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

Reserved on: 18.07.2023
Date of decision: 08.08.2023

\+ **CS(OS) 371/2017 & I.As. 9259/2017, 9261/2017, 9262/2017, 9263/2017, 13079/2017, 13943/2018**

MRS VINNU GOEL ..... Plaintiff
Through: Ms.Kanika Agnihotri, Mr.Rohan Anand, Mr.Shaurya Rohit, Advs.

versus

MR SATISH GOEL & ORS ..... Defendants
Through: Mr.Gurmehar S.Sistani, Adv. for D-1 & 7.
Mr.Ajay Verma, Sr. Adv. with Mr.Ishaan Verma, Ms.Diviani K.Verma, Mr.Armaan Verma, Advs. for D-3 to 6.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

I.A. 11717/2017

1. The present application has been filed by the defendant nos.3 to 6 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying that the parties to the present suit be referred to arbitration, in view of the Arbitration Agreement contained in the Memorandum of Understanding dated 12.11.2014 (in short the 'MoU') executed between the parties.

AVERMENTS IN THE PLAINT:

2. The present suit has been filed by the plaintiff, who is the wife of the defendant no.1 and the mother of the defendant no.2 and

defendant no. 8, claiming therein that the plaintiff along with the defendants are the joint owner of the following properties:-

S.No.	Property Name	Ownership of Mrs. Vinnu Goel
1.	Flat at 803, 58, Sahyog Building, Nehru Place, New Delhi	50%
2.	Plot No. 154, Neb Valley, Neb Sarai, New Delhi, along with house constructed thereupon	25%
3.	Millennium Plaza 204, Village Sukhrouli, Gurgaon	50%
4.	Essel Dhoot Projects Time Tower Flat Office, 312, Time Tower, MG road, Gurgaon	25%
5.	Land and Building at 9, Chanchini Colony, Dhaiya, Dhanbad	25.25%
6.	Goel Farms, Village Harchandpur, Nunaira, Gurgaon	33% (approx)

3. In paragraph 2 of the plaint, the plaintiff sets out the share of the defendants, whosoever is a joint owner with her, in each of the above properties.

4. The plaintiff further states that she owns the following properties in her individual capacity:-

i) Vipul Ltd (Sohna) NPNL Land;

ii) Basera Developers, Office Premises, Dhanbad

5. She further states that with respect to the properties jointly owned by her and the other defendants, she has acquired her share individually and the same is, therefore, self-acquired in her name from

her own funds and she alone has a right, title or interest in such share of the properties.

6. She further states that the defendant no.3, who is the brother of defendant no.1 and her brother-in-law, has fraudulently attempted to divide the assets, properties, jewellery and all holdings of the family without the consent of the plaintiff and the defendant no.1. She submits that while making such an attempt, the properties belonging exclusively to the plaintiff have also been sought to be divided without her consent.

7. She states that at the substratum of the fraudulent attempt of the defendant no.3 is a purported MoU dated 12.11.2014, where-under the defendant no.3 is claiming that all the defendants have agreed to give a share in their own properties to the others who are parties to the said MoU. She denies agreeing to give any of her shares in any of the properties, that are the subject matter of the present suit or those which stand exclusively in her own name, whether held alone or jointly by the plaintiff, in whole or in part, to any of the defendants.

8. She states that the fact of the MoU was not known to her and came to her attention only when sometime in the middle of May 2017, the defendant nos.1 and 2 got into an argument. It was then that she became aware for the first time that there was a Court case that had been instituted by the defendant no.3 against the defendant no.1 and that there was an alleged MoU on the basis of which all the properties of the family, including those that had been self-acquired by the plaintiff herein and are held exclusively or jointly by her, had been allegedly divided between the defendant no.1 and defendant no.3. She

states that the fraudulent MoU seeks to divide the subject properties as if the defendant nos.3 to 6 were the owners thereof. She further states that she is not a party to the said MoU and has at no point in time ever consented to the division of her self-acquired properties. She states that she has not permitted any of the defendants to deal with or dispose of or partition any of the properties owned by her individually or jointly.

9. She states that she vested immense trust in all the members of her family, not just on her husband and children, but also on the defendant no. 3 and his son defendant no.6, who used to occasionally sign on her behalf. She states that the relationship between the defendant nos.1 and 2, that is, her husband and her son has also deteriorated over a period of time and it is only during one of their arguments on 16-17th May, 2017, that the defendant no.1 informed the plaintiff that the defendant no.3 had filed a case before this Court against the defendant no.1, thereby seeking an appointment of an Arbitrator to enable the enforcement of a fraudulent MoU. She was informed that the MoU divided all the properties of the family members, including those that were individually held by the members such as the plaintiff herein. The plaintiff thereafter sought her impleadment in the said Arbitration Petition bearing ARB.P. No.683/2015.

10. She states the following with respect to the MoU:-

> *"15. The deceitful attempt initiated at the instance of Defendant No 3 is at its gravest when the following facts are considered:-*
> *(a) the fraudulent MOU seek to divide the properties of the Plaintiff, but those that belong to the daughter of the Plaintiff -*

Praneeta. It is pertinent to mention at this point that Praneeta lives with her husband in United Kingdom. She was not even present in India, when the purported MOU is stated to have been executed. Therefore, there cannot be any question of her consenting to the said division;

(b) the Plaintiff has now been informed that it has been claimed that the said MOU was executed in four originals at the same time. However, during a hearing, in Arbitration Petition No. 683/2015, two unsigned copies of the said MOU were produced in court. It may be necessary to note that while the Plaintiff has not seen the originals of the MOU that the Defendants No 3 seeks to rely on, the fact that there are two unsigned originals available with the Defendant No 1 establishes that the alleged MOU was not signed at the same time by the parties. This fact was initially informed about the court proceedings and thereafter the Defendant No 1 has shown the two originals of the MOU with him which he had refused to sign. Interestingly, the Plaintiff has been informed that the witnesses have signed all the four copies of the said MOU, without the same having been signed by the parties to the MOU. The Plaintiff was certainly not present when the fraudulent MOU was executed;

(c) The Plaintiff is not a party to the said fraudulent MOU,

(d) The Plaintiff is not a witness to the document in question;

(e) There is no reference or mention of the or to the Plaintiff in the entire document;

(f) The Plaintiff does not recollect appending her signatures to any document giving away her properties and is thus, as such not a signatory to the document;

(g) The fraudulent document also seeks to deal with properties that don't belong either to the Defendant No 1 or to the Defendant No 2 but instead belong to the Plaintiff and or Praneeta ,her daughter ;

(h) The fraudulent document purports to deal with the residential house of the Plaintiff, which is her matrimonial home;
(i) The fraudulent document further seeks to deal with, alter and extinguish the rights and entitlement of the Plaintiff in properties that are owned by her, held jointly or individually without as much as her knowledge, leave alone consent;
(j) The fraudulent document also deals with the jewellery of the Plaintiff without her knowledge or consent.
These facts establish that the MOU is a fabricated and fraudulent document, which is false to the knowledge of the Defendants."

