which has been overruled retrospectively. In support of his submission he has relied on ***Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd. (2008)14 SCC 171,*** wherein the Supreme Court held the overruling of a previous decision is a declaration that the supposed rule never was law.

36. He stated that, when the court lacks inherent jurisdiction in passing an order, an order passed by such court would be *non est* in law and *void-ab initio*. A defect of jurisdiction goes to the root of the matter and strikes at the very authority of the court to make an order. An order passed by a court having no jurisdiction is a nullity in law. It is further stated that when an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppels, waiver and *res-judicata*.

37. He has relied upon in ***Dwarka Prasad Agarwal (D) By LR's and Anr. v. BD Agarwal and Ors. AIR 2003 SC 2686,*** it was held by the Supreme Court of India that, it is well-settled that an order passed by a court without jurisdiction is a nullity and any order passed or action taken pursuant thereto or in furtherance thereof would also be nullities. He also has relied on ***Allahabad Development Authority v. Nasiruzzaman and Ors., (1996) 6 SCC 424.,*** wherein it is held the previous decision which was found to be erroneous on its face, it does not operate a *res judicata.* In this regard he has relied on the judgment of the Supreme Court in ***Ashok Leyland v. State of Tamil Nadu and Ors., AIR 2004 SC 2836.,*** wherein it was held that the principle of *res judicata* is a procedural provision and a jurisdictional question if wrongly decided would not attract the principle of *res judicata.* When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, *estoppel,* waiver or *res judicata*.

38. He has also relied on the following judgments; ***Ramnik Vallabhdas Madhvaniand Ors. v. Taraben Pravinlal Madhvani., (2004) 1 SCC 497, Mathura Prasad Bajoo Jaiswal and Ors. v. Dossibai NB Jeejeebhoy., AIR 1971 SC 2355; Balvant N Viswamitra and Ors. v. Yadav Sadashiv Mule (Dead) through Lrs and Ors., (2004) 8 SCC 706; Kishore v. State of Punjab., (1995) 6 SCC 614.***

39. He stated that the question, whether full and final settlement has taken place or not, is a question that can be left to the arbitrator to decide. He has relied upon ***Bharat Heavy Electricals Ltd. v. Amar Nath Bhan Prakash [1982 GLH 390]*** and ***Vidya Drolia and Ors. v. Durga Trading Corporation and Ors., (2021) 2 SCC 1.,*** wherein, the Supreme Court held that:-

> *"A claim for arbitration cannot be rejected merely or solely on the ground that the settlement agreement or discharge voucher had been executed if its validity is disputed". .*

40. He has also relied on the judgment of the Supreme Court in the case of ***Union of India v. Pradeep Vinod Constructions Company and Ors.; 2020 (1)ALT 156.,*** wherein it was held that the plea of No Claim Certificate is an issue for the arbitrator to consider by looking at the claim of the Respondent(s) and the stand of the Appellant railways. This contention raised by the parties was left open to be raised before the arbitrator.

41. In support of his argument, Mr. Kaushik has also relied on the judgment of the Supreme Court in the case of ***The Oriental Insurance Company Limited and Ors. v. Dicitex Furnishing Limited.,(2020) 4 SCC 621***; for similar proposition.

42. Mr. Kaushik stated that the practice of furnishing Discharge Voucher before releasing the claim amount on the part of the Insurance Company is unfair and unethical; he stated that the complete abuse of the coercive bargaining power subsists with the respondent Insurance Company. He has relied upon the judgments of ***Worldfa Exports Pvt. Ltd. v. United India Insurance Co. Ltd., 2016 (1) ARBLR 110 (Delhi), United India Insurance v. Ajmer Singh Cotton & General Mills and Ors. AIR 1999 SC 3027, United India Insurance Company Limited and Ors. v. Manubhai Dharmasinhbhai Gajera and Ors. AIR 2009 SC 461***, C***entral Inland Water Transport Corporation Limited and Ors. v. Brojo Nath Ganguly and Ors. AIR 1986 SC 1571, United India Insurance Co. Ltd. v. Pushpalaya Printers., AIR 2004 SC 1700.***

