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

% *Date of decision: 11 October, 2022*

+ ARB.P. 818/2021

OMEGA FINVEST LLP

..... Petitioner

Through: Mr. Vivek Kohli, Sr. Adv. with Ms. Pankhuri Jain, Mr. Anmol Chawla and Ms. Nikita Maheshwari, Advs.

versus

DIRECT NEWS PRIVATE LIMITED

..... Respondent

Through: Mr. Ashish Virmani and Mr. Vishal Kapoor, Advs.

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

V. KAMESWAR RAO, J. (ORAL)

1. The present petition is filed by the petitioner under Section 11(5) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'A&C Act, 1996') with the following prayer:

> *"In view of the facts and circumstances of the present case, it is respectfully prayed that this Hon 'ble Court may be pleased to:*
>
> *a. Appoint a Sole Arbitrator as per the provisions of the Arbitration and Conciliation Act, 1996 pursuant to Arbitration Clause in the Second Rent Agreement, dated 13.07.2016;*
>
> *b. Grant the cost of the present Petition to the Petitioner;*

c. Pass any other order/s that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. It is the case of the petitioner that the respondent had taken on lease the premises situated at B-4, Sector IlI, Noida, Uttar Pradesh-201301 (hereinafter 'Demised Premises') vide registered Rent Agreement, dated February 28, 2008 for a period of 9 years.

3. On the expiry of the Rent Agreement dated February 28, 2008, a new registered Rent Agreement dated July 13, 2016 (hereinafter 'Second Rent Agreement') was executed between the respondent and the petitioner renewing the lease for a period of 3 years i.e. w.e.f., July 01, 2016 to June 30, 2019 which was subsequently modified by the Deeds of Modification, dated September 12, 2016 (hereinafter 'First Deed of Modification') and June 14, 2018 (hereinafter 'Second Deed of Modification).

4. According to him that on expiry of lease by efflux of time on June 30, 2019, the respondent failed to handover the possession of the 'Demised Premises' and also defaulted in paying the due rent.

5. That on account of disputes and differences which had arisen between the parties due to breach of terms and conditions of the 'Second Rent Agreement', the petitioner approached this Court, and filed a Petition under Section 9 of the 'A & C Act,1996' bearing no. OMP (I) (COMM) No.265/2019, seeking urgent interim reliefs against the respondent.

6. It is the case of the petitioner that with the assistance of this Court, the parties arrived at a settlement and moved a Joint Application

dated September 16, 2019 before this Court for placing the terms of settlement on record ('Terms of Settlement'). As a result, the Court disposed of the afore-said petition in the 'Terms of Settlement' arrived at between the parties.

7. Pursuant to this, the respondent in contravention to the 'Terms of Settlement' failed to hand over the vacant possession of the 'Demised Premises' by December 31, 2019 and therefore the petitioner initiated the Contempt proceedings [bearing Cont. Case (Civil) 37/2020] against the respondent before this Court for violation of the order dated September 16, 2019.

8. Thereafter, the respondent started making several structural changes in the 'Demised Premises' and this led to filing of another petition by the petitioner under Section 9 of the 'A&C Act, 1996', bearing OMP(I) (COMM) 19/2020.

9. As per the petitioner, during the course of the afore-said Section 9 petition, the respondent once again assured the Court to hand-over the vacant possession of the 'Demised Premises', after restoring it to a position as laid down in the terms of settlement, to the petitioner on or before March 31, 2020. Moreover, the respondent also undertook to pay a monthly sum of ₹23,50,000/- as *mesne* profit for the period between January 2020 to March 2020.

10. Again, based on mutual representations and undertakings, the parties executed an 'Addendum to the Terms of Settlement' (hereinafter 'Addendum to Settlement') dated February 26, 2020 and as a consequence thereto, the Court vide Order dated February 26, 2020,

disposed of the petition in terms of the 'Addendum to Settlement' arrived at between the parties.

11. The respondent once again failed to honour the terms laid down in the 'Addendum to Settlement'. Though, the respondent managed to handover the possession of the 'Demised Premises' on July 17, 2020 but that too in a poor state and without complying with the terms of the 'Second Rent Agreement', 'Terms of Settlement' and "Addendum to Settlement'. Moreover, the respondent also failed to pay the *mesne* profit to the petitioner from March, 2020 to July 17, 2020 along with interest, if any.

12. Hence, as per the petitioner, the respondent has not only miserably failed to give vacant, peaceful and free possession of the 'Demised Premises' on time but has also failed to remove all its material, equipment(s) and goods from the 'Demised Premises'.

13. The petitioner again filed the Contempt proceedings bearing no. [Cont. Case (civil) 574/2020] before this Court, against the respondent on account of violation of Order dated September 16, 2019 passed in OMP (I)(COMM) 265/2019 and orders dated February 26, 2020 and July 10, 2020 passed in OMP(I)(COMM) 19/2020.

14. Moreover, it is the case of the petitioner that the respondent instead of paying dues and honour the terms, initiated proceedings before the Civil Judge (Senior Division) Gautam Budh Nagar, Noida against the petitioner.

15. That due to afore-said disputes and differences, the petitioner invoked the arbitration Clause 13.2 contained in the 'Second Rent Agreement'. The said Arbitration Clause and the provision related to

'Jurisdiction of Court' as embedded in the 'Second Rent Agreement' are reproduced as follows:

> *"13. GOVERNING LAW & ARBITRATION*
>
> *13.1 This Agreement shall be governed by and construed in accordance with the laws of India.*
>
> *13.2 "Any claim, controversy or dispute arising out of or in connection with this Agreement, not settled by mutual agreement of the Parties involved within 30 days after a Party is provided with written notice for settlement thereof, shall be referred to arbitration to a sole arbitrator jointly appointed by the Parties under the Indian Arbitration and Conciliation Act of 1996. In the event the Parties are unable to agree upon a sole arbitrator, the claim, controversy or dispute shall be referred to a panel of three arbitrators, one of whom shall be appointed by the Tenant and other by the Landlord and a third by the aforesaid two arbitrators. Pending the arbitration proceedings all disputes amount/ payments shall be deposited in the custody of the arbitrator(s), appointed under this clause until the completion of the arbitration proceedings. These disputed amounts /payments held by the arbitrator(s) shall be paid to the Parties as per the provisions of the arbitration award after successful completion of the proceedings.*
> *The arbitration proceedings shall be conducted in Delhi /Noida, India and shall be governed by and constructed in accordance with the laws of India. The language of the arbitration shall be in English. The cost and expenses of the arbitrator(s) and holding the arbitration shall initially be borne in equal shares by Tenant and Landlord. Initially, each Party will bear its own legal, travelling and other similar costs. However, the arbitrator(s) may, in his*

> */ their award, require any Party to pay such costs as the arbitrator(s) think fit, including the costs and expenses of the arbitration, travel, costs and advocate fees.*
> *13.3 During the pendency of the arbitration, the Parties shall continue to discharge their respective obligations under this Agreement. "*
> *14. Jurisdiction*
> *The Parties agree that the Courts at Delhi (Delhi State) shall have exclusive jurisdiction regarding any matter arising out of or related to the Deed."*

16. Consequently, the petitioner issued an Arbitration Notice, dated July 07, 2021, invoking the afore-said Arbitration Clause and recommended the name of a former Judge of this Court for appointment as the sole arbitrator.