11. Based on the above assertions, the plaintiff prays for the following relief in the present suit:-

"(i) pass a decree of declaration in favour of the plaintiff and against the Defendants declaring that the Memorandum of Understanding dated 12.11.2014 purported to be signed between Defendant No 1 & 3, and apparently co signed by the other Defendants, to be null and void;

In the alternative,
pass a decree of declaration in favour of the Plaintiff and against the Defendants declaring, that without prejudice to the prayer (i), the purported MOU dated 12.11.2014 o r its consequences do not bind the plaintiff;

(ii) pass a decree of partition in favour of the Plaintiff and against the Defendants for partitioning the said Joint Properties as fully described in para No._2 of the plaint between the parties by metes and bounds and in case the same is not possible then to direct sale of same and distribution of monies among the owners thereto in the respective shares

as fully described in para No._2 of the Plaint;"

AVERMENTS IN I.A. 11717 of 2017:

12. The defendant nos.3 to 6 have filed the present application contending that the parties to the present suit belong to the same joint family, with two branches being headed by the two brothers, that is, the defendant no.1 and the defendant no.3 herein. They claim that the two brothers, that is, the defendant nos.1 and 3 were doing business jointly since around 1970 and from the said joint business, through various joint investments and other joint actions, they acquired various moveable and immovable properties besides their businesses/business interests.

13. They further state that for family purposes, most of the abovementioned businesses/properties were nominally in the names of different family members of both the brothers, though ensuring that both the brothers, directly or with their respective family members, held equal holdings/interests in such businesses/properties.

14. They assert that since about 2010, differences arose between the defendant no.3 and defendant no.1, whereafter meetings took place with the intervention of close family members and relatives. In November 2014, due to the intervention of family members and common friends, and the intervention of the Mr.Sachin Goel, defendant no.2/ the son of the defendant no.1, in presence of the parties herein, a Chartered Accountant, that is, Mr.Sanjiv Gupta and the sister and brother-in-law of the parties, an Agreement was arrived at between the parties herein, which was recorded in the MoU. The MoU was signed by the defendant no.3 and the defendant no.1, as the

heads of their respective branches of the family, but to show complete unanimity and agreement in the family, the MoU was also confirmed and accepted, by signing on each page of the MoU and the annexures and cuttings, by various other family members of the defendant no.3 and the defendant no.1, including the plaintiff herein. By signing the MoU all signatories thereof, including the plaintiff, accepted the contents of the MoU.

15. It is further stated that the MoU has also been acted upon by the parties in part. However, thereafter the defendant no.1 failed to act in terms of the MoU, forcing the defendant no.3 to invoke the Arbitration Agreement contained in the MoU vide notice dated 23.09.2015. The defendant no.1 failed to appoint the Arbitrator and, in fact, sent an e-mail dated 19.10.2015 in response to the legal notice as an afterthought.

16. It is stated that the defendant no.3, thereafter, filed a Petition before this Court under Section 11 of the Act, bearing ARB. P. No. 683/2015 titled ***Anil Goel v. Satish Goel***. The plaintiff filed an application therein, being I.A. No. 6781/2017, seeking that she be impleaded in the same as a respondent.

17. The applicants, that is, the defendant nos.3 to 6, therefore, pray that in view of the subsisting Arbitration Agreement between the parties herein, the present suit is not maintainable and the parties should be referred to arbitration in accordance with the Section 8 of the Act.

JUDGMENT DATED 15.11.2022 IN ARB. P. NO. 683/2015:

18. Before proceeding further, I must note that by the judgment dated 15.11.2022 passed in ARB.P. No. 683/2015, a Coordinate Bench of this Court has been pleased to refer the defendant no.1 and the defendant no.3 to arbitration for settlement of their disputes under the MoU. By the same order, it has been further directed as under:-

> *"39. The petition is, therefore, disposed of with the following directions:-*
>
> *xxxxx*
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> *d. As far as the other members of the family are concerned, all questions with regard to reference to arbitration qua them are left open for adjudication in appropriate proceedings, including in CS (OS) 371/2017 filed by respondent No.2-Ms. Vinnu Goel. It is made clear that the present decision has been rendered on the specific requirements of Section 11 of the Act.*
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> *e. In the event Anil seeks to invoke the arbitration clause in the respect of any other person at this stage, the effect thereof is also left open for consideration in appropriate proceedings."*

SUBMISSION OF THE LEARNED SENIOR COUNSEL FOR THE APPLICANTS/DEFENDANT NOs.3 TO 6

19. The learned senior counsel for the applicants, that is, defendant nos.3 to 6 while reiterating the contents of the application, submits that the plaintiff having signed the MoU, is a party thereto and, therefore, the remedy of the plaintiff, if any, is only in arbitration and the present suit is, therefore, not maintainable.

20. Placing reliance on the contents of the MoU, he submits that the said MoU has been signed by the defendant no.1 for and on behalf of himself and his family members, including the plaintiff herein.

