HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Arbitration Application No.81/2024

1. Shekharchand Sacheti Son Of Late Shri Kushalchand Sacheti, Resident Of C-9, Behind Badhir School, Vaishali Nagar, Ajmer.
2. Smt. Sudha Sacheti Wife Of Shri Shekharchand Sacheti, Resident Of C-9, Behind Badhir School, Vaishali Nagar, Ajmer.

----Petitioners

Versus

1. S.M.F.G. India Home Finance Company Limited, Through Authorised Officer (Previously Known As Fullerton India Homes Finance Company Ltd.).corporate Office 503-504, Fifth Floor, G-Block, Inspire B.k.c. B.k.c. Main Road, Bandra Kurla Complex, Bandra (East) Mumbai, Maharashtra And Other Registered Office At Megh Tower, Third Floor, Old Number 307, New Number 165, Punna Mallai High Road, Madurai, Voial, Chennai, Tamilnadu.
2. S.M.F.G. India Home Finance Company Ltd., Through Manager (Previously Known As Fullerton India Homes Finance Company Ltd.) Branch Officer Third Floor 244-A, Sarcular Road, Anasagar, Link Road, Above Great Estern Ltd. Vaishali Nagar, Ajmer.

----Respondents

For Petitioner(s)	:	Mr. Dilip Sharma
For Respondent(s)	:	Mr. Naman Yadav Mr. Jitendra Choudhary

JUSTICE ANOOP KUMAR DHAND
Order

Reserved on	:	22/05/2025
Pronounced on	:	30/05/2025

Reportable

1. By way of filing this application under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act of 1996"), a prayer has been made for appointment of an Arbitrator to settle the disputes arose between the parties.

2. Learned counsel for the applicants submits that a loan agreement (hereinafter referred to as "agreement") was executed between the parties on 23.01.2017 wherein there is a clause

under Article 23 for settlement of the disputes by way of Arbitration under the provisions of the Act of 1996. Learned counsel submits that the applicants had filed a partition suit before the District Judge, Ajmer. However, the respondents raised an objection, contending that in light of the arbitration clause under Article 23 of the agreement, the Civil suit filed by the appilcants was not maintainable and the matter was required to be resolved through the proceedings provided under the Act of 1996. The learned counsel submits that faced with the above the applicants withdrew the said suit in order to initiate proceedings provided under the Act of 1996 and to invoke the arbitration clause. As a result thereof, the plaint was returned to the applicants on 01.06.2024 under Order 7 Rule 10 of the Code of Civil Procedure.

3. Learned counsel submits that after passing of the aforesaid order by the Civil Court, the instant application has been submitted for appointment of an Arbitrator for settlement of disputes arising between the parties.

4. In support of his contentions, counsel has placed reliance upon the judgment passed by Bombay High Court in the case of **Aditya Birla Finance Limited Vs. Paul Packaging Private Limited** reported in **2024 SCC Online BOM 3682**.

5. *Per contra*, learned counsel for the respondents opposed the arguments raised by learned counsel for the applicants and submitted that the proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002") have been initiated against the applicants and the same has been culminated and thereafter an application under Section

17 of the SARFAESI Act, 2002, i.e., Securitization Application has been submitted by the applicants before the Debt Recovery Tribunal, Jaipur wherein also a similar pleading has been made, as made in Para 3 of the instant application i.e., the applicants have constructed 12000 Square Feet on the disputed property and out of the aforesaid 12000 Square Feet, only 6318 Square Feet construction was mortgaged with the respondents-Company for availing the loan facility. Learned counsel submits that proceedings under the SARFAESI Act, 2002 have been initiated in respect of the property measuring 6,318 Square Feet, which was the only portion mortgaged by the applicants to the respondents.

6. Learned counsel for the respondents submits that the respondents have taken a preliminary objection with regard to maintainability of the instant application on the count that before filing the application under Section 11 of the Act of 1996, the procedure prescribed under Section 21 of the Act of 1996 has not been followed and no notice, prior to filing of the application, was served by the petitioner upon the respondents. Learned counsel for the respondents submits that since the matter is already subjudice before the DRT, the instant arbitration application is not maintainable.