17. That after the issuance of the afore-said arbitration notice, since both the parties could not appoint a sole arbitrator with mutual consent, the petitioner has filed the present petition seeking appointment of an arbitrator to adjudicate all the disputes which have arisen between the parties.

18. On the other hand the respondent has vehemently contested the present petition on the ground that the petition is not maintainable since the disputes which have arisen between the parties are not subject to any arbitration agreement between the parties. The parties are only governed by the 'Terms of Settlement', which is an independent contract not comprising of any arbitration clause and not by the terms of the 'Second Rent Agreement'.

19. It is stated, no proper stamp duty has been paid and no registration was carried out, of the 'Terms of Settlement' and

'Addendum to Settlement', despite both being registrable documents. The said documents cannot be looked into by this Court even at the stage for appointment of an arbitrator. Thus, it is stated the documents, be impounded.

20. With respect to the jurisdiction of this Court, it is stated that the disputes which have arisen between the parties are subject matter of the 'Terms of Settlement' and the adjudicatory process with respect to these disputes is already pending before the Court at Noida, Uttar Pradesh, in Original Suit No.524/2020. The afore-said Suit has been filed prior to the present arbitration proceeding and since the petitioner has been regularly appearing before the District Court at Noida and since it has also filed a petition under Section 8 of the 'A & C Act, 1996' before the Court at Noida, the petitioner has acquiesced to the jurisdiction of the Court at Noida. So, the same disputes be not referred for arbitration.

21. It is stated that reference of this matter to arbitration will lead to multiplicity of proceedings since the same issue which the petitioner purports to raise in the instant petition, is already pending before the Ld. District Court of Noida.

22. Furthermore, it is stated that the pre-condition to invocation of arbitration i.e. good faith negotiations for reaching a mutual settlement between the parties, has not been fulfilled and no such attempt at mutual reconciliation prior to invocation of arbitration has been shown by the petitioner.

23. With respect to an argument that this Court does not have the jurisdiction to entertain the present petition, it is stated that disputes between the parties have arisen out of an immovable property situated at

Noida. Even the 'Second Rent Agreement' stipulates that the arbitration proceedings shall be conducted at Noida. The fact that the 'Second Rent Agreement' states that courts in Delhi shall have jurisdiction, does not alter the seat which is stipulated to be situated at Noida. That entire cause of action has arisen in Noida and especially in view of Section 16 of the Code of Civil Procedure, 1908 the suit has been filed by the respondent before the District Court at Noida. It is stated that causes of action should not be bifurcated to refer one part of the dispute to arbitration and the other one continues before the District Court at Noida.

24. Furthermore, it is the case of the respondent that on expiry of the 'First Rent Agreement', it was for the first time that the petitioner represented that it has become the owner of the 'Demised Premises' in terms of the approval of Scheme of arrangement approved by this Court on May 28, 2012 between Syndicate Printers Ltd. and Omega Finvest Pvt. Ltd. (petitioner herein). According to the respondent, for over four years, Syndicate Printers and their directors, shareholders and persons in control, kept taking rent from the respondent under the 'First Rent Agreement' in an illegal manner.

25. It is pleaded that the respondent had no obligation to restore the 'Demised Premises' to its original condition and was only obligated to handover the possession of the 'Demised Premises' to the petitioner. It is submitted that as on date, the entire rent and even further charges beyond and above the rent stands paid to the petitioner.

26. It is pleaded that occupation of the 'Demised Premises' was not regulated by the terms of 'Second Rent Agreement' but rather as a

tenant by holding over on a month-to-month basis under the Transfer of Property Act, 1882.

27. With respect to default in handing-over the possession of the 'Demised Premises' to the petitioner on time, it is pleaded that the default was neither intentional nor deliberate but rather due to circumstances beyond the control of the respondent. It is submitted that because of restrictions and ban placed upon all construction related activities in Delhi by the Supreme Court of India and by various other authorities, w.e.f., from October 26, 2019, the respondent was not able to restore the 'Demised Premises' on time. It is also pleaded that construction work for restoration of 'Demised Premises' was also substantially suffered due to onset of Covid-19.

28. With respect to the averment of the petitioner that the respondent did not remove its goods and equipment from the 'Demised Premises' on time, it is submitted that it was the petitioner only which refused permission to the respondent to remove its goods and equipments and also threatened the respondent to sell them and appropriate the amounts.

29. It is submitted that the petitioner is also liable to refund the sum of ₹2,35,000/- along with *pendente lite* and future interest @18% per annum, as a balance security deposit to the respondent.

30. With respect to appointment of an Architect by this Court for purposes of inspecting the 'Demised Premises', it is submitted that the scope of work which was entrusted to the Architect was quite limited, however, the said Architect went beyond the terms of reference and created a false and baseless estimate of the 'costs of works'. It is

submitted that the report of the Architect has already been challenged by the respondent before this Court.

31. So, it is stated, the petition is not maintainable.

SUBMISSIONS ON BEHALF OF THE PETITIONER

32. Mr. Vivek Kohli, Learned Senior Counsel, appearing on behalf of the petitioner has vehemently argued that only the Courts in Delhi shall have the exclusive jurisdiction to entertain this petition. To demonstrate this, he relied upon Clauses 14 and 13.2 of the 'Second Rent Agreement'. He argued that conjoint reading of both the clauses manifest that the parties had agreed that the location/venue for arbitral proceedings could be either at 'Delhi or Noida' and the Courts in Delhi to have the exclusive jurisdiction. So, he submitted that when the seat/place of arbitration is stipulated to be situated in Delhi then only the Court at Delhi shall have the exclusive jurisdiction.

33. He relied upon the judgment of the Supreme Court in the case of ***EXL Careers vs. Frankfinn Aviation Services(P) Ltd., (2020) 12 SCC 667***, to plead that the Supreme Court while dealing with an agreement containing a Clause related to an exclusive jurisdiction clause has held as under:

> *"12. It is no more res-integra that in a dispute between parties where two or more courts may have jurisdiction, it is always open for them by agreement to confer exclusive jurisdiction by consent on one of the two courts…."*

34. He then submitted that both the petitions filed by the petitioner under Section 9 of the 'A & C Act, 1996' bearing no. OMP (I)(COMM) 65/2019 and OMP (I)(COMM) 19/2020 were the first proceedings

between the parties, which were filed before this Court and no objection to the jurisdiction was raised by the respondent in the said proceedings and the fact that the respondent accepted both the "Terms of Settlement" as well as "Addendum to settlement" shows that the respondent had acquiesced to the jurisdiction of the Courts in Delhi.