43. He has submitted there are various judgments of the Supreme Court,

this Court and the National Consumer Disputes Redressal Commission, wherein, the courts have taken judicial notice of the plea of coercion and fraud practiced by the Insurance Companies to compel the insured to give discharge vouchers. He stated that the Courts and Commission have also directed the IRDAI to make regulations in this regard as well as discouraged the Insurance Companies from continuance of such arbitrary and unlawful practice. He has placed reliance the following judgments;- ***Oriental Insurance Co. Ltd. v. Government Tool Room and Training Centre, (2008) CPJ 267 (NC); National Insurance Company Limited v. Abhoy Shankar Tewari, Revision Petition No. 555 of 2015.***

44. He stated that the respondent company being a "State" under the definition of Article 12, is bound to act in a fair and reasonable manner but the same was not followed by the respondent company as they got the Discharge Voucher signed from the petitioner under fraud, coercion, misrepresentation and use of coercive bargaining power. He stated that the respondent company acted in deviation of the Principles of reasonableness and fairness. He has placed reliance on ***United India Insurance Company v. Narinder Mohan Arya, (1994) 107 PLR 244***, wherein, the Supreme Court and the courts below, held the respondent / Insurance Company to be a "State" under the meaning of Article 12 of the Constitution of India.

45. He has relied on ***Kumari Shrilekha Vidyarthi and Ors. v. State of U.P. and Ors., AIR 1991 SC 537,*** whereby the Supreme Court held that the requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be

in public interest.

46. He stated that, fraud was committed against the petitioner by the respondent company. It is only one Surveyor appointed for both the claims namely, M/s Protocol Surveyors & Loss Assessors Pvt. Ltd., and thus, there being a singular assessor in both the fire claims and the Surveyor had approved payment. The same was recommended by DO-7 to Regional Office vide their office memo dated August 04, 2015. He stated that the assessment of Surveyors would have also been much higher but the Investigator tried to confuse and delay the claim process by various unhealthy practices including blaming the Surveyor. The Investigator was working with a negative frame of mind right from the very beginning with a sole objective of either to reject the claim or reduce it to the absolute minimum. He also stated that the petitioner was clearly eligible for the payment as recommended and passed by the appointed Surveyor but the respondent company fraudulently in connivance with the Investigator reduced this amount to the absolute, as the petitioner was never provided with the basic details of claim process and amount.

47. He stated that, it is amply clear that the respondent company has disregarded the Surveyor's Findings regarding the loss assessment without assigning any cogent reason. He stated that the deviation from the Surveyor's report without assigning cogent reasons on behalf of the respondent company is completely perverse, illegal and against the law. In support of his contention he has relied upon ***National Insurance Company Limited v. Sri Chakravarthi Enterprises Limited, Revision Petition 3053 of 2007;*** and ***United India Insurance Company Limited v. Lt. Col. Randhawa Singh, Revision Petition No. 2767 of 2011.***

48. He also stated that on the question of fraud the Supreme Court in

N.N. Global Mercantile Private Limited v. Indo Unique Flame Limited and Ors., 2021 (1) ARBLR 533 (SC), held that the question of fraud is arbitrable and can be referred to an arbitrator for the purpose of adjudication. He has also placed reliance on ***Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties and Ors., AIR 2020 SC 4047***, wherein the Supreme Court held that merely because a particular transaction may have criminal overtones as well, does not mean that its subject matter becomes non-arbitrable.

49. He stated that no detail/documents were provided to the petitioner about the settlement of claims in spite of the petitioner's regular and repeated reminders. He stated that the Investigator's Reports are still not provided to the petitioner, which just throws light on the gravity and seriousness of the situation. The petitioner had also requested the respondent company to provide the basis of the settlement of claim but unfortunately, the same has still not been received by the Petitioner.

50. He submitted that the letter of subrogation was never given by the petitioner as well as no consent letter was ever given by the petitioner prior to the signing of discharge voucher on the dotted lines, as demanded by the respondent company. The Discharge Voucher furnished by the petitioner was under compelling and coercive circumstances.