7. Learned counsel for the respondents submits that after culmination of the proceedings under the SARFAESI Act, 2002, an application under Section 11 of the Act of 1996 is not maintainable. In support of his contentions, counsel has placed reliance upon the judgment passed by the Hon'ble Apex Court in the case of **Vidya Drolia & Others Vs. Durga Trading Corporation** reported in **(2021) 2 SCC 1**. Learned counsel has

also placed reliance upon the judgment passed by the Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.** reported in **2017 SCC OnLine Del 7228**. Learned counsel submits that, under these circumstances, the arbitration application is liable to be rejected on this count alone.

8. In rejoinder, learned counsel for the applicants submits that there was no need for issuing separate notice to the respondents, in terms of Section 21 of the Act of 1996, as the respondents were well aware about the dispute between the parties and filing of suit by the applicants before the Civil Court, which upon the objection taken by the respondents was withdrawn by the applicants. Consequently, the plaint was returned to the applicants by the competent Civil Court under Order 7 Rule 10 of the CPC. Learned counsel submits that the judgment relied upon by the respondents in the case of **Alupro Building Systems Pvt. Ltd.** (supra), is not applicable in the facts and circumstances of the present case and also, the Co-ordinate Bench of this Court in the case of **Suresh Chandra Gupta Vs. Kishan Gopal Gupta,** while deciding **S.B. Arbitration Application No.126/2023** on 06.09.2024 has taken a note of the aforesaid fact that once the dispute is within the knowledge of the other party, complying with the requirement under Section 21 of the Arbitration and Conciliation Act, 1996 is not mandatory.

9. In rebuttal, learned counsel for the respondents submits that a Special Leave Petition (SLP) was filed challenging the order passed by the Delhi High Court before the Hon’ble Supreme Court,

which was subsequently dismissed, thereby rendering the judgment of the Delhi High Court as final and binding.

10. In surrebuttal, learned counsel for the applicants submits that parallel proceedings i.e., under the Act of 1996 and under the SARFAESI Act, 2002 can continue in the light of the judgment passed by the Hon'ble Apex Court in the case of **M.D. Frozen Foods Exports Private Limited & others Vs. Hero Fincorp Limited** reported in **(2017) 16 SCC 741**. Learned counsel submits that the aforesaid view taken by the Hon'ble Apex Court has been followed by the Bombay High Court in the case of **Aditya Birla Finance Limited** (supra). Learned counsel submits that under these circumstances, the application under Section 11 of the Act of 1996 is maintainable and looking to the dispute pending between the parties, the matter is required to be referred to the Arbitrator, in terms of the arbitration clause under Article 23 of the agreement.

11. Heard and considered the submissions made at Bar.

12. Two legal issues are involved in this arbitration application. The first issue is that "whether in view of the judgment passed by the Larger Bench of the Hon'ble Apex Court in the case of **Vidya Drolia & Others Versus Durga Trading Corporation & Others** reported in **2021 (2) SCC 1**, the dispute between a person and a financial institution with regard to non-payment of borrowed amount, can be referred or arbitration to Arbitral Tribunal, when the matter is subjudice before the Debt Recovery Tribunal?" and the other issue is that "whether an Arbitration Application is maintainable without serving a notice, as per Section 21 of the Act of 1996 to the other side."

13. This Court proceeds to deal with the first issue. A Larger Bench of the Hon'ble Apex Court, in the case of Vidya Drolia (supra), has examined the legal position, concerning the scope of judicial review at the referral stage, specifically regarding both the existence of the agreement and the issue of non-arbitrability, in paragraphs 54 to 58, which reads as under:-

> "54. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum. In Transcore v. Union of India, this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the DRT Act") is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms:
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> "64. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth

there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely, and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the "text of the statute, the legislative history, and 'inherent conflict' between arbitration and the statute's underlying purpose" with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in

preference to the courts or public forum is either completely denied or could be curtailed. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable.

56. In *M.D. Frozen Foods Exports Pvt. Ltd. and Ors. v. Hero Fincorp Ltd.,* and following this judgment in *Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited,* it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

57. In *Transcore*, on the powers of the Debt Recovery Tribunal ("DRT") under the DRT Act, it was observed:

> "18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the

debt due is concerned. It covers secured as well as unsecured debts. However, it does not Rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."