35. Reliance was also placed upon Section 42 of the 'A&C Act, 1996' to plead that once an application with respect to an arbitration agreement has been made in a particular Court then that Court alone shall have the jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made to that Court and in no other Court.

36. He also submitted that the respondent did not have any objection qua jurisdiction in both the Contempt Petitions bearing no. Cont. Case (Civil) 37/2020 and Cont. Case (Civil) 574/2020 filed by the petitioner against the respondent, which are still pending before this Court.

37. With respect to existence of Arbitration Clause contained in the 'Second Rent Agreement', Mr. Kohli pointed out paragraph 17(g) of the reply filed by the respondent wherein the respondent has sought for the refund of security deposit in accordance with terms of the 'Second Rent Agreement'. As per Mr. Kohli, the act of the respondent raising its claims out of that agreement shows that for the respondent itself, the terms of the 'Second Rent Agreement' still subsists and the parties are bound to honour it.

38. In support of his afore-said contention, he pleaded that it is nobody's case that the Arbitration Clause contained in the 'Second Rent Agreement' has been superseded by the 'Terms of Settlement'.

Moreover, since the Arbitration Clause contained in that agreement is in itself a separate agreement therefore both the parties are still bound by it. He relied upon Section 16 of the 'A & C Act, 1996' and also on the judgment of the Supreme Court of India in ***Reva Electric Car Co. (P) Ltd. vs. Green Mobil, (2012) 2 SCC 93,*** to contend the separability of the arbitration clause contained in the 'Second Rent Agreement'. He also relied upon the judgment of the Supreme Court in ***Lufthansa German Airlines vs. Airport Authority of India, MANU/SC/1304/2012***, to contend that an arbitration clause survives even the expiration of the main agreement containing it.

39. In order to establish that the Arbitration Clause contained in the 'Second Rent Agreement' has not been superseded or novated by the 'Terms of Settlement', Mr. Kohli has relied upon the judgment of the coordinate bench of this Court in ***Knowledge Podium Systems Pvt. Ltd. vs. S.M. Professional Services Pvt. Ltd. MANU/DE/0116/2021***. He argued that this Court in the afore-said Judgment has held that that the novation can only take place when there is a complete substitution of a new contract in place of the old one and in the present case, from nowhere it can be ascertained that the parties had agreed to superseding or novation of the 'Second Rent Agreement' by the 'Terms of the Settlement'. Reliance was also placed on the judgment of the coordinate bench of this Court in the case of ***Juki India Private Limited vs. M/s Capital Apparels Technology Private Limited, Arb. P. 1151/2021*** to contend the same.

40. He then relied upon the Judgment of the Supreme Court of India in ***Sirajuddin Kasim &Anr. vs. M/s. Paramount Investment Ltd.,***

MANU/SC/0559/2010 to plead that it is the settled position in law that whether the rights of the parties under an agreement are being superseded by a subsequent settlement agreement or not, is itself an arbitrable issue which can be examined by the Arbitrator. He also took the aid of the latest judgment passed by the Supreme Court in ***Sanjiv Prakash vs. Seema Kukreja and Ors., (2021) 9 SCC 732***, to argue that while entertaining a petition filed under Section 11 of the 'A & C Act,1996', the Court cannot enter into a mini-trial to usurp the jurisdiction of the arbitral tribunal and therefore the question of whether an agreement containing an arbitration clause has been novated by another agreement, cannot be adjudicated while determining the fate of Section 11 petition.

41. He has also taken this Court's attention to Clause 9.4 of the 'Second Rent Agreement', which stipulates that provisions of clauses pertaining to 'Confidentiality and Arbitration' shall survive despite the termination of the 'Second Rent Agreement.

42. He also relied upon the judgment of the Supreme Court in ***Lufthansa German Airlines (supra)*** to aver that the arbitration clause will not by itself come to an end merely because the contract containing an arbitration clause comes to an end by efflux of time.

43. To contend that notwithstanding pendency of any application filed under Section 8 of the 'A & C Act, 1996', the commencement or continuation of the arbitral proceedings will not be impeded, Mr. Kohli relied upon Section 8(3) of the 'A & C Act, 1996' and judgment of the Supreme Court in the case of ***Vijay Kumar Sharma v. Raghunandan Sharma, MANU/SC/0072/2010.***

44. With respect to the petitioner seeking appointment of a Sole Arbitrator, Mr. Kohli contended that the same was sought for the purpose of efficiency in the conduct of the arbitral proceedings and also to resolve the disputes between the parties in a cost-effective manner.

45. Mr. Kohli also submitted that the condition of good faith negotiations for invocation of arbitral proceedings has been duly fulfilled between the parties. He highlighted the order dated December 22, 2021 wherein this Court had referred both the parties to mediation before Delhi High Court Mediation & Conciliation Centre and also order dated August 23, 2019 wherein this Court while hearing the Section 9 petition in OMP (I) (COMM) 265/2019 had also referred the parties to the same mediation centre, however in both the cases, the mediation proceedings did not come out to be fruitful and failed. Therefore, according to Mr. Kohli, it cannot be said that the condition of good faith negotiation has not been fulfilled.

46. So on all the aforesaid grounds, he seeks appointment of a sole arbitrator.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

47. Whereas, Mr. Ashish Virmani, learned Counsel appearing on behalf of the respondent primarily contends against the maintainability of the instant petition by arguing that the 'Second Rent Agreement' containing an arbitration clause between the parties got expired by efflux of time on June 30, 2019 and thereby only agreement which governs the relationship between the parties is the 'Terms of Settlement' which does not contain the arbitration clause. Similarly, the 'Addendum to Settlement' which was executed on February 26, 2020 also does not

contain an arbitration clause. According to Mr. Virmani, present disputes which have arisen between the parties are result of the 'Addendum to Settlement' not the 'Second Rent Agreement'. Thus, he argued that the present disputes are not subject matter of arbitration.

48. To further crystallize his submission that the District Court at Noida has jurisdiction to deal with present disputes, Mr. Virmani submitted that the entire dispute purportedly arises out of payments sought by the petitioner from the respondent for the months till July, 2020 (which is governed by 'Addendum to Settlement'). Whereas, the respondent has already filed a suit on August 4, 2020, seeking recovery of the part of its security deposit which is lying with the petitioner, before the District Court at Noida. He submitted that District Court at Gautam Budh Nagar, Noida, shall have jurisdiction to deal with such issue by virtue of Section 16 of the Code of Civil Procedure and especially when there is no arbitration clause stipulated within 'Addendum to Settlement'. Reliance has been placed on the judgment of the Supreme Court in ***Harshad Chimanlal Modi vs. DLF Universal Ltd., (2005) 7 SCC 791*** to support this contention.

