2025 INSC 616

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5823 OF 2025

(Arising out of Special Leave Petition (C) No. 21286 of 2024)

ASF BUILDTECH PRIVATE LIMITED ...APPELLANT(S)

VERSUS

SHAPOORJI PALLONJI AND COMPANY PRIVATE LIMITED ...RESPONDENT(S)

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided in the following parts: -

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1. Leave Granted.

2. This appeal arises from the judgment and order passed by the High court of Delhi dated 4th July, 2024 in Arb. A. (Comm.) No. 4/2024 & I.As. 2124/2024-25/2024, Arb. A. (Comm.) No. 5/2024 & I.A. 2197/2024 and O.M.P. (T)(Comm.) 4/2024 by which the High Court dismissed the appeals filed by the appellant herein under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, the "**Act, 1996**") and thereby affirmed the order passed by the Arbitral Tribunal rejecting the challenge made by the appellant herein to its jurisdiction on the ground that the appellant being a non-signatory to the arbitration agreement could not have been impleaded in the array of parties and join the arbitration proceedings.

3. It appears that the High Court decided two appeals filed under Section 37(2) of the 1996 Act. The present appeal arises from the order passed by the High Court in Arb. A. (Comm.) No. 4 of 2024.

A. FACTUAL MATRIX

4. The Respondent No. 1, Shapoorji Pallonji & Co. Pvt. Ltd. ("**SPCPL**") is the Respondent No.1/counter claimant before the Arbitrator. The Respondent No. 3 (Black Canyon SEZ Pvt. Ltd. or "**BCSPL**") initiated arbitration against SPCPL in relation to Settlement Agreement dated 24.07.2020.

5. SPCPL filed its Counter-Claim against BCSPL as well as the appellant herein (ASF Buildtech Pvt. Ltd or "**ABPL**") and Respondent No.2 (ASF Insignia SEZ Pvt. Ltd or "**AISPL**"), which constituted and formed part of the 'ASF Group'. SPCPL has pleaded before the Arbitrator that BCSPL, ASIPL and ABPL being a part of the ASF Group are bound by the Arbitration Agreement contained in the Works Contract dated 21.11.2016 on the basis of the Group of Companies Doctrine.

6. BCSPL, ABPL, and AISPL respectively filed separate Section 16 Applications before the Arbitrator seeking rejection of SPCPL's counter claim to the extent it is against AISPL and ABPL. By the Arbitrator's Orders dated 23.05.2023 and 17.10.2023 respectively ("**Tribunal's First Order**"and 'Tribunal's Second Order' respectively), the Arbitrator dismissed the said Applications, *inter alia* holding that, in order to decide whether or not the inclusion of AISPL and ABPL amongst the party-Respondents on basis of such doctrine is correct on basis of facts narrated by SPCPL, some crucial aspects as regards the role and conduct of AISPL and ABPL, would need adjudication as questions mixed of facts and law, which cannot be holistically determined without first arraying them as parties.

7. In such circumstances referred to above, the matter was taken to the High Court. The High Court, after an exhaustive consideration of all the relevant aspects of the matter, disposed of the appeal in the following terms: -

> *"96. In the present case, a perusal of the impugned orders shows that the Ld. Sole Arbitrator has conflated the issue of the applicability of the Group of Companies doctrine & alter ego doctrine, and thus has resorted to piercing the corporate veil. All three could not have been combined in the manner in which the Ld. Sole Arbitrator has done. However, there are certain facts which are relevant:*
>
> *i) That the ASF Group is one cohesive group in which AISPL, ABPL and BCSPL are part of the group. There is no distinct management dealing with the activities of these three companies. The correspondence on record shows that whether in respect of demobilization or other performances under the contracts, AISPL is backing BCSPL, ASF Group is also standing as guarantee for BCSPL. The Comfort Letter given by ASPL is evidence of this. Thus, in effect, though there are three distinct incorporated legal entities, the group is functioning as one unit. The initial work order was with AISPL. Claims raised relate to periods even prior to the Novation Agreement where AISPL would be a necessary and a relevant party.*
>
> *ii) Non-payment of dues is also another claim of SPCPL qua which AISPL gave a Comfort Letter.*
>
> *iii) ABPL is the holding company and is part of the ASF Group. The order dated 22nd July, 2022 uses the expression ASF which includes ABPL as its part of ASF. Thus, the Ld. Sole Arbitrator ought to have simply applied GoCD as enshrined in the Cox and Kings (supra) to entertain the claims filed by the SPCPL.*
>
> *97. In the overall scheme of things, therefore, the delineation of Case No.1 and Case No.2 was wholly unnecessary. The impleadment of AISPL and ABPL is in accordance with law, though the Ld. Sole Arbitrator used different reasons for dismissing the Section 16 applications. In effect, the Ld. Sole Arbitrator has held that claims can be maintained against AISPL*

and ABPL. In these facts and circumstances, the Court disposes of the three petitions in the following terms:

i) AISPL and ABPL are impleaded as Respondent Nos. 2 and 3 in the arbitral proceedings.

ii) The SoC filed by SPCL is treated as counterclaim against BCSPL, AISPL and ABPL.

iii) The delineation of Case No. 1 and Case No.2 was wholly unnecessary and is set aside.

iv) For all practical purposes, the case pending before the Ld. Sole Arbitrator shall be treated as one case arising out of reference order dated 22nd July, 2022.

v) There is no legal incapacity in the Ld. Sole Arbitrator to deal with the claims and counterclaims and the mandate of the Ld. Arbitrator does not deserves to be terminated.

vi) The Ld. Sole Arbitrator was correct in his observation that, for reasons of financial and strategic convenience, BCSPL's attempt was to restrict the counterclaim only to BCSPL and not to AISPL & ABPL. Considering that AISPL and the ASF Group had assumed responsibility for payments to be made to SPCPL and for the implementation of the project, as evidenced by the Comfort Letter and various emails exchanged, their impleadment was necessary for a comprehensive adjudication of the matter.

vii) In view of the fact that SPCPL has no objection to its claim petition being treated as a counterclaim to the BCSPL's claim, it is ordered that both cases shall be treated as a single reference and a single dispute. The claims of BCSPL and the counterclaim of SPCPL shall be adjudicated by the Ld. Sole Arbitrator after framing issues. No bifurcation would be permissible.

viii) Evidence shall be led first by BCSPL, AISPL and ABPL and thereafter SPCPL in their respective claims and counterclaims.

98. Let the present order be communicated to the Ld. Sole Arbitrator by the Registry. The above two appeals and the Section 14 petition are disposed of in the above terms. All pending applications are disposed of."

8. In such circumstances referred to above, the appellant is here before this Court with the present appeal.

B. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellant

9. In the written submissions filed on behalf of the appellant herein, it is submitted as under: -

> *"**A. Introductory Submissions**:*
> *2. At the outset, it is respectfully submitted that there is not even a shred of material to show any involvement whatsoever, much less prima facie, regarding the involvement of ABPL in the negotiation, performance or termination of the subject agreements which are the subject matter of the arbitral proceedings. Accordingly, the tests laid down by this Hon'ble Court in Para 71 of **Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.**, 2024 SCC OnLine SC 2597, for making ABPL a 'veritable party' is not at all fulfilled. As a matter of fact, the Arbitral Tribunal and the High Court have sought to rope in ABPL on three counts, namely:*
> *(i) that ABPL is the holding company of Black Canyon SEZ Private Limited ("BCSPL" / "Respondent No. 2") and ASF Insignia SEZ Pvt. Ltd. ("AISPL" / "Respondent No. 3");*
> *(ii) there is common management between ABPL and BCSPL (Impugned Judgment at Pg. 47-48 of the Petition, and*
> *(iii) the branding / logo used by BCSPL is the common logo of 'ASF Group' (Impugned Judgment at Pg. 67-68 of the Petition.*
>
> *3. It is submitted that none of the aforesaid three aspects relied upon the Arbitral Tribunal and the High Court can be the ground for arraying a non-signatory as a 'veritable party'. If such contention is accepted, every holding company will have to be necessarily arrayed as a 'veritable party' which is completely against the dictum of **Oil and Natural Gas Corporation Ltd v. Discovery Enterprises Pvt. Ltd.**, (2022) 8 SCC 42; **Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr.**, 2023 SCC Online SC 1634 and **Ajay Madhusudan Patel** (supra).*
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> ***B. Essential Questions of Law***

4. The important questions of law falling for kind consideration of this Hon'ble Court in the present Special Leave Petition are:
a. Whether the Petitioner, who is not a signatory to the arbitration agreement, could be joined as a party Respondent by the Counter Claimant ***("SPCPL"/ "Respondent No. 1")*** *in its 'Separate Statement of Claim', without the referral court under section 11 of the Arbitration and Conciliation Act, 1996* ***("Act")*** *directing as such, and without any leave of the Ld. Arbitral Tribunal being sought in this regard?*
b. If so, could the same be done by directly issuing notice for filing of statement of defense to the Counter Claim (wrongly styled as 'Separate Statement of Claim') without a prior opportunity being granted to the Petitioner to contest such joinder as a party Respondent?
c. Whether such joinder as a party Respondent could be carried out in contravention of the principles laid down in ***Oil and Natural Gas Corporation*** *(supra);* ***Cox and Kings*** *(supra) and* ***Ajay Madhusudan Patel*** *(supra) as regards the parameters for invocation of group of companies doctrine?*
d. Whether merely because the Petitioner is stated to be the holding company for BCSPL and AISPL; all group companies have the same domain name/website and the email signature states 'ASF Group', the same would suffice to satisfy the tests for invocation of the group of companies doctrine for joinder of the Petitioner to the array of respondents?