58. Consistent with the above, observations in *Transcore* on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi*, which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in *HDFC Bank Ltd.* has been referred to in *M.D. Frozen Foods Exports Private Limited*, but not examined in light of the legal principles relating to non-arbitrability. The decision in *HDFC Bank Ltd.* holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case of the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act

> are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."

The Hon'ble Apex Court has held that treating the claims of banks and/or financial institutions, covered under the DRT Act, as arbitrable would effectively deprive these institutions of their specific rights, including the recovery mechanisms, provided under the DRT Act. Therefore, claims falling under the DRT Act are non-arbitrable, as there is an implied prohibition on waiving jurisdiction of the DRT. The legislation effectively overrides the contractual right to arbitration.

14. A reference was made to the Constitutional Bench of seven Judges of the Hon'ble Apex Court in **"In Re: Interplay between arbitration agreement under the Arbitration and Conciliation Act 1996, and the Indian Stamp Act, 1899" (Curative Petition (C) No.44/2023),** wherein the judgment dated 13.12.2023 passed by three Judge Bench of the Hon'ble Apex Court in the case of **Vidya Drolia** (supra) was also considered, and it has been held in para 148 to 158 as under:-

> "148. Thereafter, in **Vidya Drolia** (supra), another three-Judge Bench of this Court, affirmed the ruling in **Mayavati Trading** (supra) that **Patel Engineering** (supra) has been legislatively overruled. In **Vidya Drolia** (supra), one of the issues before this Court was whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the

question of non-arbitrability. This Court began its analysis by holding that an arbitration agreement has to satisfy the mandate of the Contract Act, in addition to satisfying the requirements stipulated under Section 7 of the Arbitration Act to qualify as an agreement.

149. In the course of the decision, one of the questions before this Court in **Vidya Drolia** (supra) was the interpretation of the word "existence" as appearing in Section 11. It was held that existence and validity are intertwined. Further, it was observed that an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. Therefore, this Court read the mandate of valid arbitration agreement contained in Section 8 into the mandate of Section 11, that is, "existence of an arbitration agreement."

150. At the outset, **Vidya Drolia** (supra) noted that "*Section 11 has undergone another amendment vide Act 33 of 2019 with effect from 9-8-2019*." The purport of the omission of the said clause was further explained in the following terms:

> **"145.** Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide subsection (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for discharging the function and thereupon the

> High Court shall perform the duty of an arbitral institution for reference to the Arbitral Tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] would become applicable."

151. **Vidya Drolia** (supra) proceeds on the presumption that Section 11(6A) was effectively omitted from the statute books by the 2019 Amendment Act. This is also reflected in the conclusion arrived at by the Court, as is evident from the following extract:

> "**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."**
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> (emphasis supplied)

152. We are of the opinion that the above premise of the Court in **Vidya Drolia** (supra) is erroneous because the omission of Section 11(6A) has not been notified and, therefore, the said provision continues to remain in full force. Since Section 11(6A) continues to remain in force, pending the notification of the Central Government, it is incumbent upon this Court to give true effect to the legislative intent.

153. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the referral court to look into the ***prima facie*** existence of a **valid** arbitration agreement, Section 11 confines the court's jurisdiction to the examination of the **existence** of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an arbitral tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of **Patel Engineering** (supra) where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

154. The legislature confined the scope of reference under Section 11(6A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In **Duro Felguera** (supra), this Court held that the referral courts only need to consider one aspect to determine the existence of an arbitration agreement – whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under

Section 11(6A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by arbitral tribunal under Section 16. We accordingly clarify the position of law laid down in **Vidya Drolia** (supra) in the context of Section 8 and Section 11 of the Arbitration Act.

155. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only *prima facie* proof of the existence of an arbitration agreement must be adduced before thereferral court. The referral court is not the appropriate forum to conduct a minitrial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the arbitral tribunal. This position of law can also be gauged from the plain language of the statute.