49. He submitted that apart from afore-said facts, the petitioner has already filed its written statement in the suit pending in Noida District Court and it is only thereafter that the petitioner issued a notice invoking arbitration i.e., after a year of the disputes having arisen between the parties. Thus, according to him, the petitioner has acquiesced to the jurisdiction of civil court at Noida.

50. Reliance has been placed upon the judgments of the Supreme Court in ***Young Achievers vs. IMS Learning Resources Pvt. Ltd.,***

(2013) 10 SCC 535 and ***Ansal Housing & Construction Ltd. vs. Samyak Projects Pvt. Ltd., 2018 SCC OnLine Del 12866*** to argue that if a superseded contract does not contain an arbitration clause then dispute arising therefrom also becomes not arbitrable as the arbitration clause in the previous contract perishes with perishing of the previous contract.

51. Mr. Virmani also relied upon the judgments of the Supreme Court in ***BSNL vs. Nortel Networks India Pvt. Ltd., (2021) 5 SCC 738*** and ***Vidya Drolia vs. Durga Trading Corporation, (2021) 2 SCC 1*** to contend that under Section 11(6A) of the 'A & C Act, 1996', the Court has to confine itself to examination of existence of an arbitration agreement and this scope of inquiry cannot be carried out by an arbitrator. So, he pleaded that disputes in the present case cannot be referred to arbitration because of *ex-facie* absence of an arbitration clause.

52. He further relied upon the judgment of the coordinate bench of this Court in ***BCC Developers and Promoters Pvt. Ltd. vs. DMRCL, Arb Pet. 813/2021*** to contend that Clause 13.2 of the 'Second Rent Agreement' specifically provides that if the parties are unable to agree on a sole arbitrator then disputes would be decided by a panel of three arbitrator and since in the present case the petitioner did not refer the matter to a three-member arbitral panel and sought interference of the this Court, therefore, the instant petition has to be dismissed. He further submitted that an appointment of a sole arbitrator may not be sought when procedure under an arbitration agreement stipulates for appointment of three-panel arbitrator.

53. So, he vehemently argued against the maintainability of the present petition and urged this Court to dismiss the same.

ANALYSIS

54. Having heard the learned counsels for the parties and perused the record, the first issue which requires consideration is, whether in view of the settlement leading to passing of an order dated September 16, 2019 in OMP (I) (COMM) No.265/2019 and 'Addendum to the Settlement' dated February 26, 2020 not having an arbitration clause, the present petition shall not be maintainable.

55. In this regard, it is the submission of Mr. Virmani that the 'Second Rent Agreement' containing the arbitration clause got expired by efflux of time on June 30, 2019 and thereby the only agreement which governs the relationship between the parties is the 'Terms of Settlement' which does not contain the arbitration clause.

56. Similarly, the 'Addendum to Settlement' which was executed on February 26, 2020 also does not contain an arbitration clause. In other words, according to Mr. Virmani, the disputes have arisen between the parties as a result of 'Addendum to Settlement' not the 'Second Rent Agreement'; hence the same are not arbitrable.

57. I am not in agreement with the submission of Mr. Virmani for the following reasons:

(i) The relationship between the parties with regard to the 'Demised Premises' situated at B-4 Sector III, Noida, Uttar Pradesh-201301, came into existence on the execution of the Rent Agreement dated February 28, 2008.

(ii) The new rent agreement dated July 13, 2016 (i.e. Second Rent Agreement) was executed between the respondent and the petitioner, renewing the lease for a period of three years which contains the arbitration clause.

(iii) The 'First Deed of Modification' executed on September 12, 2016 clearly stipulates vide Clause 2 that *"All other terms of the Rent Agreement remain unchanged"*, i.e., 'Second Rent Agreement' dated July 13, 2016 as well as the arbitration clause found in that agreement remained unchanged.

(iv) Similarly, the 'Second Deed of Modification' also encompasses a similar clause, i.e., Clause 6 which reads as *"All other terms of the Rent Agreement remain unchanged"*.

(v) On account of disputes and differences which had arisen between the parties due to breach of terms and conditions of the 'Second Rent Agreement', a petition was filed bearing OMP (I) (COMM) No.265/2019. In the said petition a joint application was filed by the parties resulting in the order dated September 16, 2019. The joint application primarily contained the stipulations related to the payment of arrears of rent/occupation charges, restoration of the premises to its original conditions etc.

(vii) There is no stipulation that the parties, on filing of a joint application and entering into a settlement, the arbitration clause contained in the 'Second Rent Agreement' shall stand rescinded.

(viii) Similar is the position with regard to the 'Addendum to Settlement' executed on February 26, 2020, i.e., it does not contain a stipulation that the arbitration clause shall stand rescinded.

(ix) The arbitration clause would not come to end even if the contract has expired by efflux of time as held by the Supreme Court in ***Lufthansa German Airlines (supra)***.

58. Also, there is no dispute that the 'Second Rent Agreement' has an arbitration clause along with the exclusive jurisdiction clause, which I have already reproduced in paragraph 15.

59. The law in terms of the judgment of the Supreme Court in the case of ***Vidya Drolia (supra)*** is clear that the scope of Section 11, more particularly in view of the amended Section 11(6A) of the 'A&C Act, 1996', the Court needs to see only the existence of an arbitration agreement and not its validity. The Supreme Court in paragraph 147 has held as under:

> *"147. We would proceed to elaborate and give further reasons:*
> *147.1. In Garware Wall Ropes Ltd. , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)*
> *"29. This judgment in Hyundai Engg. case is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the*

insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case , as followed by us."

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. "Examination", as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam-Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Stavros Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on nonarbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engg. Ltd. The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, "existence of an arbitration agreement".

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy

Sahara v. Union of India , this Court has observed : (SCC p. 642, para 191)

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."

147.9. Even in Duro Felguera , Kurian Joseph, J., in para 52, had referred to Section 7 (5) and thereafter in para 53 referred to a judgment of this Court in M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. to observe that the analysis in the said case supports the final conclusion that the memorandum of understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to Patel Engg. Ltd. and Boghara Polyfab (P) Ltd. to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in Duro Felguera

specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less.

Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in Patel Engg. Ltd. and Boghara Polyfab (P) Ltd. was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Ltd. case , this Court in Narbheram Power & Steel (P) Ltd. and Hyundai Engg. & Construction Co. Ltd. , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in Vulcan Insurance Co. Ltd. Similarly, in PSA Mumbai Investments Pte. Ltd. , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise

> *prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage."*

60. If that be so, the plea of Mr. Virmani that in view of settlement between the parties as reflected in the joint application and 'Addendum to the Settlement', there does not exist an arbitration agreement and thus the petition is not maintainable, cannot be accepted.