C. ABPL not a party to the dispute

5. ABPL was not a party or had any involvement in the following: (i) Negotiations for executing Work Contract dated 21 November 2016; (ii) Works Contract dated 21 November 2016; (iii) Supplementary Works Contract dated 9 February 2018; (iv) Novation Agreement on 17 April 2018; (v) Letter of Comfort dated 17 April 2018; (vi) Addendum No. 1 dated 27 February 2019 to the Works Contract; (vii) Settlement Agreement dated 24 July 2020; (viii) Notice invoking arbitration dated 24 January 2022; (ix) Reply to Notice invoking arbitration dated 4 March 2022, where SPCPL itself did not make ABPL a party in this reply; (x) Section 11 proceedings before the High Court of Delhi; and (xi) BCSPL's statement of claim dated 31 October 2022. A table on stages of disputes and involvement of parties therein is annexed herewith as Schedule A. The same leads to an inescapable conclusion that the involvement of the Petitioner herein in the

negotiation or performance of the contract was neither positive, nor direct and substantial, in fact it was not even incidental.

6. It is for the first time that ABPL was made a party to the proceedings by direct joinder as a respondent to the SPCPL's counter claim or 'statement of claim' dated 14 February 2023, without obtaining any leave from the Arbitral Tribunal in this regard and merely on account of being a holding company of BCSPL.

D. No material whatsoever to show ABPL's direct involvement

7. There is not even a single correspondence or transactional document to show the involvement of ABPL qua the negotiation towards, execution of or discussions towards Works Contract, the Novation Agreement, the Letter of Comfort and the Settlement Agreement in question.

8. Even SPCPL, in the Reply, had only limited its contention for inclusion of a non-signatory to AISPL ***and not to ABPL.***

9. Further, even the order of the High Court of Delhi in the Section 11 Application under the Act records that SPCPL had only insisted on making AISPL as a party and there is not even a whisper about ABPL. Further, the reference to ASF in the said order is clearly a reference to AISPL who was the original contracting party and not to ASG Group.

10. As per the law laid down by this Hon'ble Court in ***Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors****., 2024 SCC OnLine SC 2597 (Para 71), this Hon'ble Court has held that: "71. It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement.* ***However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental.*** *Thus, the conduct of the non-signatory party along with the other attending*

circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement."
(emphasis supplied)

11. It is most humbly submitted that in the facts and circumstances of the present case, which have been altogether ignored by the Ld. Arbitral Tribunal and the High Court, there is neither any finding nor any material to support the inference that that the involvement of the Petitioner herein in the negotiation or performance of the contract was either positive, direct and substantial, in fact, it was not even incidental.

12. It is prima facie evident that ABPL is not a party to the Agreements and a mini trial is not required to determine the same. Additionally, the arbitral tribunal while directly issuing a notice to ABPL for filing of statement of defence to the 'statement of claim' filed by SPCPL had not gone into such questions in depth, thus indicating that no evidence was taken into consideration to implead ABPL without the leave of the arbitral tribunal in this regard; and by way of a procedure unknown to arbitration law inasmuch as a separate statement of claim was entertained by the arbitral tribunal, contrary to established procedure that there can only be a counter claim by respondent, i.e., SPCPL.

E. Patent errors in the Impugned Judgment

13. The analysis by the High Court in the Impugned Judgment begins at Page 43 of the Petition wherein the High Court notices the: (a) Works Contract; (b) Novation Agreement; (c) Settlement agreement; (d) Letter of Comfort. Notably, in any of the aforesaid paragraphs, ABPL is neither involved nor mentioned.

14. In Para 66, the High Court notes that there is common management between ABPL and BCSPL, and in Para 70, an email dated 9 December 2020 is noted to conclude that because one of the personnel of BCSPL had used the same domain name, and there was a logo of ASF Group/ASF Insignia, therefore, ABPL being part of the ASF group and the holding company of BCSPL and AISPL was to be included as a party to the arbitration proceedings.

15. The five factors laid down by this Hon'ble Court in ***Oil and Natural Gas Corporation*** *(supra), are thereafter discussed in Para 91-94. It is relevant to note that none of the said paragraphs*

show any direct involvement of ABPL, in so far as the transaction in question is concerned.

16. The only reason due to which ABPL has been allowed to be continued as a party to the arbitration proceedings is because ABPL is a holding company of BCSPL, which is completely contrary to the law laid down by this Hon'ble Court in ***Cox and Kings*** *(supra) and* ***Oil and Natural Gas Corporation*** *(supra).*

17. Merely because a company is a holding company, it cannot, by itself, be a ground to implead the holding company in an arbitration proceeding. To do so would result in disastrous consequences, where the mere factum of the company being a holding company would expose the holding company to litigations initiated against its subsidiary. This would completely militate against and obliterate the fundamental principle of separate corporate personality.

18. It is submitted that none of the five ingredients laid down by this Hon'ble Court in ***Oil and Natural Gas Corporation*** *(supra) and affirmed, in* ***Cox and Kings*** *(supra) (Para 170) are prima facie satisfied, in the facts of the present case.*

19. Further, the High Court in Para 97(viii) of the Impugned Judgment has further patently erred in exceeding the jurisdiction under Section 37 of the Act and suo motu directing that evidence shall be inter alia led by ABPL prior to SPCPL in whose counter-claim ABPL has been arrayed as a party Respondent. Pertinently, the said aspect was neither a submission nor in issue before the High Court."

10. In such circumstances referred to above, Mr. Devadatt Kamat, the learned senior counsel appearing on behalf of the appellant herein submitted that there being merit in his appeal, the same may be allowed and the impugned order passed by the High Court may be set aside.

ii. Submissions on behalf of the Respondent No. 1

11. In the written submissions filed on behalf of the respondent No. 1 herein, it is submitted as under: -

> ***"II. Questions of law involved***
> *5. The present SLP broadly gives rise to three questions of law for the kind consideration of the Hon'ble Court:*
> *a. Whether the Arbitrator could have issued notice to parties (AISPL and ABPL) arrayed in SPCPL's Counter Claim?*
> *b. Whether AISPL and ABPL ought to be removed from the array of parties at the threshold stage before the complete pleadings or evidence are before the Arbitrator? c. Whether the Arbitrator's Orders rejecting ABPL's Section 16 Applications without finally deciding the legal or factual role and liability of ABPL ought to be interfered with before the final Arbitral Award is rendered?*
> *6. It is submitted that the three issues are not distinct and rather inter-linked inasmuch as the underlying premise pertains to the Arbitrator's power to adjudicate on matters in respect of non-signatories, both procedurally and substantively. It is SPCPL's case that all three issues have already been answered in SPCPL's favour by the Hon'ble Supreme Court in in* ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. & Anr****. and* ***Ajay Madhusudhan Patel & Ors. v. Jyotrindra S. Patel & Ors.***
>
> ***III. The present SLP is ABPL's fourth bite at the cherry***
> *7. SPCPL has succeeded on the issues presently agitated on three prior occasions–*
> *a) First, in BCSPL's Section 16 Application dated 03.03.2023 seeking removal of AISPL and ABPL from the array of parties, which was rejected by the Tribunal's First Order dated 23.05.2023 with detailed reasoning.*
> *b) Second, in AISPL and ABPL's Section 16 Applications dated 03.07.2023 seeking their own removal from the array of parties, which was rejected by the Tribunal's Second Order dated 17.10.2023 with detailed reasoning;*
> *c) Third, before the High Court, where BCSPL filed a Petition u/s 14 seeking removal of the Arbitrator, while ABPL and AISPL preferred Appeals u/s 37, culminating in the common Impugned Judgement dated 04.07.2024 ('Impugned Judgement') rejecting the said challenge with detailed reasoning.*

Only ABPL remains aggrieved and has sought to challenge the Impugned Judgement by way of the present SLP.

13. ABPL has sought to mis-categorize SPCPL's case against ABPL as merely being against the holding company of AISPL and BCSPL. However, this is ex-facie misconceived and contrary to the record, inasmuch as SPCPL has specifically pleaded that the entire negotiation, performance and termination of the Works Contract dated 21.11.2024 was with the ASF Group, though in the name of its SPV, AISPL to develop the SEZ. It was represented and assured to SPCPL throughout that AISPL had the entire support, backing and strength of the ASF Group of Companies.

14. This representation and assurance to SPCPL was backed by, rather than being premised (as sought to be alleged by ABPL), the fact that the BCSPL, AISPL and ABPL represented themselves to the world at large as the 'ASF Group', functioning with the same staff & officials, using common website 13 (www.asfinfrastructure.com) and domain email IDs (@asfinfrastructure.com). ABPL, as also AISPL and BCSPL, is part of the ASF Group. Even behind the scenes, ABPL is the holding company of BCSPL and AISPL, with 81.01% and 100% shareholding, respectively. All the three ASF Group companies have common directors and also share a common registered address. It is SPCPL's case that the commonality of resources of the ASF Group (i.e., the promoters, the directors, the shareholding, the officials, the financial and commercial backing, technical and IT systems etc) is not a coincidence or a by-product and rather is by design.