156. Section 11(6A) uses the expression "examination of the existence of an arbitration agreement." The purport of using the word "examination" connotes that the legislature intends that the referral court has to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply

a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the referral court is only required to examine the existence of arbitration agreements, whereas the arbitral tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in **Shin-Etsu Chemical Co. Ltd**. v. **Aksh Optifibre Ltd**.

157. In **Shin-Etsu** (supra), this Court was called upon to determine the nature of adjudication contemplated by unamended Section 45 of the Arbitration Act when the objection with regards to the arbitration agreement being "*null and void, inoperative or incapable of being performed*" is raised before a judicial authority. Writing for the majority, Justice B N Srikrishna held that Section 45 does not require the judicial authority to give a final determination. The court observed that:

> "74. There are distinct advantages in veering to the view that Section 45 does not require a final determinative finding by the court. First, under the Rules of Arbitration of the International Chamber of Commerce (as in force with effect from 1-1-1998), as in the present case, invariably the Arbitral Tribunal is vested with the power to rule upon its own jurisdiction. Even if the court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a *prima facie* view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon. If the

> arbitrator finds the agreement valid, there is no problem as the arbitration will proceed and the award will be made. However, if the arbitrator finds the agreement invalid, inoperative or void, this means that the party who wanted to proceed for arbitration was given an opportunity of proceeding to arbitration, and the arbitrator after fully trying the issue has found that there is no scope for arbitration. Since the arbitrator's finding would not be an enforceable award, there is no need to take recourse to the judicial intercession available under Section 48(1)(*a*) of the Act."

158. When the referral court renders a *prima facie* opinion, neither the arbitral tribunal, nor the court enforcing the arbitral award will be bound by such a *prima facie* view. If a *prima facie* view as to the

> existence of an arbitration agreement is taken by the referral court, it still allows the arbitral tribunal to examine the issue in-depth. Such a legal approach will help the referral court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the arbitral tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement."

The Constitution Bench of the Hon'ble Apex Court has held that Section 11 (6A) of the Act of 1996, continues to remain in force, pending notification of the Central Government, and it has also been held that it is incumbent upon the Court to give true effect to the legislative intent.

15. In the case of **Indian Corporation Limited vs. NCC Limited** reported in **2023 (2) SCC 539**, the Hon'ble Apex Court

taking into consideration the judgment passed in the case of **Vidya Drolia** (supra), has held in para 73 as under:-

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

16. Likewise in the matter of **NTPC Limited versus SPML Infra Limited** reported in **(2023) 9 SCC 385**, the Hon'ble Apex Court has held in paras 24, 25, 26 & 27 as under:-

"24. Following the *general Rule and the principle* laid down in *Vidya Drolia* (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals Pvt. Ltd. v. Galaxy*

Infra and Engg. Pvt. Ltd. (2021) 5 SCC 671, paras 29, 30., *Sanjiv Prakash v. Seema Kukreja and Ors.* (2021) 9 SCC 732, and *Indian Oil Corporation Ltd. v. NCC Ltd.*, the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the *exception to the general principle* that the court may not refer parties to arbitration when it is clear that the case is manifestly and *ex facie* non-arbitrable, in *BSNL v. Nortel Networks India (P) Ltd. (hereinafter "Nortel Networks")* and *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons* (2021) 5 SCC 705, arbitration was refused as the claims of the parties were demonstrably time-barred.

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the courts Under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the *parties to the agreement and the Applicant's privity* to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general Rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and *rarely as a demurrer*, the Referral Court may reject claims which are *manifestly and ex-facie non-arbitrable*. Explaining this position, flowing from the principles laid down in *Vidya Drolia* (supra), this Court in a subsequent decision in *Nortel Networks* (supra) held:

> "45….45.1…. While exercising jurisdiction Under Section 11 as the judicial forum, the Court may exercise the *prima facie* test to screen and knockdown *ex facie* meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute."

27. The standard of scrutiny to examine the non-arbitrability of a claim is only *prima facie*. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a *primary first review* and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is *bona fide* or not. The *prima facie* scrutiny of the facts must lead to a clear conclusion that there is *not even a vestige of doubt that the claim is non-arbitrable*. On the other hand, even if there is the slightest doubt, the Rule is to refer the dispute to arbitration."