61. It is pertinent to state, that the conclusion in the above paragraph 147 has been referred to a large bench by the Supreme Court, in the case of ***M/s.N.N. Global Mercantile Pvt. Ltd. v. M/s. Indo Unique Flame Ltd. & Ors., (2021) 4 SCC 379,*** decided on January 11, 2021, by holding as under:-

> *"34. We doubt the correctness of the view taken in paras 146 and 147 of the three-Judge Bench in Vidya Drolia. We consider it appropriate to refer the findings in paras 22 and 29 of Garware Wall Ropes Limited., which has been affirmed in paras 146 and 147 of Vidya Drolia, to a Constitution Bench of five Judges."*

The matter is still pending adjudication.

62. Insofar as the reliance placed by Mr. Virmani on the judgment in the case of ***Young Achievers (supra)*** is concerned, it is apposite to state, this Court had, in ***Sanjiv Prakash*** v. ***Seema Kukreja and Ors., Arb. P. 4/2020 decided on October 22, 2020***, relied upon the judgment of the Supreme Court in ***Young Achievers (supra)*** to hold that the agreement consisting of an arbitration clause invoked by the petitioner therein, stood novated and dismissed the petition. While considering the appeal therefrom, the Supreme Court in ***Sanjiv Prakash vs. Seema Kukreja***

and Ors., (supra) has referred to the judgment in ***Young Achievers (supra)***. It finally held in paragraphs 16 to 22, as under:

> *"16. Both the learned counsel strongly relied upon Clause 11.2 of the SHA which made it clear beyond doubt that the MoU stood superseded. They then relied upon the judgments in Kishorilal Gupta [Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 : AIR 1959 SC 1362] (at para 9), Damodar Valley Corpn. [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141] (at paras 7 and 8), Young Achievers [Young Achievers v. IMS Learning Resources (P) Ltd., (2013) 10 SCC 535 : (2013) 4 SCC (Civ) 788] (at paras 5 and 8), Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd. [Sasan Power Ltd. v. North American Coal Corpn. (India) (P) Ltd., (2016) 10 SCC 813 : (2017) 1 SCC (Civ) 216] , SCC para 23, and Larsen & Toubro Ltd. v. Mohan Lal Harbans Lal Bhayana [Larsen & Toubro Ltd. v. Mohan Lal Harbans Lal Bhayana, (2015) 2 SCC 461 : (2015) 2 SCC (Civ) 137] , SCC para 15 in favour of the proposition that the MoU stood novated as a result of the SHA. They also relied upon V.B. Rangaraj v. V.B. Gopalakrishnan [V.B. Rangaraj v. V.B. Gopalakrishnan, (1992) 1 SCC 160] , SCC paras 1, 2, 7 and 8 and Pushpa Katoch v. Manu Maharani Hotels Ltd. [Pushpa Katoch v. Manu Maharani Hotels Ltd., 2005 SCC OnLine Del 702 : (2005) 83 DRJ 246] , SCC OnLine Del paras 5, 7 and 8 : DRJ paras 5, 7 and 8, for the proposition that the MoU would be unenforceable in law as any restriction on transfer of shares of a private company, without incorporating the aforesaid in its Articles, would be invalid as a result of which the articles of association alone would have to be looked at. This being the case, the arbitration clause contained in an agreement which is void obviously cannot be looked at. They then referred to certain recent judgments of this Court for the proposition that the present case being an open and shut one, the learned Single Judge of the Delhi High Court was right in dismissing the Section 11 petition filed by the appellant.*

17. By virtue of the Arbitration and Conciliation (Amendment) Act, 2015 ("the 2015 Amendment Act"), by which Section 11(6-A) was introduced, the earlier position as to the scope of the powers of a court under Section 11, while appointing an arbitrator, are now narrowed to viewing whether an arbitration agreement exists between parties. In a gradual evolution of the law on the subject, the judgments in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] were explained in some detail in a three-Judge Bench decision in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] ["Vidya Drolia"]. So far as the facts of the present case are concerned, it is important to extract paras 127 to 130 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , which deal with the judgments in Kishorilal Gupta [Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 : AIR 1959 SC 1362] and Damodar Valley Corpn. [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141], both of which have been heavily relied upon by the learned Single Judge in the impugned judgment [Sanjiv Prakash v. Seema Kukreja, 2020 SCC OnLine Del 1778] , as follows : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], SCC pp. 107-09, paras 127-30)

> *"127. An interesting and relevant exposition, when assertions claiming repudiation, rescission or "accord and satisfaction" are made by a party opposing reference, is to be found in Damodar Valley Corpn. v. K.K. Kar [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141] , which had referred to an earlier judgment of this Court in Union of India v. Kishorilal Gupta & Bros. [Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 : AIR 1959 SC 1362] to observe : (Damodar Valley Corpn. case [Damodar Valley*

Corpn. v. K.K. Kar, (1974) 1 SCC 141] , SCC pp. 147-48, para 11)

'11. After a review of the relevant case law, Subba Rao, J., as he then was, speaking for the majority enunciated the following principles : (Kishorilal Gupta & Bros. case [Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 : AIR 1959 SC 1362] , AIR p. 1370, para 10)

"10. ... (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach, etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes."

In those cases, as we have stated earlier, it is the performance of the contract that has come to an end but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. We think as the contract subsists for certain purposes,

the arbitration clause operates in respect of these purposes.'

128. Reference in Damodar Valley Corpn. case [Damodar Valley Corpn. v. K.K. Kar, (1974) 1 SCC 141] was also made to the minority judgment of Sarkar, J. in Kishorilal Gupta & Bros. [Union of India v. Kishorilal Gupta & Bros., (1960) 1 SCR 493 : AIR 1959 SC 1362] to observe that he had only disagreed with the majority on the effect of settlement on the arbitration clause, as he had held that arbitration clause did survive to settle the dispute as to whether there was or was not an "accord and satisfaction". It was further observed that this principle laid down by Sarkar, J. that "accord and satisfaction" does not put an end to the arbitration clause, was not disagreed to by the majority. On the other hand, Proposition (6) seems to be laying the weight on to the views of Sarkar, J. These decisions were under the Arbitration Act, 1940. The Arbitration Act specifically incorporates principles of separation and competence-competence and empowers the Arbitral Tribunal to rule on its own jurisdiction.

129. Principles of competence-competence have positive and negative connotations. As a positive implication, the Arbitral Tribunals are declared competent and authorised by law to rule as to their jurisdiction and decide non-arbitrability questions. In case of expressed negative effect, the statute would govern and should be followed. Implied negative effect curtails and constrains interference by the court at the referral stage by necessary implication in order to allow the Arbitral Tribunal to rule as to their jurisdiction and decide non-arbitrability questions. As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication, such questions of non-arbitrability. Such prioritisation of the Arbitral Tribunal over the courts can be partial and limited when the legislation provides for some or restricted scrutiny at the

"first look" referral stage. We would, therefore, examine the principles of competence-competence with reference to the legislation, that is, the Arbitration Act.