21. He submits that the plaintiff has signed the MoU in acceptance thereof and, therefore, is bound by the terms of the MoU, including the Arbitration Agreement. Though, the plaintiff has sought to create a doubt on her signatures on the MoU, the assertions in the plaint in that regard are highly vague. In fact, in the order dated 15.11.2022 referred hereinabove, the learned Coordinate Bench of this Court has held that the plaintiff has signed the MoU on each and every page and on the annexures thereto. He submits that this finding of the learned Judge has not been challenged by the plaintiff so far, and has, therefore, attained finality. Placing reliance on the following judgments, he submits that where a person signs a document which contains contractual terms, such person is bound by it even though such person claims to have not read the same or claims to be ignorant of the precise legal effect thereof:-

i) ***Bihar State Electricity Board Patna & Ors. v. Green Rubber Industries,*** (1990) 1 SCC 731

ii) ***Orma Impex Pvt. Ltd v. Nissai Asb Pte.*** Ltd., (1999) 2 SCC 541

iii) ***Benara Bearings & Pistons Ltd. V. Mahle Engine Components India Pvt. Ltd., (***2016) 5 Arb LR 1

iv) ***Systematic Conscom Limited v. State of U.P. and Ors***. 2009 SCC OnLine All 328

v) ***PVR Ltd. v. Imperia Wishfield (P) Ltd.*** Neutral Citation No: 2022/DHC/005052

vi) ***Ansal Properties & Infrastructure Ltd & Anr. v. Dowager Maharanis Residential Accommodation***

Welfare & Amenities Trust & Anr., 2022 SCC OnLine Del 3265

vii) ***Esha Kedia v. Milan R. Parekh and Ors.*** Neutral Citation no. 2022:DHC:4062

viii) ***Shivakriti Agro (P) Ltd. v. Umaiza Infracon*** *LLP and Ors*, 2021 SCC OnLine Del 5569

22. Placing reliance on the judgment of the Supreme Court in ***Vidya Drolia & Ors. V. Durga Trading Corporation***, (2021) 2 SCC 1, he submits that the parties have to be mandatorily referred to arbitration, unless the Court finds *prima facie* that there is no valid Arbitration Agreement in existence. Placing reliance on the judgment of the Supreme Court in ***National Insurance Co. Ltd. V. Boghara Polyfab (P) Ltd.***, (2009) 1 SCC 267, he submits that even issues relating to contract formation, existence, validity and non-arbitrability, would be connected and intertwined with the issues underlying in the merits of the respective disputes/claims. They would be factual in nature and, therefore, it is for the Arbitral Tribunal to decide the same.

23. On the objection of the learned counsel for the plaintiff that the application would be governed by the Act as it stood prior to its amendment by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the 'Amending Act'), the learned senior counsel for the applicants submits that in terms of Section 26 of the Amending Act, the present suit having been instituted after coming into force the Amending Act, the proceedings shall be governed by the Amended Act in terms whereof not only the parties to the Arbitration Agreement, but also persons claiming through or under

them are bound by the Arbitration Agreement. In support, he places reliance on the judgments of the Supreme Court in ***BCCI v. Kochi Cricket P. Ltd. & Ors.***, (2018) 6 SCC 287; and ***Hindustan Construction Co. Ltd. & Anr. v. Union of India***, (2020) 17 SCC 324; and of the Himachal Pradesh High Court in ***Graviss Foods P. Ltd. V. Ice Cream Garden & Anr.***, Neutral Citation no. 2023: HHC:3757-DB.

24. On the objection of the learned counsel for the plaintiff that the parties not to be referred to arbitration as the claim of the applicants, on the date of the filing of the present application, would be *ex facie* barred by limitation, the learned senior counsel for the defendant nos. 3 to 6 submits that the suit having been filed by the plaintiff in spite of an Arbitration Agreement, the applicants have rightly contested the same by filing the present application; it is not the applicants who have approached this Court in the first instance, in which situation alone the question of limitation would become relevant.

25. On the plea of the learned counsel for the plaintiff that the MoU is not properly stamped or registered, the learned senior counsel for the applicants submits that the Collector of Stamp has duly endorsed upon the MoU the requisite stamp and has levied penalty thereon, which stands paid/deposited. The MoU, therefore, is properly stamped and cannot be challenged on this account.

26. He submits that under the MoU, there is no transfer of property, and therefore, the same does not require registration. In support he places reliance on ***Maturi Pullaiah v. Maturi Narasimham***, AIR 1966 SC 1836; ***Shyam Sunder & Ors. v. Siya Ram & Anr.***, AIR 1973 All

382; ***Mool Chand & Ors. v. Nanagram & Anr.***, (2007) 15 SCC 783; ***Vikrala Ramachandrayulu v. Vikrala Sri Nath Rangacharyulu***, AIR 1926 Mad 1117; ***Rajangam Ayyar v. Rajangam Ayyar***, AIR 1922 PC 266; and ***C.S. Kumaraswami Gounder v. Aravagiri Gounder & Anr.***, AIR 1974 Mad 239.

27. He submits that even otherwise, the Arbitration Agreement being an agreement separate and distinct from the agreement in which it is contained, and being severable, reference to arbitration under Section 8 of the Act cannot be refused only on the ground that the main Agreement is not registered.

28. On the plea of the learned counsel for the plaintiff that as allegations of fraud have been raised in the plaint, these can only be adjudicated upon by this Court and cannot referred to arbitration for adjudication, the learned senior counsel for the defendant nos. 3 to 6, placing reliance on the judgment of the Supreme Court in ***Vidya Drolia*** (Supra), submits that not only are the allegations of fraud without any basis, but even otherwise, they cannot act as an impediment to refer the parties to arbitration.

29. To the plea of the learned counsel for the plaintiff that the defendant no.8 to the present suit has not signed the MoU, and therefore, the parties cannot be referred to arbitration, the learned senior counsel for the applicants, placing reliance on the ***Ananthesh Bhakta & Ors. v. Nayana S. Bhakta & Ors.***, (2017) 5 SCC 185, submits that by merely impleading a non-signatory to an agreement as a party/defendant, the plaintiff cannot escape the Arbitration

Agreement and the parties, therefore, have to be referred to arbitration.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PLAINTIFF

30. On the other hand, the learned counsel for the plaintiff, placing reliance on the judgment of the Supreme Court in ***Bihar State Mineral Development Corporation & Anr. v. ENCON Builder (I)(P) Ltd.***, (2003) 7 SCC 418, submits that merely by signing the MoU, the plaintiff cannot be said to be a party to the Arbitration Agreement. She submits that the MoU defines the parties thereto, and the same are only defendant nos.1 and 3. She submits that, therefore, the plaintiff cannot be held bound by the Arbitration Agreement contained in the MoU.

31. She submits that the MoU would be governed by the Act prior to its Amending Act coming into force, therefore, only the parties to the Arbitration Agreement can be referred to arbitration. In support, she places reliance on the judgment of the Supreme Court in ***Union of India v. Parmar Construction Company***, (2019) 15 SCC 682.