15. At all times, in the ASF Group's dealing with SPCPL, BCSPL/AISPL/ABPL were acting as single economic unit and were together directly, substantially and actively involved in the negotiation and performance of the subject Works Contract and Settlement Agreement. It is further SPCPL's case that BCSPL/AISPL/ABPL and/or ASF Group are inextricably linked and the ASF Group as a whole maintained operational control over the performance of the Works Contract and Settlement Agreement between the parties.

16. There was no distinction between ABPL, AISPL and BCSPL insofar as the negotiation and performance of the Subject Contracts was concerned. For instance, the Novation Agreement

dated 17.04.2018 was executed on behalf of the Petitioner by one ASF official Sh. Vinod Kumar Bhartiya. The same ASF official had earlier attended the pre-bid meeting held on 30.01.2016 in relation to the Works Contract in the stated capacity of AVP (Commercial) of the 'ASF Group'. Item 2.1 of the Minutes states 'ASF Project Team' and bidders were introduced. The same ASF official had thereafter also attended the Meeting held on 02.06.2016 for LOI Civil Works of Building B1 awarded to SPCPL on behalf of 'AISPL'.

17. Similarly, Minutes of Meeting dated 25.10.2016 i.e., after the Meeting held on 02.06.2016 recording Mr. Bhartiya to have attended on behalf of AISPL, reflects his attendance on behalf of the 'ASF Group'. Agenda items 1 & 2 of the aforementioned Minutes of Meeting also show 'ASF' as having agreed to the change requested by SPCPL.

18. The Comfort Letter issued to SPCPL dated 17.04.2018 (on the same day as the Novation Agreement) acknowledges that 'AISPL and BCSPL are the group companies of ASF group and both companies are under the management & control of the same set of management/owners.' and that AISPL had 'nominated/appointed its associate company Black Canyon SEZ Pvt. Ltd. ("BCSPL") as a Co-Developer with regard to Black Canyon Private Campus Land, Black Canyon Building and its allied structure...". Subsequently, in a clear admission of all liabilities being jointly and severally shared between BCSPL, AISPL and ABPL, Sh. Anil Sharma, Vice President (Projects), ASF Group vide his email dated 02.06.2021 conveyed the commitment of 'ASF management' to release outstanding dues to SPCPL.

19. Even Clause 5 of the Settlement Agreement dated 24.07.2020 ('the Settlement Agreement') expressly records that the cost of materials 'taken over by ASF' from SPCPL, as mutually determined, would form part of the outstanding dues of SPCPL. Even the Statement of Accounts annexed to the Settlement Agreement, on the basis of which monies were to be disbursed to SPCPL records TDS value debited by 'ASF', not by BCSPL or AISPL.

20. In the Section 16 application filed by ABPL 21 , ABPL admitted that "ABPL is a part of the ASF group of companies, and

Respondents No.1 [BCSPL] and 2 [AISPL] are associate companies of ABPL."

12. In such circumstances referred to above, Ms. Aakanksha Kaul, the learned counsel prayed that there being no merit in this appeal, the same may be dismissed.

C. ANALYSIS

13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether an arbitral tribunal has the authority or power to implead or join a non-signatory to the arbitration agreement as a party to the arbitration proceedings?

i. Whether the Arbitral Tribunal has the power to Implead / Join Non-Signatories to the Arbitration Agreement?

14. One of the principle contentions raised by the appellants herein for the purpose of assailing the Impugned Judgment is that the petitioner company being a non-signatory to the arbitration agreement was never made a party to the proceedings before the referral court under Section 11 of the Act, 1996 by virtue of which the arbitral tribunal came to be constituted. No notice of invocation was issued either to the appellant company herein. In such circumstances, it was submitted that the appellant company; a non-signatory to the arbitration agreement could not have been joined as a party after the

referral stage i.e., after the constitution of the arbitral tribunal solely on the basis of the averments made in the counter-claim / statement of claim of the respondent no. 1 herein. In other words, it was contended that after the culmination of the referral stage in terms of Section 11 of the Act, 1996, the arbitral tribunal has no power whatsoever to implead or join a non-signatory to the arbitration agreement and that such power vests only with the referral court that too prior to the arbitral tribunal coming into existence.

a. Contradictory Views of different High Courts on the subject.

15. Before we proceed to answer the aforesaid contention canvassed on behalf of the appellant, it would be appropriate to first refer to the decisions of various High Courts and the cleavage of opinion that have been expressed as regards the scope and power of an arbitral tribunal to implead or join a non-signatory to an arbitration agreement.

I. Decisions holding that the Arbitral Tribunal does not have the power to Implead a non-signatory to the Arbitration Agreement.

16. The question whether an arbitral tribunal can implead a non-signatory to an arbitration agreement or not came to be examined for the first time by the Bombay High Court in ***Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Ltd.*** reported in **(2015) SCC OnLine Bom 1707**, wherein the petitioners therein had entered into separate and independent contracts with the respondents therein as-well as one 'DEPL'; an off-shoot

company of the respondents therein. When the respondents therein demanded payment of its dues under its own contract, the petitioners refused payment on the ground that DEPL previously owed them a certain sum of money, and since it was an off-shoot of the respondents, the amount owed to the respondents had been adjusted against DEPL's liability. The dispute came to be referred to arbitration and award was passed against the petitioners directing them to repay the outstanding dues to the respondents. The award came to be challenged before the Bombay High Court, wherein it was contended by the petitioners that the arbitral tribunal ought to have lifted the corporate veil to find out whether DEPL formed part of the respondent companies or not. The Bombay High Court *inter-alia* held that an arbitral tribunal does not have the power to lift the corporate veil and that only the courts have such power. In such circumstances, it held that since DEPL was not a party to the arbitration proceedings between the petitioner and the respondents, and the tribunal having no power to pierce the corporate veil, the High Court upheld the award. The relevant observations read as under: -

> *"47. The petitioners had canvassed before the arbitral tribunal that the arbitral tribunal shall lift the corporate veil to find out that the said DEPL and the respondents herein were forming part of the said Jindal Group and were one and the same entity and thus the respondents were liable for the liabilities of the said DEPL. In my view, the arbitral tribunal has no power to lift the corporate veil. Only a Court can lift the corporate veil of a company if the strongest case is made out. In my view, the prayer of the petitioners for lifting the corporate veil of the said DEPL was itself not maintainable in the arbitration proceedings. The said DEPL was not a party to these proceedings. Be that as it may,*

a perusal of the arbitral award clearly indicates that the arbitral tribunal has refused to lift the corporate veil after considering the evidence produced by both the parties and has rendered finding of fact that no such case was made out by the petitioners for lifting the corporate veil which are not perverse and thus cannot be interfered with by this Court under Section 34 of the Arbitration Act."

(Emphasis supplied)

17. In ***Balmer Lawrie & Co. Ltd. v. Saraswathi Chemicals Proprietors Saraswathi Leather*** reported in **(2017) SCC OnLine Del 7519**, the Delhi High Court was *inter-alia* dealing with the question whether an arbitral award can be enforced against non-parties to the arbitration. The awardee therein sought amendment of the execution petition in order to implead the directors of the judgment-debtor on the ground that they had siphoned off the assets and hence ought to be held responsible to satisfy the arbitral award. In this context, the Delhi High Court observed that an arbitral award cannot be enforced against non-parties to the arbitration. This in its opinion was because, an arbitral tribunal draws its jurisdiction only from the arbitration agreement, and an arbitral tribunal cannot proceed against persons who are not a party to such agreement, and as such any award rendered by it would not be binding upon non-parties to the arbitration agreement. It further observed that although in exceptional circumstances, non-signatories who are otherwise bound by the arbitration agreement may be compelled to arbitrate and thereby be liable for any award passed therein, yet such a course can only be adopted by the courts and an arbitral tribunal cannot lift the corporate veil and proceed against non-

parties, as arbitration is always consensual and confined to the arbitration agreement and as such an arbitral tribunal cannot enlarger its jurisdiction to non-parties. The relevant observations read as under: -

> *"13. In the first instance, it is doubtful whether this Court could enforce the arbitral award against non parties to the arbitration agreement. It is trite law that an arbitral tribunal draws its jurisdiction from the agreement between the parties and persons who are not party to the arbitration agreement cannot be proceeded against by an arbitral tribunal. Thus, an arbitral award made by an arbitral tribunal against any person who is not a party to the arbitration agreement would be wholly without jurisdiction and unenforceable. There may be exceptional cases where a court may compel persons who are not signatories to an arbitration agreement to arbitrate provided it is established that the non-signatory(ies) are either claiming through signatory(ies) or there was clear intention to be bound as parties (see : Chloro Controls India Private Limited v. Severn Trent Water Purification Inc : (2013) 1 SCC 641). However an arbitrator cannot lift the corporate veil and proceed against non parties. An arbitration is consensual. It is based on the agreement between parties. The arbitrator derives his jurisdiction to adjudicate disputes from the consent of parties, therefore, he is not in a position to enlarge the scope of his influence and extend his jurisdiction to non-parties by exercise of his limited jurisdiction based on the consent of parties.*
>
> *14. Though a court can lift the corporate veil, the same can be done only in extraordinary circumstances and by due adjudicatory process. It is trite law that an executing court cannot go behind thedecree; it must be enforced as it is. Thus, it is not open for a petitioner to claim that although the decree is against one entity it must be enforced against another. However, there may be cases where it is found that the assets of the judgement debtor have been secreted, siphoned off, or by a fraudulent device ostensibly placed outside the control of the judgement debtor, in an endeavour to frustrate the enforcement of the decree. In such cases, the court is not powerless to extend its reach to third parties to enforce the decree; however this is limited for recovering the assets of the judgement debtor. In the event a corporate facade is used to perpetuate such fraud, the corporate veil may be lifted."*