51. He stated that no money has been paid by the respondent company for the raw materials. He stated that in the email dated May 05, 2016 and June 24, 2016, no claim amount is mentioned about raw materials whereas substantial amount of loss on the account of the fire was in lieu of raw material. He also stated that the respondent company deliberately removed it from the claim amount which amounts to an act of fraud.

52. He stated that the manufacturing unit of the petitioner cannot be

insured without insurance of raw materials, and that within 3 weeks time from release of payment of 1st claim (being 2 months after payment of 2nd claim), the petitioner raised protest vide letter dated July 27, 2016 for claiming the balance amount on account of deficient service and against the mala-fide intensions of the respondent company and rescinded the purported discharge vouchers as being illegal and void. He also states that till July 06, 2016, the petitioner was under the clutches of respondent company when they released the payment of 1st Claim of fire that took place on September 25, 2013, if the petitioner would have raised the protest before receiving of payment in his account, it could have been stopped by the respondent company. Therefore, the petitioner had to wait till the time payment was received in his account and then only, the petitioner could have raised the protest for claiming the balance claim amounts.

53. He submitted that the mala-fide intentions of respondent company are itself proved by the fact that they released the part payment of 2nd claim earlier to the part payment of 1st fire claim.

54. He submitted that the contest of the petitioner to the settlement by the respondent company was within 21 days of the settlement of first claim ,i.e., the first claim dated September 25, 2013, discharge voucher was signed on June 24, 2016 and payment was received on July 06, 2016, for the second claim dated October 25, 2013,discharge voucher was signed on May 05, 2016 and payment was released on May 13, 2016. Hence, the petitioner could only contest the payments of claim, post receipt of part payment of both the claims, till receipt of payment under both the claims, the process was in continuation and the contest before would have blocked even the compensation payment admitted to be payable by the respondent

Insurance Company.

55. He stated that as per Section 11 (6)(A) as inserted by the Arbitration and Conciliation (Amendment) Act, 2015, the power of the court has now been restricted only to examination of the existence of an arbitration agreement. He has relied on ***Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729,*** wherein the Supreme Court interpreted Section 11 (6) (A) to hold that the Courts are required to only look into one aspect being the *"existence of an arbitration agreement"*.

56. Mr. Kaushik also relied on ***Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited, AIR 2020 SC 979;*** wherein, it is held that the doctrine of *"Kompetenz-Kompetenz*", also referred to as *"Compètence-Compètence"*, or *"Compètence de la recognized"*, implies that the arbitral tribunal is empowered and has the competence to Rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.

57. He submitted that the three Judge bench of the Supreme Court in the matter titled ***M/s. Mayavati Trading Pvt. Ltd. (supra)*** had an occasion to consider the correct interpretation of Section11 (6) (A) and the correctness of the order dated March 28, 2019 in the matter. He stated that the law is well settled on the aspect that whenever a previous decision is overruled by a larger bench, the previous decision is completely wiped out and negated.

58. He submitted that the manner in which the claim of the Petitioner was handled is completely against the IRDAI (Protection of Policyholders

Interests) Regulations, 2017 and the established procedure of settling insurance claims. He also submitted that clause 15 of the IRDAI (Protection of Policyholders Interests) Regulations, 2017 highlights upon the procedure in which the claims are to be settled, however, the respondent company has acted in a manner being contrary to the established procedure of law.

59. He stated that the Legal Maxim *"Necessitates Non Habet Legem"* meaning thereby that "*Necessity Knows no Law*" squarely applies to the present case in hand and the Discharge Vouchers were issued by the respondent company in unfair use of its coercive bargaining power and that further such compelling circumstances were made out by the Respondent Insurance Company under which the Petitioner had no other option but to sign on the dotted lines. He has relied upon the ***Ambika Construction v. Union of India, (2006) 13 SCC 475*** and ***Chairman and MD, NTPC Limited v. Reshmi Constructions, (2004) 2 SCC 663,*** wherein the Supreme Court recognized the Legal Maxim "*Necessitates Non Habet Legem*" and applied the same.