32. She further submits that the plaintiff has not only denied having signed the alleged MoU, but has also raised serious questions of fraud, therefore, such issues can be determined only by this Court, and the parties cannot be referred to arbitration. In support, she places reliance on ***Amrish Gupta v. Gurchait Singh Chima (deceased) through his LR and Widow Mrs. Daljeet Kaur Chima***, 2022 SCC OnLine Del 1116; and ***A. Ayyasamy v. A Paramasivam & Ors.***, (2016) 10 SCC 386.

33. She submits that the claims of the defendants/applicants would also be barred by the Law of Limitation. She submits that admittedly the notice dated 23.09.2015 invoking arbitration was issued by the defendant no.3 only to the defendant no.1. The defendant no.3 did not invoke the Arbitration Agreement against the plaintiff. The claim of the defendant no.3 against the plaintiff would, therefore, be barred by limitation and the parties herein cannot be referred to arbitration. In support, she places reliance on the judgment of the Supreme Court in ***Bharat Sanchar Nigam Limited & Anr. v. Nortel Networks India Private Limited*** (2021) 5 SCC 738; and of this Court in ***Web Overseas Limited v. Universal Industrial Plants Manufacturing Company Private Limited***, 2022 SCC OnLine Del 4111.

34. Placing reliance on the judgment of the Supreme Court in ***N.N. Global Mercantile Private Limited. v. Indo Unique Flame Ltd. & Ors.***, (2023) SCC OnLine SC 495, she submits that the MoU is not properly stamped and, therefore, the parties cannot be referred to arbitration. She submits that the MoU needs to be impounded by this Court, and unless proper Stamp Duty and penalty thereon is paid/affixed, the same is not admissible in evidence and the parties cannot be referred to arbitration.

35. Placing reliance on the judgments of the Supreme Court in ***Kale & Ors. v. Deputy Director of Consolidation & Ors.***, (1976) 3 SCC 119; ***Sita Ram Bhama v. Ramvatar Bhama***, (2018) 15 SCC 130; as also of this Court in ***Deepak Arora v. Rashmi***, 2021 SCC OnLine Del 5360, she submits that as the MoU seeks to create and extinguish rights in the immoveable properties, the same is compulsorily

registrable under the Registration Act, 1908, and in absence of registration, it cannot be admitted in evidence even for the purposes of referring the parties to arbitration.

36. She further submits that the plaintiff has specifically denied that she had ever consented to the MoU. The same, therefore, is voidable at the option of the plaintiff and she has, by way of the present suit, exercised such option. She cannot, therefore, be held to be bound by the MoU or the Arbitration Agreement contained therein.

37. She submits that, in any case, as the defendant no. 8 is not a signatory to the Arbitration Agreement, the parties to the Suit cannot be referred to arbitration.

ANALYSIS AND FINDING

Application governed by the Amending Act:

38. As is evident from the above, the first issue raised by the learned counsel for the plaintiff is whether the present proceedings/application is to be decided and is governed by the Act as it stood prior to the coming into force the Arbitration and Conciliation (Amendment) Act, 2015 or thereafter. In this regard, the learned counsel for the plaintiff has placed reliance on the judgment of the Supreme Court in ***Parmar Construction***, (supra) to contend that in the present case, the notice invoking the arbitration under Section 21 of the Act was issued by the defendant no.3/applicant on 23.09.2015, that is, prior to the coming into force of the Amending Act, and, therefore, the provisions of the Act prior to the amendment would apply.

39. On the other hand, the learned senior counsel for the defendant no.3/applicant, placing reliance on the judgment of the Supreme Court

in ***Kochi Cricket P. Ltd.***, (supra) and ***Hindustan Construction Co.*** (supra), in my opinion, rightly so, has contended that as the present suit was filed by the plaintiff post the coming into force of the Amending Act, the provisions of the Act after its amendment would become applicable for the purposes of the adjudication of the present application.

40. Section 26 of the Amending Act is read as under:

> *"**26**. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."*

41. In ***Kochi Cricket*** (supra), the Supreme Court interpreting Section 26 of the Amending Act, has held as under:

> *"**36.** All the learned counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word "but", which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said section. For this, he relied upon Concise Oxford Dictionary on Current English, which states:*
>
> > *"introducing emphatic repetition; definitely (wanted to see nobody, but nobody)."*

Quite obviously, the context of the word "but" in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

37. *What will be noticed, so far as the first part is concerned, which states—*

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is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "... but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

38*. That the expression "the arbitral proceedings" refers to proceedings before an Arbitral Tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:*

"Conduct of arbitral proceedings"

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an Arbitral Tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the respondent, would also make it clear that it is these proceedings, and no

others, that form the subject-matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force. In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an Arbitral Tribunal, the second part refers to court proceedings "in relation to" arbitral proceedings, and it is the commencement of these court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the 1996 Act.*

> **[Section 29-A of the Amend (sic Amended) Act provides for time-limits within which an arbitral award is to be made. In Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602 at p. 633 : 1994 SCC (Cri) 1087, this Court stated: (SCC p. 633, para 26)"26. ... (iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be*

> *prospective in operation, unless otherwise provided, either expressly or by necessary implication." It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29-A of the Amendment (sic Amended) Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.]*

39. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings — arbitral proceedings themselves, and court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to court proceedings which relate to the

arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to court proceedings which have commenced on or after the Amendment Act came into force.

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***48**. Shri Chidambaram, appearing on behalf of some of the respondents, has argued that the interpretation accepted by this Court supra is the correct interpretation. He has also argued that, alternatively, the expression "in relation to arbitral proceedings" in the second part of Section 26 would also include within it arbitral proceedings before the Arbitral Tribunal, as otherwise Section 26 would not apply the Amendment Act to such arbitral proceedings. We are afraid that this alternative interpretation does not appeal to us, for the simple reason that when the first part of Section 26 makes it clear that arbitral proceedings commenced before the Amendment Act would not be governed by the Amendment Act, it is clear that arbitral proceedings that have commenced after the Amendment Act comes into force would be so governed by it, as has been held by us above. The negative form of the language of the first part only becomes necessary to indicate that parties may otherwise agree to apply the Amendment Act to arbitral proceedings commenced even before the Amendment Act comes into force. The absence of any reference to Section 21 of the 1996 Act in the second part of Section 26 of the Amendment Act is also a good reason as to why arbitral proceedings before an Arbitral Tribunal are not contemplated in the second part.*

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***58.** From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been*

> *made under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by "enforcement" in Section 36. On the one hand, it has been argued that "enforcement" is nothing but "execution", and on the other hand, it has been argued that "enforcement" and "execution" are different concepts, "enforcement" being substantive and "execution" being procedural in nature."*
>
> ***(Emphasis supplied)***

42. The Supreme Court has, therefore, clearly held that the Amending Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of the Amending Act, and to the court proceedings which have commenced on or after the Amending Act came into force.