(Emphasis supplied)

18. In yet another decision of the Delhi High Court in ***Sudhir Gopi v. Indira Gandhi National Open University & Anr.*** reported in **(2017) SCC OnLine Del 8345**, placing reliance on ***Oil and Natural Gas Corporation*** (supra) and ***Balmer Lawrie*** (supra) it was held that an arbitral tribunal does not have the jurisdiction to lift the corporate veil and pass an award against non-signatories to an arbitration agreement. It observed that consent of parties is the cornerstone of arbitration and it is from such arbitration agreement that the arbitral tribunal derives its jurisdiction to render an award. It further held that in exceptional cases, the non-signatories can be compelled to arbitrate, but that it is only the courts who are empowered to refer them to arbitrate and that the arbitral tribunals have no power or jurisdiction to do so as its jurisdiction is confined by the arbitration agreement. The relevant observations read as under: -

> *"11. "Like consummated romance, arbitration rests on consent". The agreement between parties to resolve their disputes by arbitration is the cornerstone of arbitration. The arbitral tribunal derives its jurisdiction from the consent of parties (other than statutory arbitrations). In absence of such consent, the arbitral tribunal would have no jurisdiction to make an award and the award so rendered would, plainly, be of no value. [...]*
>
> *xxx xxx xxx*
>
> *16. There may be cases where courts can compel non signatory (ies) to arbitrate. These may be on grounds of (a) implied consent and/or (b) disregard of corporate personality. In cases of implied consent, the consent of non signatory (ies) to arbitrate is inferred*

from the conduct and intention of the parties. Thus, in cases where it is apparent that the non-signatory (ies) intended to be bound by the arbitration agreements, the courts have referred such non-signatories to arbitration.

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20. The courts would, undoubtedly, have the power to determine whether in a given case the corporate veil should be pierced and the persons behind the corporate façade be held accountable for the obligations of the corporate entity. However as stated earlier, an arbitral tribunal, has no jurisdiction to lift the corporate veil; its jurisdiction is confined by the arbitration agreement - which includes the parties to arbitration - and it would not be permissible for the arbitral tribunal to expand or extend the same to other persons.

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35. Arbitration agreement can be extended to non-signatories in limited circumstances; first, where the Court comes to the conclusion that there is an implied consent and second, where there are reasons to disregard the corporate personality of a party, thus, making the shareholder(s) answerable for the obligations of the company. In the present case, the arbitral tribunal has proceeded to disregard the corporate personality of UEIT. The arbitral tribunal has lifted the corporate veil only for the reason that UEIT's business was being conducted by Mr. Sudhir Gopi who was also the beneficiary of its business being the absolute shareholder (barring a single share held by Mr. Fikri) of UEIT. This is clearly impermissible and militates against the law settled since the nineteenth century. Any party dealing with the limited liability company is fully aware of the limitations of corporate liability. Business are organised on the fundamental premise that a company is an independent juristic entity notwithstanding that its shareholders and directors exercise the ultimate control on the affairs of the company. In law, the corporate personality cannot be disregarded. Undisputedly, there are exceptions to this rule and the question is whether this case falls within the scope of any exceptions.

36. A corporate veil can be pierced only in rare cases where the Court comes to the conclusion that the conduct of the shareholder is abusive and the corporate façade is used for an improper purpose, for perpetuating a fraud, or for circumventing a statute."

(Emphasis supplied)

19. The Madras High Court in ***V.G. Santhosam v. Shanthi Gnanasekaran*** reported in **2020 SCC OnLine Mad 560**, was called upon to examine whether an arbitral tribunal has the jurisdiction to pass an order impleading a non-signatory to an arbitration agreement, with a view to enable such non-signatory to participate in the arbitration proceedings. In the said case, there was a dispute amongst the partners of a firm which came to be referred to arbitration. In the arbitration proceedings the respondent therein filed an application for her impleadment on the ground that she is the legal heir of one of the erstwhile partners and thus entitled to his share into the firm. The arbitral tribunal allowed the application and impleaded the respondent by taking recourse to the powers provided under Order I Rule 10 of the Code of Civil Procedure, 1908 (for short, the "**CPC**"). In appeal, the Madras High Court held as follows: -

(i) **First,** that there is no express provision under the Act, 1996 that allows for impleadment of a third-party, and as such any order of impleadment by an arbitral tribunal can at best be considered to be an interim measure in terms of Section 17 of the Act, 1996. However, since Section 17 contemplates exercise of only those powers provided within the scope

of the arbitral proceedings and by extension within the ambit of Act, 1996, the order of the arbitral tribunal in impleading a third-person unconnected with the dispute between the parties of arbitration was impermissible and in violation of the scheme of the Act, 1996. Placing reliance on Section 2(h) and 7 of the Act, 1996 respectively, the High Court held that since "*party*" has been defined to mean only a party to the "*arbitration agreement*", the arbitral tribunal in exercise of its powers under Section 17 could not have impleaded the respondent therein, who was not a party to the arbitration agreement. The relevant observations read as under: -

> *"60. Section 17 of the Arbitration and Conciliation Act, 1996, provides interim measures ordered by the Arbitral Tribunal. The impleading petition is entertained under Section 17(1)(ii)(e), which states that "such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient". By invoking the said provision of Law, the Tribunal can pass any order regarding interim measures. There is no express provision for impleadment in the Act. In the absence of any such express provision, the Arbitrator impliedly could entertain the impleading petition only under Section 17(1)(ii)(e) of the Arbitration and Conciliation Act, 1996. However, the said provision indicates that the power is to be exercised within the ambit of the Act and cannot be extended so as to exercise an inherent power by invoking the Code of Civil Procedure. Thus, the very findings of the Arbitrator by exercising wide powers under Order I, Rule 10 of the Code of Civil Procedure, he entertained the impleading petition is absolutely untenable and beyond the scope of the arbitral proceedings as well as the Act itself. Any interim measure is to be granted within the scope of the arbitral proceedings and not beyond the dispute raised between the parties for arbitration. Therefore, the very exercise of power to*

implead a third person who is unconnected with the Partnership Deed is improper and in violation of the very Scheme of the Act itself.

61. It is pertinent to note that Section 2(h) of the Arbitration Act defines "Party means a party to an Arbitration Agreement". When the definition for the word 'Party' is provided under the Act, then no other party other than the party to the "Arbitration Agreement" is entitled to participate in the arbitral proceedings. The term 'Arbitration Agreement' is defined under Section 2(b) as an agreement referred to in Section 7 of the Act. Section 7(1) of the Act, stipulates that Arbitration Agreement means "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." Thus, the Arbitrator has committed an error in interpreting the scope of the Act and allowed the impleading petition in violation of the very Scheme and the provisions of the Act.

63. Section 2(1)(b) of the Act defines 'Arbitration Agreement' as an agreement referred to in Section 7 and Section 7 provides that an Arbitration Agreement is an agreement between the parties to submit all or any of the disputes to be adjudicated by an Arbitrator in respect of their definite legal relationship whether contractual or not. Section 7 contemplates that the agreement should be in writing and signed by the parties. Therefore, a non-signatory or a third party could not be subjected to arbitration. Only in exceptional cases like the case whether the rights of the parties are flowing under the Arbitration Agreement, third parties could be subjected to arbitration. The Court is required to examine the exceptions from the touchstone of direct relationship of the party signatories to the contract."

(Emphasis supplied)

(ii) **Secondly,** that Section 16 of the Act, 1996 cannot be interpreted in such a manner to allow any third-party to the arbitration agreement to have

itself impleaded and get its rights or dispute adjudicated. It held that Section 16 contemplates the competence of the Arbitral Tribunal to only rule on its jurisdiction as regards the existence or validity of the arbitration agreement, and cannot enter upon adjudication on the civil rights of the parties.