60. Mr. Kaushik stated the prayer as made in the petition be granted and an Arbitrator be appointed for adjudication of disputes between the parties.

61. Mr. Amit Kumar Singh, the learned counsel for the respondent company stated that on June 24, 2016, the petitioner willingly accepted ₹ 2, 20, 36,840 in lieu of settlement of claim for fire that took place on September 25, 2013 and ₹2, 81, 44,413/- in lieu of the settlement of claim for the fire that took place in October 25, 2013.

62. He stated that on receipt, the petitioner on its own free will executed a discharge voucher on the said date itself and vide letter dated July 27,

2016, the petitioner lodged its protest against the execution of the discharge voucher and demanded balance amount of ₹2,92,12,401/- and ₹ 7,86,59,526/-.

63. He submitted in the earlier round of litigation, the Supreme Court allowed the appeals filed by the respondent company and concluded as under:-

> *"In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27th July 2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in the absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication In our considered view, the High Court has committed a manifest error in passing the impugned order and adopting a mechanical process in appointing the Arbitrator without any supportive evidence on record to prima facie substantiate that an arbitral dispute subsisted under the agreement which needed to be referred to the arbitrator for adjudication."*

64. He stated that mere over-ruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. He also stated that with the dismissal of the ***Review Petition***, the inter-se dispute between the parties has attained finality on July 10, 2019.

65. He has placed reliance on the Judgment of the Supreme Court in the case of ***Neelima Srivastava v. State of Uttar Pradesh and Ors., 2021 SCC OnLine SC 610,*** wherein the Supreme Court held as under;-

> *"30. It becomes absolutely clear from the above clarification that earlier decisions running counter to the principles settled in the decision of Umadevi (3) will not be treated as precedents. It cannot mean that the judgment of a competent Court delivered prior to the decision in Umadevi (3) and which has attained finality and is binding inter se between the parties need not be implemented. Mere over-ruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between over-ruling a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognized by law. Mereover-ruling of the principles by a subsequent judgment will not dilute the binding effect of the decision on inter- parties.*"

66. He submitted that the present petitions are filed 3 years after the dismissal of the review petitions are clearly as an afterthought and an abuse of the process of law and pleads for dismissal of the petition with costs.

ANALYSIS

67. Having heard the learned counsel for the parties and perused the record, the initial issue which arises for consideration is whether the present petitions shall be maintainable in view of the fact that the petitioner had already filed petitions seeking appointment of Arbitrator, which though allowed by this Court vide order dated May 30, 2017 but on a challenge by the respondent herein, before the Supreme Court by way of Special Leave Petitions (which were converted into Civil Appeals being ***CA No. 3284/2019*** and ***3285/2019,*** namely, ***Antique Art Export(supra))*** have been allowed, vide a common judgment and order dated March 28, 2019, wherein it was held that, no arbitrable dispute subsists between the parties, resulting in the Supreme Court setting aside the order of this Court

appointing the Arbitrator. Even the Review Petitions filed by the petitioner herein seeking review of common judgment and order of the Supreme Court dated March 28, 2019, were dismissed by the Supreme Court on July 10, 2019.

68. The submission of Mr. Kaushik was, in view of the fact that the judgment in ***Antique Art Export (supra)*** having been overruled in ***M/s. Mayavati Trading Pvt. Ltd. (supra)***, the doctrine of *res judicata* is not applicable. According to him, as per the judgment relied upon by him, the judgment of the Supreme Court in ***Antique Art Export (supra)*** is erroneous / without jurisdiction, in view of Section 11(6)(A) of the Act of 1996, and the same is not binding even between the parties *inter-se.*

69. I am not impressed by the said submission. It is true that the judgment in the case of ***Antique Art Export (supra)*** has been overruled by three Judge Bench of Supreme Court in the case of ***M/s. Mayavati Trading Pvt. Ltd. (supra)*** but the fact remains, the dispute / issue *inter-se* parties with regard to the appointment of Arbitrator has attained finality with the decision of the Supreme Court in ***Antique Art Export (supra),*** hence, the present petitions shall be barred by principle of *res judicata*.