43. The submissions of the learned counsel for the plaintiff that in the present case, the arbitration proceedings would be deemed to have commenced with the issuance of the notice dated 23.09.2015 under Section 21 of the Act by the defendant no.3, is self-destructing. On the one hand, the plaintiff contends that the said notice was addressed only to defendant no.1, and therefore, does not invoke the arbitration against the plaintiff, and that the said position has also been accepted by the Coordinate Bench of this Court in its judgment dated 15.11.2022 in Arb.P.683/2015, ***Anil Goel v. Satish Goel*** Neutral Citation no**.** 2022/DHC/004826, and on the other hand, seeks to take

benefit of the same notice to exclude the applicability of the Amending Act to the present application. The plaintiff cannot be allowed to approbate and reprobate. If the Arbitration proceedings commenced even against the plaintiff by the said notice, surely the present suit is not maintainable and the parties are to be referred to arbitration. If the arbitration proceedings did not commence with the above notice, as it was not addressed to the plaintiff herein, the present suit and the application being filed after the coming into force of the Amending Act, the Amending Act will apply.

44. In ***Parmar Construction*** (supra), the Supreme Court was considering a case where the notice under Section 21 of the Act had been made and received prior to the coming into force of the Amending Act. The Supreme Court held that such a case shall be governed by the pre-amended Act. In the present case, however, even as per the plaintiff, there being no notice under Section 21 of the Act issued to the plaintiff by the defendant no.3, and the suit having been filed post the coming into the force of the Amending Act, the provisions of the Amending Act would apply to the present application as well as the present suit.

Section 8 of the Act and its application:

45. Before proceeding further with the consideration of the other issues contended by the learned counsel for the plaintiff, I may now reproduce Section 8 of the Act, as amended, as under:

> *"**8. Power to refer parties to arbitration where there is an arbitration agreement.—***
> *(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a*

> *party to the arbitration agreement or any person claiming through or under him, so applies not later than when submitting his first statement on the substance of the dispute, then, notwithstanding any judgement, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*
> *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:*
> *Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.*
> *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."*

46. With regards to the allegations of fraud vitiating the Arbitration Agreement and, therefore, reference of the parties to arbitration be denied, interpreting Section 8 of the Act, the Supreme Court in ***Avitel Post Studioz Limited & Ors v. HSBC PI Holdings (Mauritius) Limited.,*** (2021) 4 SCC 713, has observed as under:

> *"**19.** These provisions, together with Section 8 of the 1996 Act, which now makes it mandatory to refer an action which is brought before a judicial authority, which is the subject-matter of an arbitration agreement, to arbitration, if the conditions of the section are*

met, all point to a sea change from the 1940 Act which was repealed by this 1996 Act. By way of contrast with Section 8 of the 1996 Act, Section 20 of the 1940 Act is set out hereinbelow:

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20. It will be seen from Section 20 of the 1940 Act, as was in held in Abdul Kadir Shamsuddin Bubera v. Madhav Prabhakar Oak AIR 1962 SC 406, that a wide discretion is vested in the Court if sufficient cause is made out not to refer parties to arbitration. It was in that context that the observations in Adbul Kadir as to serious allegations of fraud triable in a civil court, being "sufficient cause" shown under Section 20(4) of the 1940 Act were made. Also, the approach of the 1940 Act is made clear by Section 35(1), which is set out hereinbelow:

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Thus, even where arbitral proceedings are ongoing, such proceedings become invalid the moment legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire. As against this, sections 5, 8 and 16 of the 1996 Act reflect a completely new approach to arbitration, which is that when a judicial authority is shown an arbitration clause in an agreement, it is mandatory for the authority to refer parties to arbitration bearing in mind the fact that the arbitration clause is an agreement independent of the other terms of the contract and that, therefore, a decision by the arbitral tribunal that the contract is null and void does not entail ipso jure the invalidity of the arbitration clause.

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***35.** After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied,*

and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

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43. *In the light of the aforesaid judgments, para 27(vi) of Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 and para 36(i) of Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532, must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject-matter of such proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so."*

47. The Supreme Court in ***Vidya Drolia*** (supra), speaking through Hon'ble Mr. Justice Sanjiv Khanna, discussed the law on Section 8 and 11 of the Act, pre and post the amendment to the Act, observing that the scope and ambit of the Court's jurisdiction under Section 8 or 11 of the Act is similar. It was further held as under:

*"**132**. The courts at the referral stage do not perform ministerial functions. They exercise and perform judicial functions when they decide objections in terms of Sections 8 and 11 of the Arbitration Act. Section 8 prescribes the courts to refer the parties to arbitration, if the action brought is the subject of an arbitration agreement, unless it finds that prima facie no valid arbitration agreement exists. Examining the term "prima facie", in Nirmala J. Jhala v. State of Gujarat, (2013) 4 SCC 301, this Court had noted:*

> *"**48**. '27. ... A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed. While determining whether a prima facie case had been made out or not the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.' [Ed. : As observed in Martin Burn Ltd. v. R.N. Banerjee, AIR 1958 SC 79, p. 85, para 27.] "*

***133.** Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary. [The European Convention on International Commercial Arbitration appears to recognise the prima facie test in Article VI(3):*

> *"**VI. (3)** Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, courts of contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary."]*

134. *Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the jurisdiction exercised by the court and in this context, the observations of B.N. Srikrishna, J. of "plainly arguable" case in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifiber Ltd. (2005) 7 SCC 234, are of importance and relevance. Similar views are expressed by this Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788, wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.*

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138. *In the Indian context, we would respectfully adopt the three categories in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.*

139. *We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a*

dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

140. *Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.*

141. *The court would exercise discretion and refer the disputes to arbitration when it is satisfied that the contest requires the Arbitral Tribunal should first decide the disputes and rule on non-arbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings. Appropriate in this regard, are observations of the Supreme Court of Canada in Dell Computer Corpn. v. Union des Consommateurs & Olivier Dumoulin 2007 SCC OnLine Can SC 34, which read:*

> *"85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.*
>
> *86. Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."*

xxxx

153. *Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.*

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

154.1. *Ratio of the decision in SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 on the*

scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. *Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.*

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

154.4. *Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of*

arbitration as an alternative dispute resolution mechanism."