17. Even in the case of **Magic Eye Developers Pvt. Ltd. Vs. Green Edge Infrastructure Pvt. Ltd. & Others** reported in **(2023) 8 SCC 50**, it has been held by the Hon'ble Apex Court in paras 8 to 10 as under:-

> "8. While considering the aforesaid issue, Section 11(6-A) of the Arbitration Act which has been added through the Arbitration and Conciliation Amendment Act, 2015 is required to be read which reads as follows:

> "11. (6-A) The Supreme Court or, as the case may be, the High Court, while considering any application Under Sub-section (4) or Sub-section (5) or Sub-section (6), shall, notwithstanding any judgment, decree or order of any court, *confine to the examination of the existence of an arbitration agreement*."

9. Thus, post-Arbitration and Conciliation Amendment Act, 2015, the jurisdiction of the court Under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties – "nothing more, nothing less". Thus, as per the Section 11(6-A) of the Act, it is the duty cast upon the Referral Court to consider the dispute/issue with respect to the existence of an arbitration agreement.

10. At this stage, it is required to be noted that as per the settled position of law, pre-referral jurisdiction of

> the court Under Section 11(6) of the Arbitration Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. The said matter requires a thorough examination by the referral court. [paragraph 25 of the decision in *NTPC Ltd.* (supra)]. The Secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute. Both are different and distinct."

18. Facts pleaded in this application indicate that the applicants have obtained a loan from the respondent by mortgaging the property in question. An agreement was executed to this effect, which includes an arbitration clause under Article 23 thereof. This

clause stipulates that all disputes/ differences arising out of or in relation to the agreement shall be settled through arbitration in accordance with the provisions of the Act of 1996. The Arbitration Clause under Article 23 of the agreement, reads as under:-

Article 23 - Arbitration

All disputes, difference and/or claims arising out of or in relation to this Agreement shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory amendments thereof and the same shall be referred to the sole arbitration of an arbitrator to be nominated/appointed by FIHFC. In the event of death, refusal, neglect, inability or incapability of the persons so appointed to act as an arbitrator, FIHFC may appoint another person to act as an arbitrator. The award including the interim award/s of the arbitrator shall be final and binding on all the parties concerned. The arbitrator may lay down from time to time the procedure to be followed by him in conducting arbitration proceedings and shall conduct arbitration proceedings in such manner as he considers appropriate. The arbitration proceedings shall be held at the place mentioned in the Loan Summary Schedule. Subject to the arbitration claus contained herein, the competent courts at the place mentioned in the Loan Summary Schedule shall hav exclusive jurisdiction over any matter or legal proceedings arising out of or in relation to this Agreement. This shall not however limit the rights of the Lender to file/take proceedings in any other Court of Law or Tribunal of competent jurisdiction.

19. As per the pleadings, contained in this application, the applicants' loan account was classified as a Non-Performing Asset

(NPA), and proceedings under the SARFAESI Act, 2002 were initiated against them. As a result thereof, the respondents took physical possession of the entire 12,000 Square Feet of construction on the applicants' property, without making any sub-division. As per the applicants, the disputed property in question was put for auction in November, 2023. The Securitisation Application was filed by the applicants against the action of the respondents which is pending before the Debt Recovery Tribunal, Jaipur and the application seeking interim protection has been rejected.

20. In the meantime, on 16.03.2024, the applicants filed a partition suit before the Court of the District Judge, Ajmer, seeking partition of 6,318 Square Feet portion of the construction from the total 12,000 Square Feet constructed area of the property. The said suit was transferred to the Court of Additional District Judge (ADJ) No.5, Ajmer, where the respondents submitted an application on 16.05.2024 under Sections 8 and 5 of the Act of 1996 for referring the matter to the Arbitrator for adjudication of the dispute in the light of arbitration clause of the loan agreement.

21. The learned ADJ returned the plaint to the applicants under Order 7 Rule 10 CPC for its presentation before the competent forum of law. As per Para 12 of the present application, the applicants made a telephonic request to the respondents to resolve the dispute by appointing an Arbitrator. However, the respondents did not pay any heed to the said request. Consequently, the applicants have approached this Court by way of filing the present arbitration application.