> *"78. The sole object of the Arbitration Act is to resolve the disputes as expeditiously as possible with the minimum intervention of the Court of Law. The scope of Alternative Dispute Resolution (ADR) cannot be expanded so as to usurp the inherent powers of Civil Courts. Section 16 cannot be interpreted so as to entertain an application from any person, who is a third party to the Arbitration Agreement for the purpose of arbitral adjudications and competence of the Arbitral Tribunal to Rule of its Jurisdiction would indicate that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the Arbitration Agreement and for that purpose, the Tribunal may consider the facts and the terms and conditions of the agreement. Section 16(2) states that "a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence".*
>
> *80. This Court is of the considered opinion that even such a right is traceable in favour of the first respondent, then the only possible course would be to approach the Competent Court of Law and establish her legal right, if any, available based on the documents or the evidences. Civil rights are to be established independently before the Competent Civil Court by the parties. However, such civil rights cannot be adjudicated or enforced by the Arbitrator in the contracted arbitration proceedings under the provisions of the Act. If an Arbitrator is allowed to adjudicate the civil rights of the parties or the rights regarding inheritance of properties, then it would result in submerger of the very Arbitration Agreement.*

84. Even after impleadment, the possible disputes to be raised by the first respondent in the arbitration proceedings are that she is the legal heir of late Mr. V.G. Panneerdas and therefore, she is entitled to be a partner in the partnership firm in her capacity as a legal heir. This Court is doubtful, whether such a dispute affecting the rights of all other legal heirs shall be adjudicated by the Arbitrator in the arbitration proceedings. Considering the scope of the arbitration proceedings and taking note of the rights of the legal heirs of late Mr. V.G. Panneerdas and the terms and conditions of the Partnership Deed as well as the disputes raised under the Arbitration Act, it is highly improper on the part of the learned Arbitrator to adjudicate the civil rights of the parties under the General Laws. In such an event, the Arbitrator would be travelling beyond the scope of the Arbitration Act and such a power is not vested with an Arbitrator under the provisions of the Arbitration Act, 1996.

85. Therefore, the civil rights of the parties are to be established before the Competent Court of Law. The disputes raised under the Arbitration Act alone can be adjudicated by the Arbitrator by exercising the powers conferred under the Act. The Arbitrator cannot be equated with the Court of Law and this proposition is well settled as the Arbitrator is a creator of the Statute and has no inherent power, which exists in the Civil Court and the Arbitrator cannot exercise the inherent power and has to exercise the powers strictly within the ambit of the Arbitration Act and certainly not beyond the scope of the arbitration proceedings.

105. [...] However, such Alternative Dispute Resolution processes would not confer any power to the Arbitrator to decide the civil rights of a third person, who is not a party to the Arbitration Agreement. Alternative Dispute Resolution mechanism would not provide any competency to exercise the inherent power conferred to the competent Civil Court of Law. The Alternative Dispute Resolution processes with reference to the Statute is to be exercised within the ambit of the provisions and not to decide the civil rights of the citizen. In such an event, we are converting the Alternative Dispute Resolution System as the Court of Law

and such a practice would be dangerous as the Arbitrators are appointed based on contract basis and by consent of the parties and the remuneration to the Arbitrator is also paid by the parties to the Arbitration Agreement. When the Arbitrators are receiving their remuneration from the parties to the Arbitration Agreement, which is contractual in nature, they are bound to act as a neutral person between the parties to the agreement and resolve the disputes raised between those parties. In the event of allowing the Arbitrator to exercise the powers beyond the scope of the Arbitration Act, then the Arbitrator would be exercising the inherent powers of the Court, so as to grant the relief to a person, who is not a party to the Arbitration Agreement and the very nature of the arbitration proceedings do not permit such a situation.

(Emphasis supplied)

(iii) **Lastly,** that an arbitrator is a statutory creature of the Act, 1996 and its scope, powers and jurisdiction is confined all but to the statutory provisions of the said Act. An arbitrator cannot travel beyond the statute and the arbitration agreement in such a manner so as to usurp the jurisdiction of civil courts. As such an arbitral tribunal cannot exercise the inherent powers conferred upon national courts such as under Order I Rule 10 of the CPC, and is bound to function only within the scope of the Act, 1996 and adjudicate disputes between parties to the "*arbitration agreement*" in terms of the said Act. A power which is not contemplated under the Act, 1996 cannot be exercised by an arbitral tribunal. It observed that if such concept of power to impleadment is provided to the arbitrator then not only would it lead to widening the scope of arbitration proceeding but also would defeat the very purpose

of the Act, 1996 i.e., the adjudication between the consenting parties to the arbitration agreement with a defined contractual legal relationship. The relevant observations read as under: -

> *"77. The above proposition of law laid down by the Courts would reveal that the Arbitrator cannot exercise an inherent power conferred to the Civil Courts under the Code of Civil Procedure. The Arbitrator is bound to function within the scope and ambit of the Act and resolve the disputes between the contracted parties to the Arbitration Agreement as defined under the Act. Travelling beyond the scope of the Act is impermissible and if such an exercise is made, then the same would result in exercise of excess jurisdiction and finally the Arbitrator would be functioning as a Civil Court, which is not intended under the provisions of the Arbitration and Conciliation Act, 1996. When the Arbitrator is appointed under the Statute, scope, powers and jurisdiction shall be within the provisions of the said Statute. The Arbitrator is not empowered to travel beyond the scope of such powers and in the event of such an exercise, the same would cause prejudice to either of the parties to the Arbitration Agreement and this apart, certain common civil rights cannot be decided by the Arbitrator.*
>
> *81. The Arbitrator is a person appointed in order to resolve the dispute between the parties under certain terms and conditions in the Arbitration Agreement. The disputes between the parties are definite and existence of Arbitration Agreement is an essential one, while-so, the Arbitrator cannot invoke the powers contemplated under Order 1, Rule 10 of the Code of Civil Procedure, wherein wide powers are granted, so as to implead a person, which is otherwise unconnected with the partnership or in the Arbitration Agreement. If such a concept of power to impleadment is provided to the Arbitrator, then the scope of arbitration proceedings will be, not only widened but, the purpose and the object of the Act, would be defeated. Thus, the Arbitrator is empowered to adjudicate the disputes strictly with reference to the Arbitration Agreement and with the consent of the parties to the Arbitration Agreement.*

Contrary to the contractual agreement between the parties, the Arbitrator cannot exercise any powers so as to implead a third party to the Arbitration Agreement for the purpose of adjudicating the right of any such third party.

83. However, the Arbitrator usurped the wide powers conferred under Order 1, Rule 10 of the Code of Civil Procedure and impleaded the first respondent for the purpose of adjudicating the disputes aroused through an Arbitration Agreement. It violates the very contractual obligation between the Arbitrator as well as the parties to the Arbitration Agreement under the provisions of the Arbitration and Conciliation Act, 1996. The Arbitrator in the event of exercising such wide powers under the Code of Civil Procedure, the same would infringe the rights of other parties, which cannot be adjudicated in the arbitration proceedings.

85. Therefore, the civil rights of the parties are to be established before the Competent Court of Law. The disputes raised under the Arbitration Act alone can be adjudicated by the Arbitrator by exercising the powers conferred under the Act. The Arbitrator cannot be equated with the Court of Law and this proposition is well settled as the Arbitrator is a creator of the Statute and has no inherent power, which exists in the Civil Court and the Arbitrator cannot exercise the inherent power and has to exercise the powers strictly within the ambit of the Arbitration Act and certainly not beyond the scope of the arbitration proceedings.

99. The spirit of the order passed by the Arbitrator with reference to the Arbitration Act is to be considered by this Court. The above findings would reveal that the Arbitrator has made an initiation to decide the legal rights of the parties, including the rights of the first respondent. The Arbitrator in express terms held that the impleadment of party, provisions contained in the Code of Civil Procedure through Order 1, Rule 10 gives a wide power to a Court and in our context, the same must apply to an Arbitral Tribunal. Such a conclusion arrived by the Arbitral Tribunal is undoubtedly an exercise of inherent power, which is impermissible in law. The power which is not contemplated

under the Arbitration Act, cannot be exercised by the Arbitral Tribunal. The power being statutory in character, the inherent power is not vested. While-so, the Arbitrator cannot invoke the provisions of the Code of Civil Procedure for the purpose of impleading a third person into the arbitral proceedings and he is bound to be strict with reference to the contracted Arbitration Agreement as well as the parties to the Arbitration Agreement and the adjudication must be within the parameters of the disputes raised between the parties to the Arbitration Agreement.

102. In the order impugned, the Arbitrator arrived a conclusion that the impleadment of the first respondent will help to secure a comprehensive adjudication of the extent to which the heirs of the parents, who were partners during the respective lifetime could claim right or not. Such a broad exercise of power invoked by the Arbitrator for the purpose of determining the civil rights of a person is beyond the scope of the provisions of the Arbitration Act. If the Arbitrator is appointed under the Arbitration Act is allowed to decide the civil rights of a person, who is otherwise not a party to the Arbitration Agreement, then the Arbitrator would be exercising the inherent power conferred to the Civil Court, which is not contemplated."