70. This I say so, even the proceedings under Section 11 of the Act of 1996, shall be governed by the principle of *res judicata*, in view of the judgment of the Supreme Court in the case of ***Anil, S/o Jagannath Rana & Ors. v. Rajendra. S/o Radhakrishan Rana and Ors., (2015) 2 SCC 583***, wherein in paragraphs 13, 15 and 16, the Supreme Court held as under:

> *"13. In Satyadhyan Ghosal v. Deorajin Debi [AIR 1960 SC 941], this principle was discussed in detail and it has been settled as follows. To quote: (AIR pp. 943-44, paras 7-8)*

> *"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter—whether on a question of fact or a question of law—has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.*
>
> *8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.*
>
> *xxxx xxxx xxxx*

15. The principles as discussed above on res judicata have been consistently followed by this Court. And the recent judgments in that regard are in Subramanian Swamy v. State of T.N and in Surjit Singh v. Gurwant Kaur. <u>Thus, once the judicial authority takes a decision not to refer the parties to arbitration, and the said decision having become final, thereafter Section 11(6) route before the Chief Justice is not available to either party.</u>

16. <u>With great respect, the Designated Judge has gone wholly wrong in passing the order under Section 11 of the Act when the civil court is in seisin of the dispute and where arbitration has already been declined by the said court</u>."

71. The Supreme Court in the case of ***Neelima Srivastava (supra)***, has reiterated the principle in identical fact situation, wherein, in Paragraphs 34 to 36, it held as under:-

> *"34. In Rupa Ashok Hurra v. Ashok Hurra, while dealing with an identical issue this Court held that reconsideration of the judgment of this Court which has attained finality is not normally permissible. The decision upon a question of law rendered by this Court was conclusive and would bind the Court in subsequent cases. The Court cannot sit in appeal against its own judgment.*
> *35. In Union of India v. Major S.P. Sharma, a three-judge bench of this Court has held as under:—*
>
> > *"A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning."*
>
> *36. Thus, it is very well settled that it is not permissible for the parties to re-open the concluded judgments of the Court as the same may not only tantamount to an abuse of the process of the Court but would have far reaching adverse effect on the administration of justice."*
>
> *(emphasis supplied)*

72. In this regard, I may also reproduce the Judgment of the Supreme Court in the case of ***Union of India and Ors. v. Sarawati Marble and Granite Industries Pvt. Ltd, (2020) 20 SCC 810,*** wherein it is held as under:

> *"5. A neat submission which has been made by Mr A.K. Sanghi, learned Senior Counsel appearing for the Union of India, is that no such writ petition to claim refund of the excise duty, penalty and interest was maintainable when the proceedings in respect of the respondents had attained finality and amount recovered. Merely because this Court in some other judgment, at a subsequent date, took a different view and settled the position in law, is not*

> *a valid ground available to the respondents to approach the High Court under Article 226 of the Constitution of India and claim such a relief.*
> *6. The aforesaid submission is valid and justified in law. Insofar as the respondents are concerned, the duty was paid by them after proper adjudication and a particular view was taken which was upheld by the Tribunal as well. As mentioned above, no further appeals were brought by the respondents and, therefore, such proceedings had attained finality. The order of refund of this amount, merely because this Court took a different view thereafter in some other case, would not be permissible. Thus, insofar as the direction contained in the impugned judgments to refund the amount of duty, interest and penalty is concerned, the same is set aside. However, once this Court has settled the position of law holding that the aforesaid process would not amount to manufacture, from the date of the judgment of this Court, the Excise Department is not entitled to recover any such excise duty from the respondents."*
>
> *(emphasis supplied)*

73. In support of the submissions on the maintainability of the petitions, by stating the principle of *res-judicata* is not applicable, Mr. Kaushik has relied upon following judgments for the proposition, which I reproduce in a tabular form:

S. No.	Judgment	Proposition
1.	***Rodemadan India Limited v. International Trade Expo Center Limited, AIR 2006 SC 3456;*** ***State of West Bengal v. Associated Contractors, AIR 2015 SC 260;***	1) The applications under Section 11 are not made to the court as contemplated under the Act of 1996. 2) Section 42 is not attracted to applications filed under Section 11 of the Act. Since an application under Section 11 is not made to a "court"

	Debdas Routh and Ors. v. Hinduja Leyland Finance Limited and Ors., 2018 4 CALLT57(HC); Ravi Ranjan Developers Pvt. Ltd. v. Aditya Kumar Chatterjee, Civil Appeal No. 2394-95/2022; Khazana Projects & Industries Pvt. Ltd. v. Indian Oil Corporation Limited, FMA No. 2748/2016 ***Afcons Infrastructure Limited v. Konkan Railway Corporation Limited, Arb. P. No. 10/2019***	within the definition of section 2(1)(e).
2.	***Canara Bank v. NG Subbaraya Setty & Anr., Civil Appeal No. 4233/2018.***	There are certain notable exceptions to the application of the *doctrine* of *res judicata*. One well known exception is that the doctrine cannot impart finality to an erroneous decision on the jurisdiction of a Court. Likewise, an erroneous judgment on a question of law, which sanctions something that is llegal, also cannot be allowed to operate as res judicata".
3.	***Municipal Corporation of Delhi v. Gurnam Kaur , AIR 1989 SC 38***	A case decided "without argument", "without referenceto the crucial words of the Rule" and "without any

		citation of authority", is not binding and would not be followed".
4.	***Ramdas Bhikaji Chaudhari v. Sadanand and Ors., AIR 1980 SC 126.***	Whenever a previous decision is over-ruled by a larger bench the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been over-ruled, and the court would have to decide the case according to law laid down by the latest decision of this Court and not by the decision which has been expressly overruled".
5.	***In Assistant Commissioner, Income Tax, Rajkot v. Saurashtra Kutch Stock Exchange Ltd., (2008) 14 SCC 171***	If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.
6.	***Dwarka Prasad Agarwal (D) By LR's and Anr. v. BD Agarwal and Ors. AIR 2003 SC 2686.***	It is now well-settled that an order passed by a court without jurisdiction is a nullity. Any order passed or action taken pursuant thereto or in furtherance thereof would also be nullity.
7.	***Allahabad Development Authority v.***	It is seen that when the Legislature has directed to act in a particular

	Nasiruzzaman and Ors., (1996) 6 SCC 424.	manner and the failure to act results in a consequence, the question is, whether the previous order operates as res judicata or estoppel as against the persons in dispute. When the previous decision was found to be erroneous on its face, the judgment does not operate as *res judicata*.
8.	***Ashok Leyland v. State of Tamil Nadu and Ors., AIR 2004 SC 2836.***	The principle of res judicata is a procedural provision. A jurisdictional question if wrongly decided would not attract the principle of res judicata. When an order is passed without jurisdiction, the same becomes a nullity. When an order is a nullity, it cannot be supported by invoking the procedural principles like, estoppel, waiver or res judicata".
9.	***Ramnik Vallabhdas Madhvani and Ors. v. Taraben Pravinlal Madhvani., (2004) 1 SCC 497.***	Principles of Res-Judicata is a procedural provision. The same has no application where there is inherent lack of jurisdiction". ***Mathura Prasad Bajoo Jaiswal and Ors. Vs Dossibai NB Jeejeebhoy [AIR 1971 SC 2355; Para 12] & Balvant N Viswamitra and Ors. Vs Yadav Sadashiv Mule (Dead) through Lrs and Ors. [2004 8 SCC 706; Para 9]. Nand Kishore Vs State of Punjab; [1995 6 SCC 614].***
10.	***Canara Bank v. NG Subbaraya Setty & Anr.,***	(1) The general rule is that all issues that arise directly and substantially in a former suit or proceeding between