22. The facts pleaded in this application have been disputed by the respondents on the ground that the mortgaged immovable property has already been auctioned under the SARFAESI Act, 2002 and a sale certificate has been issued in this regard on 12.02.2024 in favour of one Digvijay Singh and thereby third-party rights have been created. Against the above proceedings, an application under Section 17 of the SARFAESI Act, 2002 has been submitted by the applicants and the prayer made therein for interim relief has been rejected, hence, this application is not maintainable and is liable to be rejected.

23. The sole objection raised by the respondent is that the arbitration clause under provided Article 23 of the loan agreement cannot be invoked due to the ongoing proceedings before the DRT.

24. In this regard, the Hon'ble Apex Court in the case of **M.D. Frozen Foods Exports Private Limited** (supra) has held in paragraphs 33 and 34 as under:-

> "33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.
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> 34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in Sarthak Builders Pvt. Ltd. v. Orissa Rural Development Corporation Limited MANU/OR/0110/2014, the Full Bench of the Delhi High Court in HDFC Bank Limited v. Satpal Singh Bakshi (supra) and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v.

State of U.P. MANU/UP/0209/2009 : AIR 2010 All 3 lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in M/s. Deccan Chronicles Holdings Limited v. Union of India MANU/AP/0060/2014 : AIR 2014 Andhra Pradesh 78 following the overruled decision of the Orissa High Court in Subash Chandra Panda v. State of Orissa MANU/OR/0069/2008 : AIR 2008 Ori 88 does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

A perusal of the above decision makes the legal position succinctly clear that the Hon'ble Supreme Court has held that SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is in the context of an adjudicatory proceedings. The SARFAESI proceedings and arbitration proceedings thus can proceed parallely. In view thereof, such objection raised by the respondent, touching upon the very invocation of arbitration clause by the applicants, runs contrary to the above decision of the Supreme Court, wherein no uncertain terms, it has been held that both proceedings under SARFAESI and arbitration can go hand in hand. Thus, in my opinion, such objection of the respondent is devoid of merit. In testing the merit of such objection holistically, it becomes necessary to delve on the scope of interference, intervention of this Court in proceedings instituted under Section 11 of the Arbitration Act.

25. The Bombay High Court in the case of **Tata Capital Limited v. Priyanka Communications (India) Pvt. Ltd., and Ors.** while deciding CARAP No.168/2023 has considered the said aspect.

While ruling on the same, the said Court has relied upon an important decision of the Supreme Court in Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899. The relevant paragraphs of the judgment of the Bombay High Court Court in **Tata Capital** (Supra) are reproduced below:

> "27. A perusal of these judgements shows that, prior to the judgement the Hon'ble Supreme Court in Interplay (Supra), the scope of interference by the Court in proceedings under Section 11 of the Act was slightly wider. However, the judgement of the Hon'ble Supreme Court in Interplay (Supra) has narrowed down the scope. In Interplay (Supra), the Hon'ble Supreme Court has held that the scope of examination under section 11 (6A) should be confined to the existence of an arbitration agreement on the basis of Section 7 of the Act. Similarly, the validity of an arbitration agreement, in view of Section 7 of the Act, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. The Hon'ble Supreme Court has held that this interpretation gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by the Arbitral Tribunal under Section 16 of the Act. The Hon'ble Supreme Court in Interplay (Supra) accordingly clarified the position of law laid down in Vidya Drolia and Others (Supra) in the context of Section 8 and Section 11 of the Act in the aforesaid terms. Further, in Interplay (Supra), the Hon'ble Supreme Court held that, in jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of

an arbitration agreement must be adduced before the Referral Court. The Hon'ble Supreme Court held that the Referral Court is not the appropriate forum to conduct a mini trial by allowing the parties to adduce evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.

28. Further, in Interplay (Supra), the Hon'ble Supreme Court held that Section 11 (6A) uses the expression "examination of the existence of an arbitration agreement". The purpose of using the word "examination" connotes that the legislature intended that the Referral Court had to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provided that the Arbitral Tribunal can 'rule' on its jurisdiction, including the existence and validity of the arbitration agreement. The Hon'ble Supreme Court further held that a 'ruling' connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court was only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction including the issues pertaining to the existence and validity of an arbitration agreement.