(Emphasis supplied)

20. In ***Arupri Logistics Pvt. Ltd. v. Vilas Gupta & Ors.*** reported in **(2023) SCC OnLine Del 4297** a family arrangement had been drawn between the respondents therein whereby their business holdings and properties were bifurcated into two distinct groups. Sometime thereafter, dispute cropped up between the two respondent groups as regards a parcel of land alleged to have been sold to the appellants therein in violation of the terms of the family arrangement and without proper authorization. Since, the family arrangement contained an arbitration clause, a sole arbitrator was appointed by the referral

court to resolve the said dispute between the respondent groups therein. The appellants therein were never arrayed as parties in the proceedings before the referral court, and it was only when one of the respondents therein moved an application before the arbitral tribunal for seeking impleadment of the appellants therein, that they were arrayed in the arbitration proceeding. The Sole arbitrator allowed the said application and impleaded the appellants therein. In appeal, the Delhi High Court held that the arbitral tribunal's power to implead does not flow from the provisions of the Act and that it being a creature of the Act, 1996 and the arbitration agreement cannot assume powers other than those conferred upon it. It can neither join or delete parties that were never referred to arbitration by the referral court. The said decision is in four-parts: -

(i) **First,** although Section 19 of the Act, 1996 permits the arbitral tribunal to formulate the procedure to be followed in accordance with the CPC yet it does not mean that all powers that are ordinarily vested in a national court by the CPC could also be said to have been conferred upon the arbitration tribunal which have otherwise not been provided by the statute. The power to implead has been explicitly conferred upon a court in terms of Order I Rule 10, and in the absence of any such provision in the Act, 1996, the power to conduct proceedings under Section 19 sub-section (3) of the Act, 1996 can neither be construed as a source of power of the arbitral tribunal to join parties nor can such

power be readily inferred due to its nature of militating against the very consensual scheme of arbitration. The relevant observations read as under: -

> *"58. As this Court reads Section 19(1), it finds that all that the said provision purports to achieve is to unfetter an AT from the rigors of procedure as embodied in the two statutes noticed above. While it may still be open for the AT to seek guidance and regulate its procedure bearing in mind the underlying principles flowing through the provisions of the CPC or the Evidence Act, that would not be liable to be read as either conferring additional powers upon an AT or arming it with the plethora of powers that may be otherwise specifically conferred upon courts in terms of those statutes.*
>
> *59. The power to implead stands conferred upon a court specifically in terms of Order I Rule 10 of the CPC. The aforesaid power is introduced in the CPC to enable the court to either strike out the name of parties or join parties whose presence in its opinion is necessary in order to enable it to effectively adjudicate upon and settle all questions involved. What needs to be remembered is that the power to implead stands vested in a court under the CPC by virtue of an express conferral of power in terms of Order I Rule 10(2). The power to implead and join has not been understood to exist in Section 151 of the CPC and which deals with inherent powers.*
>
> *60. The position which emerges from the aforesaid discussion is that the power to implead is one which stands specifically conferred by virtue of a provision duly incorporated in the CPC. The power stands placed in the hands of a court in order to enable it to effectively resolve disputes and arrive at a just settlement of questions that stand raised before it. However, and contrary to the above, the Act fails to incorporate a power to implead insofar as the AT is concerned. The power to conduct proceedings in a manner considered appropriate and which is recognised by Section 19(3) also cannot possibly be stretched to be read as a source of the authority of an AT to join parties.*

> *61. It is relevant to note that the discretion conferred on an AT to formulate the procedure to be followed in proceedings which it proposes to initiate cannot be extended to contemplate joinder of persons who are not signatories to an arbitration agreement. This more so since the joinder of parties which may otherwise not be signatories to an arbitration agreement raises substantive issues. The impleadment of a party in arbitral proceedings results in that individual or entity becoming bound by an award, interim or final, that may be rendered by the AT even though it may have never consented to seek resolution of questions by that tribunal. The impleadment of a party unilaterally by the AT thus results in a non-signatory being subjected to the authority of that tribunal and accepting its right to adjudicate upon disputes even though it may have never consented to subject itself to the authority of the said AT. This would clearly militate against the principle of "party consent" which forms the very foundation of arbitration."*
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> (Emphasis supplied)

(ii) **Secondly,** an arbitral tribunal owes its existence to the arbitration agreement and is essentially a designated private forum for resolving the disputes between the parties to such agreement and as such is detached from the hierarchy of 'courts'. Its genesis flows from the arbitration agreement and upon its constitution, the arbitral tribunal is governed by such agreement and the contours of the Act, 1996 only. The idea of vesting of inherent powers have been recognized only for adjudicatory institutions such as national court's whose genesis and by extension their powers flows from their right to act as a matter of justice and hence, the vesting of such powers to meet the ends of justice. However, an arbitration tribunal cannot be equated to a national court

since it derives its power to adjudicate from an express and private conferral of authority by parties through an agreement, and thus, there can be no vesting of an inherent power. Any authority that has been conferred upon the arbitral tribunal by the parties can only be exercised within the confines of the Act, 1996. The relevant observations read as under: -

> *"63. [...] an AT owes its genesis to parties resolving to confer authority on a person or an institution to render an award and adjudicate upon disputes that may arise. While the courts may intervene by virtue of the provisions of Section 11 of the Act, they do so only in cases where parties are unable to agree upon the constitution of an AT. However, even where the courts do constitute an AT by virtue of Section 11, the person or institution so designated remains a private forum which springs into existence principally in light of the agreement of parties and their resolve to have their disputes decided by that tribunal.*
>
> *64. An AT constituted either upon consensus of parties or consequent to intervention by courts remains a forum outside the ordinary hierarchy of legal institutions on which the justice dispensation system of our nation rests. It owes its genesis to the agreement between the parties and upon its constitution comes to be governed by the provisions of the Act. It is thus not an adjudicatory institution which can claim to be vested with inherent powers.*
>
> *65. Inherent powers are those which have been recognised to inhere in courts forming part of the formal hierarchy of legal institutions and which may be compendiously referred to as national courts. AT's thus constitute forums outside the circuit of national courts and remain to be institutions which owe their existence principally to the agreement between parties. [...]*
>
> *66. [...] An AT remains an institution which comes to be constituted merely on the basis of a private agreement*

between parties. It must also be remembered that the inherent power recognised to exist in courts flows from their right to act ex debito justitiae. The power to do so has always been recognised to exist in national courts with Section 151 of the CPC merely recognizing and reaffirming that power inhering in courts. [...]

67. What the Court seeks to highlight is the superior powers which are recognised to exist in national courts as opposed to ATs' generally. Statutes while according recognition to the inherent powers recognised to exist in national courts accept such a supervening power inhering in those courts and which enables them to pass such orders as would subserve the ends of justice. AT's on the other hand derive the power to adjudicate based on an express conferral of authority by parties to an agreement. Even where parties confer a power on the AT to arbitrate, that conferral must be within the contours of the applicable law. [...]"

(Emphasis supplied)

(iii) **Thirdly,** it held that the power to implead a party could also not be said to flow from either Section(s) 16 or 17 of the Act, 1996 respectively. The doctrine of *kompetenz-kompetenz* enshrined in Section 16 that enables the arbitral tribunal to rule on any jurisdictional objection such as the existence or validity of the arbitration agreement is confined or limited only to the objections raised by the parties before it by virtue of the arbitration agreement. It cannot be regarded as a source of power to implead parties. Similarly, the power to pass interim measures under Section 17 of the Act, 1996 cannot possibly encompass the power to implead or join a third-party to the arbitration proceedings, as such impleadment or joinder are not interim or interlocutory in nature, since

the exercise of such power in essence also makes the third-party to be bound by all other subsequent findings and the ultimate award of the tribunal that may be rendered apart from the 'interim order'. The relevant observations read as under: -

> *"68. We also find ourselves unable to recognize the power to implead as flowing from Sections 16 or 17 of the Act. Section 16 as is manifest from its plain language empowers the AT to rule on its own jurisdiction. It is in essence an adoption of the kompetenz-kompetenz principle as recognized to inhere in AT's. The power to rule on jurisdiction or on objections with respect to the existence or validity of the arbitration agreement cannot possibly be recognized as a source of power to implead parties. It is essentially concerned with the right of the AT to rule on any jurisdictional objection that may be raised by parties before it. The authority to render a decision on a jurisdictional question or challenge that may be raised cannot be stretched to infer a power to join parties to the arbitration proceedings.*
>
> *69. Insofar as Section 17 is concerned, none of the interim measures of protections which are spelt out in clauses (a) to (e) of Section 17(1)(ii) deal with or confer authority upon the AT to join non-signatories. At least none of those clauses explicitly speak of a power to implead. The power to frame an interim measure which may be considered to be "just and convenient" and which is spoken of in clause (e) also cannot be justifiably extended as embodying a power to implead. This since Section 17 fundamentally deals with "interim measures". The impleadment or the joinder of a party to arbitral proceedings cannot be construed to be an order which may be termed as either interim or interlocutory. This since the moment a party is joined in the proceedings, it becomes bound by the award which may be ultimately rendered by the AT.*
>
> *70. This Court also finds itself unable to recognize a power to implead being liable to be read in Section 17 merely because post its amendment by Act 3 of 2016 the AT now*

stands empowered to grant interim measures at par with the power which stands vested in courts in terms of Section 9 of the Act. The clear intent underlying the amendment to Section 17 is to enable AT's to frame interim measures from a position of equivalence with courts. The amendment to Section 17 appears to have been motivated solely by the felt need to save courts from being deluged with applications for interim relief. However, one must not lose sight of the fact that both Section 17 as well as Section 9 continue to deal with interim measures. The power to join a party and thus subject it to the ultimate decision and award that may be rendered by the AT cannot be conceived to be a component of the power to frame interim orders under Section 17. The Court in this respect concurs with the view expressed by the Madras High Court and reflected in Paras 127-134 of Abhibus as well as the legal position as enunciated and explained in Paras 81 and 99 of V.G. Santhosam.