	Civil Appeal No. 4233/2018.	the same parties are res judicata in a subsequent suit or proceeding between the same parties. These would include issues of fact, mixed questions of fact and law, and issues of law. (2) To this general proposition of law, there are certain exceptions when it comes to issues of law: (i) Where an issue of law decided between the same parties in a former suit or proceeding relates to the jurisdiction of the Court, an erroneous decision in the former suit or proceeding is not res-judicata in a subsequent suit or proceeding between the same parties, even where the issue raised in the second suit or proceeding is directly and substantially the same as that raised in the former suit or proceeding. This follows from a reading of Section 11 of the Code of Civil Procedure itself, for the Court which decides the suit has to be a Court competent to try such suit. When read with Explanation (I) to Section 11, it is obvious that both the former as well as the subsequent suit need to be decided in Courts competent to try such suits, for the "former suit" can be a suit instituted after the first suit, but which has been decided prior to the suit which was instituted earlier.

74. I have considered the above judgments relied upon by Mr. Kaushik.

75. In so far as his plea that Section 11 petition is not made to the *'Court'* by relying upon the judgment of the Supreme Court in the case of ***Rodemadan India Limited (supra)*** is concerned, the same is a misplaced argument. It is true that a petition under Section 11(6) shall lie before the High Court or the Supreme Court and are not *"Court"* within the meaning of Section 2(1)(e) but the exercise of the power under Section 11 (6) by the High Court or Supreme Court is a judicial function ***(Ref: SBP and Co. v. Patel Engg. Ltd. 2005 (8) SCC 618)***.

76. So it follows, the High Court while exercising judicial function under Section 11(6) can determine the issue of maintainability of a petition on any ground including on territorial jurisdiction / *res judicata* etc., and the same is clear from the judgment of ***Anil, S/o Jagannath Rana & Ors. (supra)***, that the principle of *res judicata* shall be applicable to a petition under Section 11. Otherwise, it would mean, despite a petition under Section 11 (6) not maintainable, like, on the ground that the High Court lacks the territorial jurisdiction as the seat of arbitration is elsewhere; the petition needs to be entertained. Such cannot be the position in law. This Court can, if a petition is not maintainable, shall be within its right to dismiss the petition at the threshold.

77. The plea of Mr. Kaushik that, while appointing an Arbitrator, there is no decision on merits and as such, *res-judicata* shall not be applicable, is also without merit, inasmuch as the proceedings in ***Antique Art Export (supra)***, arose from a petition under Section 11 of the Act filed before this Court. The Supreme Court by a detailed judgment by holding that no arbitrable dispute subsists between the parties, has set aside the order of

this Court appointing the Arbitrator. Such a finding is binding between the parties and any subsequent litigation shall be barred by principle of *res judicata*. Accordingly, these petitions need to be dismissed at the threshold.

78. Similarly, the plea of Mr. Kaushik that, Section 42 is not attracted to a petition under Section 11 of the Act as High Court is not a *'Court'* within the meaning of Section 2(1)(e) of the Act is concerned, no doubt the High Court while exercising power under Section 11(6) of the Act is not a *'Court'* as defined under Section 2(1)(e) of the Act and Section 42 is not attracted, but for the reason already stated above, this Court while exercising its jurisdiction under Section 11 can look into the issue of maintainability of an application before this court on any ground including on the principle *of res judicata*.

79. In so far as the judgments relied upon by Mr. Kaushik on the proposition (1) *res judicata* shall not be applicable to an erroneous decision; (2) the case decided without argument, without reference to the crucial words of Rule and without any citation or authority is not binding to be followed; (3) whenever a previous decision is overruled by a larger bench, the previous decision is completely wiped out and Article 141 will have no application to the decision which has already been overruled and the Court has to decide the case according to law laid down by the latest decisio0n; (4) if a subsequent decision alters the earlier one, it does not make new law, it only discovers the principle of correct principle law which has to be applied retrospectively; (5) it is settled law that an order passed by a Court without jurisdiction is a nullity; (6) a jurisdictional question if wrongly decided, would not attract the principle of *res judicata* are concerned, the same are misplaced in the facts of this case and cannot

be the grounds to open a settled issue.