48. Justice N.V. Ramana crystallised the principles as applicable to Sections 8 and 11 of the Act as under:

> *"**244.** Before we part, the conclusions reached, with respect to Question 1, are:*
> ***244.1.** Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*
> ***244.2.** Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.*
> ***244.3.** The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*
> ***244.4.** The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".*
> ***244.5.** The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*
> ***244.5.1.** Whether the arbitration agreement was in writing? Or*
> ***244.5.2.** Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*
> ***244.5.3.** Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*
> ***244.5.4.** On rare occasions, whether the subject-matter of dispute is arbitrable?"*
>
> ***(Emphasis supplied)***

49. From the above, it is clear that while considering an application under Section 8 of the Act, the Court is to only *prima facie* determine

the existence of an Arbitration Agreement, and only if it is found *manifestly* and *ex facie* that no Arbitration Agreement is in existence, that the Court would refuse to refer the parties to the arbitration. The Court by default would refer the matter to arbitration, when contentions relating to non-arbitrability are plainly arguable and when consideration thereof, in a summary proceeding, would be insufficient and inconclusive. The Court would not hold mini-trial or an elaborate review so as to usurp the jurisdiction of the arbitral tribunal at this stage.

50. Keeping in view of the above principles in mind, I shall now proceed to consider the grounds of the opposition of the plaintiff to the present application.

Parties to the MoU:

51. The learned counsel for the plaintiff has submitted that only the defendant no.1 and defendant no.3 are parties to the MoU and therefore, the Arbitration Agreement contained therein binds only these two parties. She has submitted that by merely appending her signatures to the MoU, the plaintiff would not become a party to the MoU or to the Arbitration Agreement therein.

52. For considering the above submission of the learned counsel for the plaintiff certain terms of the MoU would need reference:

> *"This Memorandum of Understanding (MOU) is made on this 12th day of November 2014, between:*
>
> *1. Sh. Satish Goel son of Late Sh. L.N. Goel, hereinafter referred to as Party of Part I, and*

2. Sh. Anil Goel son of Late Sh. L.N. Goel, hereinafter referred to as Party of Part II.

xxxx

*2. **IMMOVABLE PROPERTIES***

The immovable properties owned by both the parties and their family members, which are a part of this MOU are listed out in the annexure attached to this MOU. The properties may be in joint names or in individual names. It is understood that these properties were acquired through joint funds and belong equally to both the parties.

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MOVABLE PROPERTY

1.Jewellery

The jewellery belonging to the parties to this MOU, their spouses, children and their spouses, except the "Stridhan" of the ladies, shall be valued by two independent valuers and be divided among the parties in equal share. The difference in the values shall be compensated in cash to the other party.

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Once the division of property is decided among the parties. A family settlement agreement will be drawn up mentioning the division of the properties and necessary legal steps shall be taken to get the family settlement agreement recognized by a Court of Law.

The parties shall take immediate steps to finalise the family settlement agreement, which is the crux of this MOU. These are the broad parameters of the family settlement, which shall be detailed in the family Settlement agreement to be drafted.

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<u>The parties to this agreement have decided that in case of any dispute in the implementation of this MOU, the matter will be referred to a panel of three arbitrators, one arbitrator to be appointed by each of the parties and the third arbitrator to be appointed mutually by the two arbtirators</u>.

The parties to this MOU have today the 12th Day of November, 2014 signed the agreement in presence of following witnesses:"

53. At the outset, it is to be noted that though the MoU claims to be executed only between the defendant no.1 and defendant no.3, it is signed by the other family members belonging to the two groups as well. Though the learned counsel for the plaintiff has sought to raise certain issues regarding her purported signatures on the MoU, I shall discuss the same separately in this judgment. For the present discussion, I shall proceed on the basis that the MoU is signed by the plaintiff as well.

54. The MoU records and details the immovable properties "owned by both the parties and their family members". It also states that the jewellery belonging to the parties to the MoU, their spouses, children and their spouses, except the Stridhan of the ladies, shall be valued and be divided amongst the parties in equal share. The MoU, therefore, relates also to the properties which may be standing in the name of the individual members of the family/group of family, and the plaintiff being one of the signatories thereto, would at least *prima facie* be bound by the terms thereof. The plaintiff, being the signatory thereto, would also and equally be bound by the Arbitration Agreement contained in the MoU.

55. In ***Encon Builders*** (supra), the Supreme Court laid down the following essential elements of an arbitration agreement:-

(a) There must be a present or future difference in connection with some contemplated affair;

(b) There must be the intention of the parties to settle such difference by a private tribunal;

(c) The parties must agree in writing to be bound by the decision of such tribunal; and

(d) The parties must be ad idem.

56. All the above conditions stand satisfied in the present case.

56. The plaintiff seeks to cast a doubt on her signatures appearing on the MoU by stating that she does not recollect appending her signatures on any documents giving away her properties. As there was no categorical denial of her signatures appearing on the MoU, this Court by its order dated 01.05.2023, gave another opportunity to the plaintiff to clearly state her case on the genuineness of her signatures on the MoU. The order dated 01.05.2023 is reproduced as under:

> *"1. During the course of the arguments, it has been put to the learned counsel for the plaintiff that there is only a very vague assertion in the plaint that the MoU dated 12.11.2014 is not signed by the plaintiff. The plaintiff shall, therefore, state her case clearly as to whether she is denying her signatures on the MoU or not.*
> *2. An affidavit in this regard shall be filed by the plaintiff within a period of two days from today."*

57. In purported compliance to the above order, the plaintiff has filed an affidavit dated 04.05.2023, stating as under:

> *"1. My counsel has informed me about the order dated 01.05.2023 passed by the Hon'ble Court in my matter. My counsel on my request has explained the order to me in Hindi. In furtherance of the directions of the Hon'ble Court, I now say: -*

a. My counsel has shown me the photocopy of the Memorandum of Understanding dated 12.11.2014 again. I have seen that several parties have signed the document towards the bottom of every page. My counsel has drawn my attention to signatures that say my name and are being attributed to me.

b. About these signatures, I state that I do not admit these signatures for the following reasons: -

i. I do not recollect ever signing a document that took away my properties to be divided within the family. I am not a party to any agreement which takes away my share in my properties.

ii. I was never informed that my properties are being divided between my husband and his brother. I have never authorized either my son or my husband or my brother in law, to deal with my properties or to divide them to my prejudice

iii. Mr Sanjay Goel, the son of my brother in law Mr Anil Goel, would copy my signatures so well, that no one could tell if they had been done by me or him.

iv. I have never attended a meeting where an agreement was signed in the presence of family members and properties were divided by that agreement. I am not a witness to the signing of any agreement or MOU, which divided properties.