(Emphasis supplied)

(iv) **Lastly,** it observed that although various principles such as 'alter ego' or 'group of companies' have been recognized to compel a third-party to partake in the arbitration proceedings, yet such principles have been invoked only in the context of Section(s) 8 or 45 of the Act, 1996 respectively which empowers a judicial authority to make a reference to arbitration. Since both these provisions uses the phrase *"a party to the arbitration agreement or any person claiming through or under him"* unlike Section 2(1)(h) that defines "*party"* to include only "*a party to an arbitration agreement*", it necessarily meant that it is only the courts that have the power to refer even a non-signatory to

arbitration by resorting to such principles. However, an arbitral tribunal is only limited to adjudicate between parties to an arbitration agreement in terms of Section 2(1)(h) of the Act, 1996. The relevant observations read as under: -

> *"72. Although that Report was submitted in August 2014 and various amendments have been introduced in the Act thereafter, Section 2(1)(h) has remained unchanged. The meaning to be ascribed to the word "party" as appearing in the Act at different places has come to be expanded only in Section 8 which in terms of the Arbitration and Conciliation (Amendment) Act, 2015 incorporates the phrase "a party to the arbitration agreement or any person claiming through or under him". The only other provision in which the word "parties" was further extended is Section 45 which too incorporates the phrase "or any person claiming through or under him". However, and significantly, both Sections 8 and 45 deal with powers conferred on a "judicial authority" as opposed to an AT. Insofar as the AT is concerned therefore, it would be the provisions of Section 2(1)(h) alone which would apply.*
>
> *91. However, and while the decision of the larger Bench is still awaited, this Court finds that the various decisions rendered on the subject and as were noticed in Cox & Kings essentially related to cases where courts were called upon to invoke those theories and hold parties, who even though may not have been signatories to the arbitration agreement, to be bound by the same. In fact, some of the decisions which were noticed in Cox & Kings had been rendered in the context of Section 45 which, as was noticed above, specifically employs the expression "any person claiming through or under him". The more fundamental question which remains to be answered by the Court is whether an AT would be justified in invoking those doctrines. This Court is of the firm opinion for reasons which are set out hereinafter that such a power cannot be recognised to inhere in an AT."*
>
> (Emphasis supplied)

Accordingly, the Delhi High Court concluded that since an arbitral tribunal owes its origin to the arbitration agreement providing for resolution of disputes between the parties to such agreement in a private forum outside the ordinary hierarchy of judicial authorities, the arbitration agreement alone, along with the intended applicable statutory laws constitute the body of laws within which the arbitral tribunal may exercise its powers. The arbitral tribunal cannot arrogate to itself powers which are neither conferred by the statute or the rules which govern the arbitration nor can it take recourse to inherent powers that ordinarily vests within a judicial authority. Even in exceptional cases where the scope of arbitration may be expanded to include even non-signatories, any such power to do so has been expressly conferred by the legislature only upon courts within the Act, 1996 by appropriate legislative insertions to the term "*party*". The relevant observations read as under: -

> *"92. As was held hereinbefore, the AT owes its origin principally to well recognised and identifiable sources. The principal source would be the agreement in terms of which parties may have resolved for all disputes being referred to an AT and thus choose a forum falling outside the circuit of national courts and the ordinary hierarchy of judicial authorities. The other would be rules framed by a body where the agreement contemplates institutional arbitration. Last but not the least would be the statutory laws framed by countries which are intended to govern and regulate ATs'. The agreement, institutional rules or national statutes would thus constitute the code or the body of laws specifying the powers that may be available to be exercised by the AT. As was pertinently observed by Redfern and Hunter, parties cannot by agreement invest powers upon an AT which are*

otherwise reserved to be exercised by courts and judicial institutions created by the State.

93. What needs to be emphasised is that an AT cannot arrogate to itself powers which are neither conferred by the statute or the rules which govern the arbitration nor can it take recourse to inherent powers, which as has been found hereinabove, are acknowledged to inhere in courts and judicial authorities only. The AT, cannot, therefore, expropriate for itself powers which are vested solely in judicial institutions. It remains bound by the provisions of the statutes which prevail and which in this case undisputedly is the Act. In the absence of a power of impleadment having been conferred upon the AT in terms thereof, it would have no authority or jurisdiction to join or implead parties to the proceedings. The Court has already found that the power to implead cannot be sustained or traced to Sections 16 or 17 or 19 of the Act. In fact, the Act incorporates no provision which could be even remotely considered as being liable to be read as being the repository of the power of the AT to implead.

94. The Act, wherever it was intended to expand the meaning to be ascribed to the word "party" has done so by introducing specific provisions in that respect. Even where such recourse was taken, the power has come to be conferred upon a judicial authority. If the AT were recognised to have the authority to invoke the alter ego or group of companies principles, it would undoubtedly result in the Court recognising a power vesting in the AT to compel the presence of a party who had never, at least ostensibly, agreed or conceded to its jurisdiction or authority to decide. Such a party would necessarily be one who had not even made party to the proceedings by the referral court. This would clearly result in the AT seeking to exercise authority over a party and compelling it to join the proceedings even though it may have never been ad idem on disputes being resolved by way of arbitration. This would not only result in the AT travelling far beyond the contours of the arbitration agreement but negate against the fundamental tenet of arbitration which is founded on consensus and agreement. The Court for all the aforesaid reasons, thus, finds itself unable to countenance the position as taken by the Sole Arbitrator in the present case.

95. Quite apart from the Court having found for reasons aforenoted that the AT stands conferred with no authority to

implead or join parties, a reading of the impugned order would clearly appear to indicate that the Sole Arbitrator has proceeded to join the appellants on considerations which are recognized to constitute the basis for the exercise of power under Order I Rule 10 of the CPC. However, the Sole Arbitrator has failed to bear in mind that the Act confers no authority upon an AT to wield powers akin to Order I Rule 10 of the CPC as specifically conferred on national courts. We have also found for reasons aforenoted that Section 19(2) cannot be read as enabling the AT to adopt Order I Rule 10 of the CPC."

(Emphasis supplied)

II. Decisions holding that the Arbitral Tribunal has the power to Implead a non-signatory to the Arbitration Agreement.

21. While on one hand the Delhi High Court along with the Bombay High Court and the Madras High Court have taken the view that it is only the courts who have the power to implead a non-signatory to partake in arbitration and that such power is not vested in an arbitral tribunal, the High Court of Gujarat on the other hand, speaking through Akhil Kureshi J. (as he then was) in ***IVRCL Ltd. v. Gujarat State Petroleum Corporation Ltd.*** reported in **2015 GUJHC 31651 DB** observed albeit in the context of scope of Section 9 of the Act, 1996, more particularly whether an injunction would be maintainable against a non-signatory, that it is no longer *res-integra* that even a non-signatory to an arbitral agreement can be subjected to arbitration proceedings. Placing reliance on the decision of this Court in ***Chloro Controls*** (supra), it was held that the courts have recognized various instances where even a non-signatory to an arbitration agreement can be allowed to be joined in the arbitration

proceedings by way of principle of *alter-ego,* apparent authority, agency or group of companies etc. It observed that such instances are premised on the 'implied consent' of the third-party to the arbitration agreement and thus, it would be futile to say that a non-signatory to an arbitration agreement can be compelled to submit to the jurisdiction of the arbitral tribunal so validly constituted. In the last, it observed that whether a particular case is a fit one for enjoining a third-party on the aforesaid principles would be for the arbitral tribunal to determine, being the appropriate forum by examining the facts of each case, an exercise which is neither possible nor proper for the courts to embark upon. The relevant observations read as under: -

> *"13. It is no longer res integra that in given set of circumstances, even a non-signatory to an arbitral agreement can be subjected to arbitration proceedings. Such instances may be rare and may arise in special facts of the case and would ordinarily provide an exception to the normal rule, that only a signatory to the arbitral proceedings can be compelled to submit to the jurisdiction of the arbitral tribunal. Nevertheless, instances have been recognized by Courts where either on the ground of piercing corporate veil as one entity found to be the alter ego of the other or some such similar ground, even a non-signatory entity to an arbitration agreement is allowed to be joined in the arbitration proceedings. As noted, in case of Chloro Controls (I) P. Ltd. (supra), the law on the point was discussed at length by 3 Judge Bench of the Supreme Court and it was concluded that various legal basis may be applied to bind a non-signatory to an arbitration agreement. Such instances would be of that of implied consent, third party beneficiaries, guarantors, assignment and other transfer mechanisms of contractual rights. Such theory relies on the discernible intentions of the parties and to a large extent, on good faith principle. The second stream of cases would be included in the legal doctrines of agent-principal relations, apparent authority, piercing of veil, joint venture relations, succession and estoppel. It was observed that this principle does not rely on the*

parties' intention but rather on the force of the applicable law. It would therefore be futile to argue that in no case, a non-signatory to an arbitration agreement can be compelled to submit to the jurisdiction of the arbitral tribunal so validly constituted. Whether in the present case, facts are such that any of the principles cited above or any other recognized by judicial precedent would apply or not is neither possible nor proper on our part to comment upon. Entire issue is pending before the appropriate forum. We would therefore not be justified in allowing the appeal and vacating the injunction only on this ground."