130. Section 16(1) of the Arbitration Act accepts and empowers the Arbitral Tribunal to rule on its own jurisdiction including a ruling on the objections, with respect to all aspects of non-arbitrability including validity of the arbitration agreement. A party opposing arbitration, as per sub-section (2), should raise the objection to jurisdiction of the tribunal before the Arbitral Tribunal, not later than the submission of statement of defence. However, participation in the appointment procedure or appointing an arbitrator would not preclude and prejudice any party from raising an objection to the jurisdiction. Obviously, the intent is to curtail delay and expedite appointment of the Arbitral Tribunal. The clause also indirectly accepts that appointment of an arbitrator is different from the issue and question of jurisdiction and non-arbitrability. As per sub-section (3), any objection that the Arbitral Tribunal is exceeding the scope of its authority should be raised as soon as the matter arises. However, the Arbitral Tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-sections (2) and (3) if it considers that the delay is justified. As per the mandate of sub-section (5) when objections to the jurisdiction under sub-sections (2) and (3) are rejected, the Arbitral Tribunal can continue with the proceedings and pass the arbitration award. A party aggrieved is at liberty to file an application for setting aside such arbitral award under Section 34 of the Arbitration Act. Sub-section (3) to Section 8 in specific terms permits an Arbitral Tribunal to continue with the arbitration proceeding and make an award, even when an application under sub-section (1) to Section 8 is pending consideration of the court/forum. Therefore, pendency of the judicial proceedings even before the court is not by itself a bar for the Arbitral

Tribunal to proceed and make an award. Whether the court should stay arbitral proceedings or appropriate deference by the Arbitral Tribunal are distinctly different aspects and not for us to elaborate in the present reference."

18. *Again, insofar as the facts of the present case are concerned, para 148 of the aforesaid judgment is apposite and states as follows: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 119)*

"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

19. *A recent judgment, Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. [Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671 : (2021) 3 SCC*

(Civ) 307] , referred in detail to Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in paras 15 to 18 as follows : (Pravin Electricals case [Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671 : (2021) 3 SCC (Civ) 307] , SCC pp. 691-98)

> *"15. Dealing with "prima facie" examination under Section 8, as amended, the Court then held : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 110-11, para 134)*
>
> *'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. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234] are of importance and relevance. Similar views are expressed by this Court in Vimal Kishor Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.'*
>
> *16. The parameters of review under Sections 8 and 11 were then laid down thus : (Vidya Drolia case [Vidya*

Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 112-13, paras 138-40)

'138. In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] 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. [Ed. : The Boghara categories are set out in para 96, at pp. 86-87 of Vidya Drolia, (2021) 2 SCC 1. Given that Boghara, (2009) 1 SCC 267 was decided before the 2015 Amendment, it is worthwhile juxtaposing the observations of Ramana, J. in his supplementing opinion hereinbelow, on this issue in paras 225.1, 225.2 and 227 of Vidya Drolia case:"Post the 2015 Amendment, judicial interference at the reference stage has been substantially curtailed… post the 2015 Amendment, the structure of the

Act was changed to bring it in tune with the pro-arbitration approach. Under the amended provision, the court can only give prima facie opinion on the existence of a valid arbitration agreement."This would only appear to emphasise the limited and restricted nature of review by the court at the referral stage even while having resort to the Boghara categories, which must be read in light of the observations made in para 138 of Vidya Drolia case, modifying and limiting them in light of the 2015 Amendment and the fourfold test of non-arbitrability postulated herein.]

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. [Ozlem Susler, "The English Approach to Competence-Competence" Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13.]

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.'

17. The Court then examined the meaning of the expression "existence" which occurs in Section 11(6-A) and summed up its discussion as follows : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 115-19, paras 146-47)

'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.

147. We would proceed to elaborate and give further reasons:

147.1. In Garware Wall Ropes Ltd. [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof : (SCC p. 238)

"29. This judgment in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the

sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , as followed by us."

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Invalid agreement is no agreement.

147.2. The court at the reference stage exercises judicial powers. "Examination", as an ordinary expression in common parlance, refers to an act of looking or considering something carefully in order to discover something (as per Cambridge Dictionary). It requires the person to inspect closely, to test the condition of, or to inquire into carefully (as per Merriam-Webster Dictionary). It would be rather odd for the court to hold and say that the arbitration agreement exists, though ex facie and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable. The court is not powerless and would not act beyond jurisdiction, if it rejects an application for reference, when the arbitration clause is admittedly or without doubt is with a minor, lunatic or the only claim seeks a probate of a will.

147.3. Most scholars and jurists accept and agree that the existence and validity of an arbitration agreement are the same. Even Stavros Brekoulakis accepts that validity, in terms of substantive and formal validity, are questions of contract and hence for the court to examine.

147.4. Most jurisdictions accept and require prima facie review by the court on non-arbitrability aspects at the referral stage.

147.5. Sections 8 and 11 of the Arbitration Act are complementary provisions as was held in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] The object and purpose behind the two provisions is identical to compel and force parties to abide by their contractual understanding. This being so, the two provisions should be read as laying down similar standard and not as laying down different and separate parameters. Section 11 does not prescribe any standard of judicial review by the court for determining whether an arbitration agreement is in existence. Section 8 states that the judicial review at the stage of reference is prima facie and not final. Prima facie standard equally applies when the power of judicial review is exercised by the court under Section 11 of the Arbitration Act. Therefore, we can read the mandate of valid arbitration agreement in Section 8 into mandate of Section 11, that is, "existence of an arbitration agreement".

147.6. Exercise of power of prima facie judicial review of existence as including validity is justified as a court is the first forum that examines and decides the request for the referral. Absolute "hands off" approach would be counterproductive and harm arbitration, as an alternative dispute resolution mechanism. Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration.

147.7. Exercise of the limited prima facie review does not in any way interfere with the principle of competence-competence and separation as to obstruct arbitration proceedings but ensures that vexatious and frivolous matters get over at the initial stage.

147.8. Exercise of prima facie power of judicial review as to the validity of the arbitration agreement would save costs and check harassment of objecting parties when there is clearly no justification and a good reason not to accept plea of non-arbitrability. In Subrata Roy Sahara v. Union of India [Subrata Roy Sahara v. Union of India, (2014) 8 SCC 470 : (2014) 4 SCC (Civ) 424 :

(2014) 3 SCC (Cri) 712] , this Court has observed : (SCC p. 642, para 191)

"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. One needs to keep in mind that in the process of litigation, there is an innocent sufferer on the other side of every irresponsible and senseless claim. He suffers long-drawn anxious periods of nervousness and restlessness, whilst the litigation is pending without any fault on his part. He pays for the litigation from out of his savings (or out of his borrowings) worrying that the other side may trick him into defeat for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for what he has lost for no fault? The suggestion to the legislature is that a litigant who has succeeded must be compensated by the one who has lost. The suggestion to the legislature is to formulate a mechanism that anyone who initiates and continues a litigation senselessly pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs"."