29. The aforesaid position in law laid down by Interplay (Supra) has been confirmed by the subsequent decision of the Hon'ble Supreme Court in SBI General Insurance Co. Ltd. (Supra) referred to hereinabove."

Having considered the above decisions, it becomes clear that in the context of examining an application under Section 11, the Court ought to prima-facie decide on the existence of arbitration agreement under the framework of Section 7 of the Arbitration Act, and no further. Applying it to the present facts, evidently there is an arbitration agreement which manifests itself in the arbitration clause contained under Article 23 of the loan agreement. Thus, the statutory requirement under Section 7 of the Arbitration Act is fulfilled. The Applicants had invoked the said clause to refer the disputes or differences arising out of loan agreement to arbitration. Thus, the objection taken by the respondent on the invocation of the arbitration clause, is sans merit in the given facts and circumstances.

26. Having considered the above, in the considered opinion of this Court, there exists an arbitration agreement in the form of an arbitration clause, as provided under Section 7 of the Arbitration Act, the existence of which, per se is not assailed by the respondent. Thus, it is just legal and proper that an arbitrator is appointed to arbitrate upon the disputes and differences arising under the loan agreement to be so adjudicated by such sole arbitrator, as contemplated under the arbitration agreement manifesting in the said arbitration clause.

27. Further, on careful examination of the provisions of the Arbitration Act, considering and applying the decision of the Hon'ble Supreme Court in **Re:Interplay** (Supra) and the Bombay High Court in **Tata Capital** (Supra), the objections raised by the respondents are devoid of legal foundation, in deciding the present application under Section 11(6) of the Arbitration Act.

28. Perusal of the judgement of the Hon'ble Apex Court rendered in the case of **M.D. Frozen Foods Exports Private Limited** (supra) clearly indicates that in the event, the secured assets are insufficient to satisfy the debts, the secured creditor may proceed against other assets, in execution, against the debtor, after determination of the pending outstanding amount by a competent forum.

29. Now this court proceeds to decide the second issue. As per the case of the respondents, no notice under Section 21 of the Act of 1996, for appointment of Arbitrator, was given by the applicants before filing the application under Section 11 of the Act of 1996. Therefore, the instant application is not maintainable.

30. Perusal of Section 21 of the Act of 1996 indicates that it serves certain definite purposes; Firstly, it notifies the opposing party of the nature of the claim, even when the Arbitrator has already been named by the parties; secondly, it provides an opportunity for the opposing party to challenge the admissibility of the claim at the outset; thirdly, it allows the other party to raise objections regarding impartiality or disqualification of the arbitrator; and finally, it marks the date of receipt of the notice, which is crucial for determining the commencement of the arbitration.

The Hon'ble Apex Court in the case of **Arif Azim Co. Ltd. Vs. Aptech Ltd.** reported in **2024 (5) SCC 313** has held in Para 57 as under:-

> "57. The other way of ascertaining the relevant point in time when the limitation period for making a Section 11(6) application would begin is by making use of the

Hohfeld's analysis of jural relations. It is a settled position of law that the limitation period under Article 137 of the Limitation Act, 1963 will commence only after the right to apply has accrued in favour of the applicant. As per Hohfeld's scheme of jural relations, conferring of a right on one entity must entail the vesting of a corresponding duty in another. When an application Under Section 11(6) of the 1996 Act is made before this Court without exhausting the mechanism prescribed under the said Sub-section, including that of invoking arbitration by issuance of a formal notice to the other party, this Court is not duty bound to appoint an arbitrator and can reject the application for being premature and non-compliant with the statutory mandate. However, once the procedure laid down Under Section 11(6) of the 1996 Act is exhausted by the applicant and the application passes all other tests of limited judicial scrutiny as have been evolved by this Court over the years, this Court becomes duty-bound to appoint an arbitrator and refer the matter to an Arbitral Tribunal. Thus, the "*right to apply*" of the applicant can be said to have as its jural correlative the "*duty to appoint*" of this Court only after all the steps required to be completed before instituting a Section 11(6) application have been duly completed. Thus, the limitation period for filing a petition under Section 11(6) of the 1996 Act can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

The essence of the matter is that merely stating that a dispute has arisen between the parties and referring to a claim does not satisfy the requirements of Section 21 of the Act of 1996

and a valid notice must be served to the other party to initiate the arbitration proceedings and in absence of notice under Section 21, the arbitration application cannot be entertained.