80. There is no contest to the fact that the petitioner itself had filed earlier petitions before this Court for appointment of arbitrator. The Court was competent to decide the same, and infact appointed an Arbitrator. The appeals were filed under Article 136 of the Constitution of India and as such were maintainable before the Supreme Court.

81. The Supreme Court passed a detailed Judgment on March 28, 2019. The Supreme Court in the said Judgment considered the provisions of 11(6)(A) of the Act of 1996, and held that the dispute raised are not arbitrable and as such set aside the judgment of this Court appointing the learned Arbitrator. It is on an interpretation of Section 11 (6)(A), the Supreme Court in ***M/s. Mayavati Trading Co. (supra)*** had overruled the judgment in ***Antique Art Export (supra),*** by holding that Section 11(6)(A) of the Act is confined to the examination of the existence of an arbitration agreement as the issue of accord and satisfaction has been overruled legislatively. Suffice to state, the overruling of the Judgment was on the ground that, ***Antique Art Export (supra)*** does not lay down the correct law. The Supreme Court while overruling ***Antique Art Export (supra)*** has laid down the correct law. It was not the conclusion of the Court that the Judgment in ***Antique Art Export (supra)*** is a nullity. Not being a nullity, the Judgment in the case of ***Antique Art Export (supra)*** is binding between the parties herein.

82. I may state here, the judgment of ***M/s. Mayavati Trading Co. (supra)*** had also been considered by the Supreme Court, in its subsequent judgments more specifically in ***Bharat Sanchar Nigam Ltd. & Anr. v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738; Vidya Drolia (supra)*** and ***Indian Oil Corpn. Ltd. v. NCC Ltd., (2023) 2 SCC 539***. In

Bharat Sanchar Nigam Ltd. & Anr. (supra), the Supreme Court has held as under:

> *"36. In a recent judgment delivered by a three-judge bench in Vidya Drolia v. Durga Trading Corporation, on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes." The prima facie review at the reference stage is to cut the deadwood, where dismissal is bare faced 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 that the subject matter is not arbitrable, that reference may be refused.*
>
> *xxxx xxxx xxxx*
>
> *While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Para 148 of the judgment read as follows: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1: (2021) 1 SCC (Civ) 549], SCC p. 119)*

83. In ***Vidya Drolia (supra)***, the Supreme Court has held as under:-

> *"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such*

interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law."

xxx xxx xxx

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

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."

(emphasis supplied)

84. In ***Indian Oil Corpn. Ltd.(supra),*** the Supreme Court held as under:-

> ***"73.*** *In the recent decision of this Court in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. in which this Court also had an occasion to consider Section 11(6-A) of the Arbitration Act and ultimately has observed, after referring to and considering the decision of the three-Judge Bench of this Court in Vidya Drolia that the jurisdiction of the Court under Section 11 of the Arbitration Act is primarily to find out whether there existed a written agreement between the parties for resolution of the dispute and whether the aggrieved party has made out a prima facie arguable case, it is further observed that limited jurisdiction, however, does not denude the Court of its judicial function to look beyond the bare existence of an arbitration clause to cut the deadwood. In the said decision, this Court had taken note of the observations made in Vidya Drolia that with a view to prevent wastage of public and private resources, the Court may conduct "prima facie review" at the stage of reference to weed out any frivolous or vexatious claims."*

(emphasis supplied)

85. The submission of Mr. Kaushik was that the Supreme Court in ***Antique Arts Export (supra)***, should have only considered the existence of arbitration agreement and should not have gone into accord and satisfaction, is a misconceived submission. This submission of Mr. Kaushik cannot be a ground to re-open an issue which has already stood settled between the parties.

86. In view of my above discussion in the facts of this case, this Court is of the view that the present petitions filed by the petitioner are not maintainable as *inter se* parties, the issue of appointment of an arbitrator has attained finality with the orders passed by the Supreme Court in ***Antique Art Export (supra)*** and ***Antique Art Export [2] (supra).*** The petitions are liable to be dismissed without going into other submissions and Judgments made and relied upon by Mr. Kaushik. The petitions are dismissed. No costs.

V. KAMESWAR RAO, J

FEBRUARY 22, 2023*/aky/ds*

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