147.9. Even in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , Kurian Joseph, J., in para 52, had referred to Section 7(5) and thereafter in para 53 referred to a judgment of this Court in M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd. [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] to observe that the analysis in the said case supports the final conclusion that the memorandum of understanding in the said case did not incorporate an arbitration clause. Thereafter, reference was specifically made to Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab (P) Ltd. [National Insurance Co.

Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] to observe that the legislative policy is essential to minimise court's interference at the pre-arbitral stage and this was the intention of sub-section (6) to Section 11 of the Arbitration Act. Para 48 in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] specifically states that the resolution has to exist in the arbitration agreement, and it is for the court to see if the agreement contains a clause which provides for arbitration of disputes which have arisen between the parties. Para 59 is more restrictive and requires the court to see whether an arbitration agreement exists — nothing more, nothing less. Read with the other findings, it would be appropriate to read the two paragraphs as laying down the legal ratio that the court is required to see if the underlying contract contains an arbitration clause for arbitration of the disputes which have arisen between the parties — nothing more, nothing less. Reference to decisions in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] was to highlight that at the reference stage, post the amendments vide Act 3 of 2016, the court would not go into and finally decide different aspects that were highlighted in the two decisions.

147.10. In addition to Garware Wall Ropes Ltd. case [Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209 : (2019) 4 SCC (Civ) 324] , this Court in Narbheram Power & Steel (P) Ltd. [Oriental Insurance Co. Ltd. v. Narbheram Power & Steel (P) Ltd., (2018) 6 SCC 534 : (2018) 3 SCC (Civ) 484] and Hyundai Engg. & Construction Co. Ltd. [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607 : (2019) 2 SCC (Civ) 530] , both decisions of three Judges, has rejected the application for reference in the insurance contracts holding that the claim was beyond and not covered by the

arbitration agreement. The Court felt that the legal position was beyond doubt as the scope of the arbitration clause was fully covered by the dictum in Vulcan Insurance Co. Ltd. [Vulcan Insurance Co. Ltd. v. Maharaj Singh, (1976) 1 SCC 943] Similarly, in PSA Mumbai Investments Pte. Ltd. [PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] , this Court at the referral stage came to the conclusion that the arbitration clause would not be applicable and govern the disputes. Accordingly, the reference to the Arbitral Tribunal was set aside leaving the respondent to pursue its claim before an appropriate forum.

147.11. The interpretation appropriately balances the allocation of the decision-making authority between the court at the referral stage and the arbitrators' primary jurisdiction to decide disputes on merits. The court as the judicial forum of the first instance can exercise prima facie test jurisdiction to screen and knock down ex facie meritless, frivolous and dishonest litigation. Limited jurisdiction of the courts ensures expeditious, alacritous and efficient disposal when required at the referral stage.'

18. The Bench finally concluded : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 120-21, paras 153-55)

'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 Patel Engg. Ltd. [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.

155. Reference is, accordingly, answered.'

20. The Court in Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] then concluded, on the facts of that case, that it would be unsafe to conclude one way or the other that an arbitration agreement exists between the parties on a prima facie review of facts of that case, and that a deeper consideration must be left to an arbitrator, who is to examine the documentary and oral evidence and then arrive at a conclusion.

21. Likewise, in BSNL v. Nortel Networks (India) (P) Ltd. [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352] , another Division Bench of this Court referred to Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] and concluded : (BSNL case [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352], SCC pp. 765-66, paras 46-47)

"46. The upshot of the judgment in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and Mayavati Trading [Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly that Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]

47. 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, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

22. Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12-4-1996 requires a detailed consideration of the clauses of the two agreements, together with the surrounding circumstances in which these agreements were entered into, and a full consideration of the law on the subject. None of this can be done given the limited jurisdiction of a court under Section 11 of the 1996 Act. As has been held in para 148 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , detailed arguments on whether an agreement which contains an arbitration clause has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Also, this case does not fall within the category of cases which ousts arbitration altogether, such as matters which are in rem proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract. There is nothing vexatious or frivolous in the plea taken by the appellant. On the contrary, a Section 11 court would refer the matter when contentions relating to non-arbitrability are plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the Arbitral Tribunal."

63. The Supreme Court has in the aforesaid case, in view of amendment to Section 11, whereby Section 11(6A) of the 'A&C Act, 1996' was added, held that any issue with regard to novation need to be considered by the Arbitrator. In other words, the limited jurisdiction of the Court while considering an application under Section 11 of the

'A&C Act, 1996' is to see the existence of an arbitration agreement and not its validity. But the said proposition shall not come into play in this case as I have already held that the arbitration clause in the 'Second Rent Agreement' still binds the parties.

64. Insofar as the judgment in the case of ***Ansal Housing & Construction Ltd. (supra)***, relied upon by Mr. Virmani, for the same proposition is concerned, the same has also no applicability for the reason that the issue which arose for consideration in that case was whether the arbitration clause existing in the Memorandum of Understanding dated July 12, 2012 executed between the parties having been cancelled by a subsequent Deed of Cancellation dated April 20, 2013 which had no arbitration clause, be invoked by the parties for the adjudication of the disputes. Suffice to state, that the Clause 1 of the 'Deed of Cancellation' therein, *inter alia* stipulated '*That the MoU dated 12th July, 2012 shall stand cancelled without any Party having any claim against each other except as agreed hereinafter*'. It was in this context, that the Coordinate Bench of this Court had held that as the MoU dated July 12, 2012, stood cancelled, the Arbitration Clause perished. Therefore, the said judgment is clearly distinguishable on facts.

65. I may also deal with the judgments referred to by Mr. Virmani in the cases of ***BSNL (supra)*** and ***Vidya Drolia (supra)*** to contend that under Section 11 (6A) of the 'A&C Act, 1996' the Court has to confine its examination to the existence of an arbitration agreement, as this scope of inquiry cannot be carried out by an Arbitrator.

66. I agree with the submission of Mr. Virmani for the purpose he has relied upon the afore-said two judgments but disagree with him to the extent that the 'Terms of Settlement' and the 'Addendum to Settlement' have revoked the arbitration clause containing in the 'Second Rent Agreement'.