31. But in the instant case, the respondents were not taken by surprise regarding invocation of the arbitration clause by the applicants for the first time before this Court inasmuch as the applicants submitted a suit for partition of property against the respondents before the Court of ADJ, where an application was submitted by none other than the respondents themselves under Sections 8 and 5 of the Act of 1996 that Civil Suit is not maintainable and an Arbitration Application under Section 11 of the Act is maintainable, hence accepting their prayer, the learned ADJ returned the plaint to the applicants under Order 7 Rule 10 CPC for its presentation before the competent court of law, and only thereafter, the applicants have submitted the instant application. Thus, it can safely be said that the respondents were not taken by surprise by the filing of this arbitration application, for the appointment of an arbitrator before this Court, especially given that no prior written notice was issued by the applicants. It is inconceivable to suggest that the respondents were unaware of the dispute concerning the partition of the property in question. The applicants approached the Civil Court for partition by way of filing a Civil suit, but the same was returned by the Civil Court under Order 7 Rule 10 CPC, at the request/prayer of the respondents and even the interim order under Section 9 of the Act of 1996 was passed against the respondents under the provisions of Act of 1996 by the concerned competent Court of law. Hence, the respondents were well versed with the entire dispute raised

against them. Therefore, under these peculiar circumstances, this application under Section 11 of the Act of 1996 is maintainable even without issuing a proper notice to the respondent under Section 21 of the Act of 1996 by the applicants.

32. In view of the discussions made hereinabove, the instant application stands allowed and this Court deems it just and proper to appoint Justice Sabina (Former Acting Chief Justice), High Court of Himachal Pradesh, Resident of House No.1842, Sector 34-D, Chandigarh (Mobile No.97800-08138) as Sole Arbitrator to adjudicate/resolve the dispute which arose between the parties.

33. The appointment of the Sole Arbitrator is subject of declaration being made under Section 12 of the Arbitration and Conciliation Act, 1996 (for short 'the Act of 1996') with respect to the independence and impartiality and ability to devote sufficient time to complete the arbitration proceedings within the prescribed period.

34. The arbitration fee of the Sole Arbitrator shall be payable in accordance with the provisions contained in the Manual of Procedure of Alternative Dispute Resolution, 2009 as amended by the Manual of Procedure for Alternative Dispute Resolution (Amendment), 2017 vide notification dated 23.03.2017 read with 4th schedule appended to the Act of 1996 or as determined by the Arbitrator with consensus of parties.

35. The Registry is directed to intimate the Arbitrator-Justice Sabina (Former Acting Chief Justice), High Court of Himachal Pradesh, Resident of House No.1842, Sector 34-D, Chandigarh (Mobile No.97800-08138) for her approval and declaration in terms of Section 11(8) read with Section 12(1) of the Act of 1996.

36. All issues raised by the parties before the Arbitrator shall be considered in accordance with law.

37. Since as per Section 29A of the Act of 1996, the arbitration proceedings are required to be concluded within the scheduled time as stipulated therein, it is expected from the parties to appear before the Arbitrator on 09.06.2025 or on any other date as informed by the Arbitrator subject to agreement by the parties. Furthermore, the parties shall provide their respective E-mail/ contact number/ mobile number and/or also of their authorized representatives/ Lawyers appearing on their behalf before the Arbitration Tribunal, in order to facilitate the Arbitrator to send information/communication to the parties, whenever required. The information send by the Arbitrator, on such address/ E-mail/ cellphone of the parties or to their authorized representatives/ Lawyers, shall be treated as sufficient communication unless same is not changed.

38. Before parting with the order, it is made clear that the respondents being secured creditors would be at liberty to proceed further against the applicants in terms of the judgment passed by the Hon'ble Apex Court in the case of **M.D. Frozen Foods Exports Private Limited** (supra).

(ANOOP KUMAR DHAND),J

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