V. The document is dated November, 2014. I do not remember if I ever signed this document."

58. A reading of the above would show that the plaintiff still does not categorically deny her signatures on the MoU. Only a vague assertion in this regard is being made. Applying the test of only a *prima facie* consideration at the stage of the Section 8 application, I therefore, find the denial of the plaintiff of her signatures appearing on the MoU to be *prima facie* not tenable and as not been offering a defence to her to oppose the present application. *Prima facie*, I find that the plaintiff has signed the MoU in token of acceptance of the terms thereof and is bound by the terms thereof, including the Arbitration Agreement.

59. The assertion of the plaintiff that she was not informed that the properties standing in her name were being made subject matter of the MoU, also cannot be accepted at this stage. Having appended her signatures to each and every page of the MoU, she cannot plead ignorance of the terms contained therein.

60. In ***Green Rubber Industries*** (supra) and ***Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.*** (1996) 4 SCC 704, the Supreme Court observed that a person who signed a document which contains contractual terms is normally bound by them, even though he had not read them or claims to be ignorant of the precise legal effect thereof.

61. The plaintiff also, therefore, does not meet the test of 'fraud' by the above submissions so as to avoid the reference of the parties to arbitration.

62. In ***Vidya Drolia*** (Supra), the Supreme Court while considering the allegation of fraud or forgery as offering an exception to the reference of the parties to the arbitration, observed as under:

> *"73. A recent judgment of this Court in Avitel Post Studioz Ltd v. HSBC PI Holdings (Mauritius) Ltd. (2021) 11 SCC 161 has examined the law on invocation of "fraud exception" in great detail and holds that N. Radhakrishnan v. Maestro Engineers (2010) 1 SCC 72 as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in paragraph 34 of the judgment in Avitel Post Studioz Ltd., which quotes observations in Rashid Raza v. Sadaf Akhthar (2019) 8 SCC 710:*
>
> > *"4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/ fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."*
>
> *to observe in Avitel Post Studioz Ltd:*
>
> > *"35.....it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which*

> *allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain."*
>
> ***74.*** *The judgment in Avitel Post Studioz Ltd interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post- contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.*
>
> *xxxx*
>
> ***78.*** *In view of the aforesaid discussions, we overrule the ratio in N.Radhakrishnan inter alia observing that allegations of fraud can (sic cannot) be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in the case of HDFC Bank Ltd v. Satpal Singh Bakshi 2012 SCC OnLine Del 4815, which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."*

63. In the present case, from the averments in the plaint, the plaintiff has not been able to make out a *prima facie* case of fraud, which would vitiate and invalidate the arbitration clause itself and, therefore, offer her a defence to the present application.

Claims Barred by Limitation:

64. The plea of the learned counsel for the plaintiff that the MoU having been allegedly executed on 12.11.2014; the defendant no.3 having issued the notice under Section 21 of the Act, albeit, only to defendant no.1 on 23.09.2015, while having filed the present application only on 09.10.2017, the claims of the defendant are barred by law of limitation and, therefore, the parties should not be referred to arbitration also has no merit.

65. In the present case, it is the plaintiff who has filed the present suit. The applicants as defendants, in view of the Arbitration Agreement, are entitled to file an application under Section 8 of the Act challenging the maintainability of the present suit and seeking a reference of the parties to arbitration. The only limitation contained in Section 8 of the Act is that such an application should have been filed not later than the date of submitting the first statement on the substance of the dispute by the applicant. It is not the case of the plaintiff that the applicants have fallen foul of the said provision.

66. In ***Bharat Sanchar Nigam Limited & Anr.*** (Supra), the Supreme Court emphasised that limitation is normally a mixed question of facts and law and, therefore, would lie within the domain of the Arbitral Tribunal. It was held that the issue of limitation is an issue of admissibility of the claim and, therefore, should be left to be decided by the Arbitral Tribunal, either as a preliminary issue or at the final stage of the proceedings after respective evidence has been led by the parties. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-

barred that the Court may decline to make the references of the parties to Arbitration.

67. In the present case, as the application is under Section 8 of the Act, the only question before this Court is, whether the plaintiff is a party to the Arbitration Agreement, and whether the dispute falls within the ambit of the said Agreement. Both these questions are to be answered against the plaintiff and in favour of the applicants.

68. In ***Web Overseas Limited*** (Supra), the Court was considering the issue of whether the time spent by a party in pursuing its application under Section 8 of the Act was required to be excluded for considering whether its Counter-Claim was preferred within the period of limitation. The said issue will become relevant to the facts of the present case only when the applicants, on being referred to arbitration, choose to raise a Counter-Claim against the plaintiff in such proceedings. The said judgment, therefore, would have no application to the facts of the present case.

69. Similarly, in ***State of Goa v. Praveen Enterprises***, (2012) 12 SCC 581, the question before the Court was whether the Counter-Claim, in the absence of a notice under Section 21 of the Act, is maintainable or not. As noted herein above, the stage of considering this question has not arisen in the present case.

Stamping and Registration of the MoU:

70. The learned counsel for the plaintiff further submits that the MoU in question is not admissible in evidence, as it is not properly stamped. She submits that the MoU seeks to create rights in the properties and would, therefore, amount to a conveyance under the

Indian Stamp Act, 1899 (hereinafter referred to as the 'Indian Stamp Act'), requiring stamping on an *ad valorem* basis. Placing reliance on the judgment of the Supreme Court in ***N.N. Global Mercantile (P) Ltd.*** (Supra), she submits that till the MoU is properly stamped and the penalty thereon is paid, the same cannot be acted upon by this Court.