67. Insofar as the submission of Mr. Virmani, that the respondent has already filed a suit for recovery of security deposit, which is pending before the District Court at Noida and that court is competent to deal with such an issue by virtue of Section 16 of the Code of Civil Procedure, 1908, and specially when there is no arbitration clause stipulated in the 'Addendum to Settlement' is concerned, the same is unmerited. This I say so, for more than one reason, firstly, in view of my conclusion above; secondly, the petitioner herein, in its reply to the suit filed at Noida, has taken an objection with regard to the maintainability of that suit because of the existence of arbitration clause; thirdly, in view of Section 8(3) of the 'A&C Act,1996' and the judgment relied upon by Mr. Kohli of ***Vijay Kumar Sharma (supra)***, this Court is not precluded from deciding this petition under Section 11 of the 'A&C Act, 1996'.

68. In the judgment of ***Vijay Kumar Sharma (supra)*** the Supreme Court has in paragraph 9 held as under:

> *"9. It is evident from Sub-section (3) of Section 8 that the pendency of an application under Section 8 before any court will not come in the way of an arbitration being commenced or continued and an arbitral award being made. The obvious intention of this provision is that neither the filing of any suit by any party to the arbitration agreement nor any application being made by the other party under*

Section 8 to the court, should obstruct or preclude a party from initiating any proceedings for appointment of an arbitrator or proceeding with the arbitration before the Arbitral Tribunal. Having regard to the specific provision in Section 8(3) providing that the pendency of an application under Section 8(1) will not come in the way of an arbitration being commenced or continued, we are of the view that an application under Section 11 or Section 15(2) of the Act, for appointment of an arbitrator, will not be barred by pendency of an application under Section 8 of the Act in any suit, nor will the Designate of the Chief Justice be precluded from considering and disposing of an application under Section 11 or 15(2) of the Act. It follows that if an arbitrator is appointed by the Designate of the Chief Justice under Section 11 of the Act, nothing prevents the arbitrator from proceeding with the arbitration. It also therefore follows that the mere fact that an appeal from an order dismissing the suit under Order 7 Rule 11 CPC (on the ground that the disputes require to be settled by Arbitration) is pending before the High Court, will not come in the way of the appointment of an arbitrator under Section 11 read with Section 15(2) of the Act, if the Authority under Section 11 finds it necessary to appoint an Arbitrator. Therefore the first contention of the appellant is liable to be rejected."

69. One of the contentions of the respondent is that the 'Terms of Settlement/Addendum to Settlement', being neither stamped nor registered, cannot be looked into by this Court even at the stage of appointment of an Arbitrator. I am not in agreement with this submission of Mr. Virmani for two reasons; Firstly, it is his own case that the 'Terms of Settlement/Addendum to Settlement' does not contain an arbitration clause. If that being an admitted position, there is no requirement for this Court to even look at those terms of settlement to determine about the existence of an arbitration clause. Secondly, the

present petition has been filed by the petitioner on the strength of an arbitration clause as existing in the 'Second Rent Agreement' which admittedly is a stamped and registered document and it is not the case of Mr. Virmani, that the 'Second Rent Agreement' is not sufficiently stamped.

70. Hence, the judgment relied upon by Mr. Virmani in the case of ***Chand Kaur v. Raj Kaur and Ors., AIR 1997 P&H 155***, has no applicability.

71. One of the submissions of Mr. Virmani is that the terms of Clause 13.2 of the 'Second Rent Agreement' provides, that, in the event the parties are unable to agree upon a sole Arbitrator, the claim, controversy or dispute shall be referred to a panel of three arbitrators and since in the present case, the petitioner did not refer the disputes to a three member arbitral tribunal and sought recourse to this Court, the present petition needs to be dismissed. To substantiate this, he has relied upon the judgment of the coordinate bench of this Court in ***BCC Developers (supra).*** Suffice to state, that I am not in agreement with the submission made by Mr. Virmani, as in the said judgment, this Court was concerned with the fact where the arbitration clause contemplated that if the total value of the claim is more than five million then the same shall be referred to a panel of three Arbitrators. The stand of the petitioner in that case was, that the power of the respondent to provide a panel of arbitrators stands nullified under the provisions of amended Section 12 of the 'A&C Act, 1996' and for this reason, the petitioner therein sought the appointment of a Sole Arbitrator. This argument was negated by the Court by holding that the terms of the arbitration agreement needed to

be given effect to because of its sacrosanct nature and thereby rejected the contention of the petitioner that the arbitration 'Clause 17.9' was hit by the provisions of Section 12 of the 'A&C Act,1996'. So, it was in this context that this Court had held that the appointment needed to be made, in terms of Clause 17 of the agreement executed between the parties therein but it is not such a case here.

72. In the case in hand, the arbitration clause as find mentioned in the 'Second Rent Agreement', *inter alia* contemplates that disputes arising out of or in connection with this agreement shall be referred to arbitration by a sole Arbitrator jointly appointed by the parties. Suffice to state, that it is only in the event that the parties are unable to agree upon a sole Arbitrator, the dispute could be referred to a panel of three Arbitrators, wherein, one of whom to be appointed by the petitioner and the other by the respondent and third by the aforesaid two arbitrators. In the present case, the petitioner had invoked the arbitration clause by proposing the name of a Former Judge of this Court for the appointment as an Arbitrator, which was opposed by the respondent contending that dispute between the parties is not arbitrable. Therefore, this is not a case where the respondent has not agreed to the appointment of a Former Judge of this Court as an Arbitrator but it has challenged the very arbitrability of the dispute. In that sense, the case setup by the respondent is the dispute does not fall within the parameters of the arbitration clause. So the respondent cannot now urge that three Arbitrators need to be appointed.

73. That apart, nothing precludes this Court while exercising its power under Section 11 of the 'A&C Act, 1996' to appoint a sole

Arbitrator. I also agree with the submission of Mr. Vivek Kohli that the appointment of a Sole Arbitrator would be cost effective.

74. Another plea of Mr. Virmani is that the condition of good faith negotiation for invocation of the arbitration proceedings has not been complied with, so the petition is not maintainable. This plea is also not appealing as it is a matter of record that this Court had previously referred both the parties to mediation process under the aegis of the Delhi High Court Mediation and Conciliation Centre, which has failed.

75. That apart, even earlier also in Section 9 petition being OMP (I) (COMM) No.265/2019, parties were referred to the mediation process, which had also failed. Hence, it is too late in the day for referring the parties to good faith negations.

76. Accordingly, the present petition is allowed. The parties are referred to arbitration process. I appoint Justice V.B. Gupta, a former Judge of this Court (Mobile No. 9871300039) as the Arbitrator, who shall adjudicate the disputes between the parties.

77. The fee of the learned Arbitrator shall be in terms of Fourth Schedule of the 'A&C Act, 1996'. He shall give his disclosure in terms of Section 12 of the 'A&C Act, 1996'.

78. A copy of this order be sent to the learned Arbitrator.

V. KAMESWAR RAO, J

OCTOBER 11, 2022*/aky*