71. I am unable to agree with the above submission of the learned counsel for the plaintiff. While there is no doubt that in terms of the judgment of the Supreme Court in ***N.N. Global Mercantile (P) Ltd.*** (Supra), an Arbitration Agreement which is inadequately stamped cannot be admitted in evidence and, therefore, cannot be relied upon by the Court for referring the parties to arbitration, in the present case, the MoU bears the certificate of the Collectors of Stamp determining the stamp and the penalty payable on the MoU and certifying that the said amount stands paid thereon. In terms of Section 32(3) of the Indian Stamp Act, any instrument upon which such an endorsement has been made shall be deemed to be duly stamped and shall be admissible in evidence and can be acted upon as if it had been originally duly stamped. Section 32 of the Indian Stamp Act is reproduced hereinunder:-

> "***Section 32. Certificate by Collector.***- *(1) When an instrument brought to the Collector under section 31 is, in his opinion, one of a description chargeable with duty, and*
>
> *(a) the Collector determines that it is already fully stamped, or*
>
> *(b) the duty determined by the Collector under section 31, or such a sum as, with the duty already paid in respect of the instrument, is equal to the duty so determined, has been paid,*
>
> *the Collector shall certify by endorsement on such instrument that the full duty (stating the*

amount) with which it is chargeable has been paid.

(2) When such instrument is, in his opinion, not chargeable with duty, the Collector shall certify in manner aforesaid that such instrument is not so chargeable.

(3) Any instrument upon which an endorsement has been made under this section, shall be deemed to be duly stamped or not chargeable with duty, as the case may be; and, if chargeable with duty, shall be receivable in evidence or otherwise, and may be acted upon and registered as if it had been originally duly stamped:

Provided that nothing in this section shall authorize the Collector to endorse--

(a) any instrument executed or first executed in India and brought to him after the expiration of one month from the date of its execution or first execution, as the case may be;

(b) any instrument executed or first executed out of India and brought to him after the expiration of three months after it has been first received in India; or

(c) any instrument chargeable with a duty not exceeding ten naye paise, or any bill of exchange or promissory note, when brought to him, after the drawing or execution thereof, on paper not duly stamped."

72. The plea of the learned counsel for the plaintiff that the MoU is not admissible in evidence as it is not registered under the Registration Act, 1908, is also ill-founded. As held by the Supreme Court in ***SMS Tea Estates Private Limited. v. Chandmari Tea Company Private Limited***, (2011) 14 SCC 66, the Arbitration Agreement being severable from the main Agreement and being independent of the other terms of the document, even where the document is not registered but is compulsorily registrable, having regard to Section

16(1)(a) of the Act, the Court can delink the Arbitration Agreement from the main document and can refer the parties to arbitration.

73. Therefore, even if the plea of the plaintiff of the MoU being compulsorily registrable is to be accepted, it can offer no defence to the plaintiff in the present application.

74. I may, however, note herein that the learned senior counsel for the applicants has submitted that as the MoU does not convey any title in the properties, the same is not compulsorily registrable. Though I *prima facie* find merit in the said submission, I have refrained from considering the said submission in detail as this issue is not relevant for the purposes of adjudication of the present application. This issue has to be necessarily left for consideration by the learned Arbitral Tribunal, which may be constituted on the parties being referred to arbitration.

Defendant No. 8 not a signatory to the MoU:

75. The submission of the learned counsel for the plaintiff that the parties to the present suit cannot be referred to arbitration, as defendant no.8 is not a signatory to the MoU also cannot be accepted. It is relevant to note that the defendant no.8 is the daughter of the plaintiff and the defendant no.1. The prayers made in the suit have been reproduced hereinabove, which clearly show that the challenge of the plaintiff is to the validity of the MoU. Merely because she has chosen to implead the defendant no.8 as a party to the suit, she cannot be allowed to defeat the Arbitration Agreement.

76. In ***Ananthesh Bhakta*** (Supra), the Supreme Court in similar circumstances has observed as under:-

"30. *The relevant facts and pleadings of the parties have been marshalled by the trial court. The trial court has returned the findings that Plaintiff 1 represented by his mother and next friend was party to the retirement deed. The mother of the plaintiff, namely, Smt Usha A. Bhakta has signed the retirement deed for self and on behalf of her minor children, Plaintiff 1. Plaintiffs 2 and 3 claiming their rights through one of the partners Shri Gangadhar Bhakta, their father, who was party to the retirement deed. In para 23 of the judgment, the learned District Judge had returned the following findings:*

> *"… therefore, Plaintiff 1 represented by his mother and next friend Smt Usha A. Bhakta is a party to the retirement deed and Plaintiffs 2 and 3 are claiming their rights through one of the partner late Shri Gangadhar Bhakta, who was also a party to the retirement deed. Defendants 1 to 5 are also the parties to this retirement deed. Therefore, except Defendant 6 all others are either personally or through the persons from whom they are claiming the right are parties to the deed of retirement dated 25-7-2005…."*

Thus it was only Defendant 6 who was not party to the retirement deed or partnership deed. Both fifth and sixth defendants are issues of late M. Prakashchandra Bhakta.

31. *The learned counsel for the respondents have submitted that it was case of the plaintiffs themselves that by virtue of the will executed by M. Prakashchandra Bhakta it was only Defendant 5 who became entitled to benefits of partnership and Defendant 6 was not given any share.*

32. *The plaintiffs admittedly are parties to the arbitration agreement as noted above. It does not lie in their mouth to contend that since one of the defendants whom they have impleaded was not party to the arbitration agreement, no reference can be made to the arbitrator. In the*

> *facts of the present case, it cannot be said that merely because one of the defendants i.e. Defendant 6 was not party to the arbitration agreement, the dispute between the parties which essentially relates to the benefits arising out of the retirement deed and partnership deed cannot be referred."*

CONCLUSION:

77. In view of the above, I hold that *prima facie* there is an Arbitration Agreement in existence between the parties to the present suit, contained in the MoU. The dispute raised by the plaintiff in the present suit is *prima facie* covered within the ambit and scope of the said Arbitration Agreement. I, therefore, hold that the present suit is not maintainable and the parties are accordingly referred to arbitration.

78. The present application is allowed in the above terms. The plaintiff shall also pay costs of Rs.2 lacs to the applicants.

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79. As the application filed by the defendant nos.3 to 6 under Section 8 of the Act has been allowed, accordingly the present suit is dismissed.

80. All pending applications are also disposed of as infructuous.

NAVIN CHAWLA, J.

AUGUST 08, 2023/*rv*/AS/*rp*