(Emphasis supplied)

22. Similarly in ***IMC Ltd. v. Board of Trustees of Denndayal Port Trust*** reported in **(2018) SCC OnLine Guj 4972**, the Gujrat High Court placing reliance on ***IVRCL Ltd*** (supra) held that there is nothing in the Act, 1996 which precludes or prohibits an arbitral tribunal from lifting the corporate-veil and pursuant thereto impleading even a non-signatory to arbitration proceedings. Expressing its disagreement with the views of the Bombay High Court and the Delhi High Court in ***Sudhir Gopi*** (supra) and ***Oil and Natural Gas Corporation Ltd*** (supra) respectively, it held that except for a limited sphere of fields involving disputes which are non-arbitrable, the arbitral tribunal is well-empowered to take up all other disputes and issues thereto which would necessarily also include the issue of lifting the corporate veil to enjoin a non-signatory to the arbitration. Whether a case is made out for impleading a third-party (sic non-signatory) or not would be a matter for the arbitral tribunal being the proper designated forum for adjudication of disputes, keeping in mind the facts of each case and the position of law. It further observed that

both the recognition of such power of an arbitral tribunal **AND** the non-issuance of a notice of invocation in terms of Section 21 of the Act, 1996 to the third-party sought to be impleaded will hardly occasion any prejudice, as it is always open to such a third-party to challenge its impleadment by way of an application under Section 16 of the Act, 1996. The relevant observations read as under: -

> *"23. Reverting to the facts of the case on hand, it is to be noticed that the order passed by the learned Arbitral Tribunal clearly records that opinion expressed is prima-facie and subject to objections and remedies available under the Arbitration Act to the impleaded respondent, i.e. the appellant herein. If the appellant claims that it is not a party to the agreement, as such it cannot be impleaded as party respondent in the arbitration proceedings, it is always open for it to move an application under Section 16 of the Arbitration Act to rule on its jurisdiction. In view of such remedy and further remedies available under the law, by ordering impleadment, we are of the opinion that no prejudice is caused to the appellant. Whether notice is required to be issued to a party before ordering impleadment, or not, is a matter which depends on facts and circumstances of each case. If a strong case is made out for impleadment, it is always open for the Courts and Tribunals to order impleadment and to give an opportunity before deciding the main claim. In that view of the matter and having gone through the case law on the subject as referred above, we are of the view that the order of the learned Arbitral Tribunal cannot be said to be not in conformity with law merely on the ground that appellant was not issued notice before passing the order of its impleadment. Even the learned Single Judge has also rightly rejected the plea of the appellant for quashing the order of the learned Arbitral Tribunal on the aforesaid ground.*
>
> *xxx xxx xxx*
>
> *45. On hearing the response on the said issues by the learned Senior Counsel Shri Mihir Thakore and keeping in view of the provisions of the Arbitration Act, 1996, as also the judgment of the Hon'ble Supreme Court in the case of A. Ayyasamy v. A.*

Paramasivam reported in (2016) 10 SCC 386, we are not in agreement with the view taken by the learned Single Judges in the aforesaid judgments in Sudhir Gopi v. Indira Gandhi National Open University reported in 2017 SCC OnLine Del 8345 and Oil and Natural Gas Corporation Ltd. v. Jindal Drilling and Industries Limited reported in 2015 SCC OnLine Bom 1707. There is nothing in law which prohibits an Arbitral Tribunal from lifting the corporate veil on the basis of doctrine of alter ego. The Arbitral Tribunal has a right to take up all disputes which a Court can undertake, except certain disputes generally treated as non-arbitrable, viz. (i) patent, trade marks and copyright, (ii) anti-trust/competition laws, (iii) insolvency/winding up, (iv) bribery/corruption, (v) fraud, (vi) criminal matters. The Arbitration and Conciliation Act, 1996, does not make any provision excluding any category of disputes treating them as non-arbitratble but the Courts have held that certain kinds of disputes may not be capable of adjudication through means of arbitration. This issue is elaborately considered by the Hon'ble Supreme Court in the case of A. Ayyasamy v. A. Paramasivam reported in (2016) 10 SCC 386. [...]

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47. Further, in the case of IVRCL Limited v. Gujarat State Petroleum Corporation Limited - First Appeal No. 1714 of 2015 and other allied appeals, decided on 08-13/10/2015, a Division Bench of this Court held that it is no longer res-integra that in a given set of circumstances, even a non-signatory to an arbitral agreement can be subjected to arbitration proceedings. It is further observed that instances have been recognized by Courts where on the ground of piercing corporate veil, as one entity being found to be an alter ego of the other or on similar grounds, even a non-signatory entity to an arbitration agreement is allowed to be joined in the arbitration proceedings. The Division Bench has disapproved the argument that, in no case, a non-signatory to the arbitration agreement can be compelled to submit to the jurisdiction of the Arbitral Tribunal validly constituted.

48. In view of the aforesaid judgments of the Hon'ble Supreme Court and Division Bench of this Court, we are not in agreement with the submission made by Shri S.N. Soparkar, learned Senior Counsel for the appellant, that the learned Arbitral Tribunal has no jurisdiction to examine the issue by lifting the corporate veil

and further, on facts, no case is also made out to examine the claim of alter ego by lifting the corporate veil. Whether a case is made out for impleading a third party by applying the doctrine of lifting of corporate veil, is a matter which is to be examined having regard to facts of each case and keeping in mind the concept of group Companies. [...]"

(Emphasis supplied)

23. In ***NOD Bearing Pvt. Ltd. v. Bhairav Bearing Corporation*** reported in **(2019) SCC OnLine Bom 366** the facts germane for our discussion are that an agreement for supply of ball bearings was entered into between the petitioner therein and one KBIL group. For facilitation of distribution of these goods, the petitioner therein entered into a dealership agreement with the respondent therein, pursuant to which a certificate of distribution came to be issued to the respondent therein by KBIL. Due to various issues as regards the fulfilment of supply of goods, the KBIL and the petitioner therein terminated the certificate of distribution and the dealership agreement, respectively with the respondent therein. Aggrieved by the aforesaid, the respondent therein initiated arbitration against the petitioner therein *inter-alia* for the purpose of challenging the aforesaid termination and claiming damages therefrom. Before the arbitral tribunal one of the key issues canvassed by the petitioner therein was that the arbitration suffers from a mis-joinder or non-joinder of parties inasmuch as KBIL had not been impleaded. It contended that the dealership agreement entered into by it with the respondent therein was only in the capacity of an agent of the KBIL, and thus any claims arising out of the

same must be made against the principal alone i.e., KBIL, who has not been made a party to the arbitration proceedings. The aforesaid contention came to be rejected by the arbitral tribunal and ultimately an award was passed against the petitioner therein. In appeal, the Bombay High Court upholding the decision of the sole arbitrator held that construction and determination of the scope of agreement so as to determine which parties are necessary to the proceedings is a matter strictly within the jurisdiction of the arbitrator. It further observed that as long as the interpretation of the agreement by the arbitrator is reasonable, the courts would refrain from interfering with the same merely because another view is possible. Although the Bombay High Court did not make any observations as regards the power of tribunal to implead or join a non-signatory, yet its observations as to the scope of jurisdiction of the arbitral tribunal, more particularly for determining whether there exists any principal-agent relationship nevertheless is of significance, which we shall discuss in more detail in the latter parts of this judgment. The relevant observations read as under: -

> *"4. Learned Counsel for the Petitioner submits that dealership agreement, which gave rise to the Respondent's claim, was entered into by the Petitioner as an agent of KBIL. Learned Counsel submits that the Petitioner having disclosed in the dealership agreement its principal and its express authority to name a dealer whilst acting for the principal, namely, KBIL, the Respondent's dealership is not a sub-agency of the Petitioner, but an agency of the principal itself, namely, KBIL. Learned Counsel relies on Section 194 read with Section 230 of the Contract Act in this behalf. Based on this contention, it is further submitted that the claim being in respect of a contract of agency as between the*

Respondent and KBIL, the latter was a necessary party for any adjudication concerning the agreement. [...]

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5. The learned arbitrator rejected the Petitioner's submissions on the ground that the dealership agreement between the Petitioner and the Respondent was on a principal to principal basis; though this agreement was in pursuance of its entitlement to appoint dealers under its main contract of distributorship with KBIL and this agreement conferred upon KBIL certain rights, in essence, it was an agreement between the Petitioner and the Respondent. The arbitrator considered various circumstances to arrive at this conclusion. The arbitrator inter alia observed that under the dealership agreement, the Respondent was required to place a purchase order on, and purchase bearings from, the Petitioner and prices were required to be separately agreed between the Respondent and the Petitioner from time to time. After considering various clauses of the dealership agreement (in particular, clauses 3(b), 5(a) to (c), 6(a), 7(a), (d), 10, 11(f) and 13 thereof), the arbitrator held that a holistic reading of the agreement did not show that the Petitioner was merely acting as an agent of KBIL, whilst entering into the dealership agreement with the Respondent. The arbitrator relied on the case of Coats Viyella India Ltd. v. India Cement Ltd. in this behalf. In Coats Viyella India Ltd., the Supreme Court, after considering the agreement as a whole, had held that under the agreement, a privity of contract of the appellant was only with the respondent and there was no liability on the other party, who was claimed to be the principal, to make payment to the appellant; the agreement was on a principal to principal basis between the appellant and the respondent, the rights and liabilities of the appellant arising only under the agreement. Based on the material placed before the learned arbitrator and a reasonable interpretation of the dealership agreement and application of law, the arbitrator came to his conclusion that the Petitioner did not act merely as an agent on behalf of KBIL in entering into the dealership agreement and since the Respondent's case was that the Petitioner's acts had directly resulted in the Respondent suffering losses, the proceedings did not suffer from any mis-joinder or non-joinder of necessary party so as to vitiate the proceedings. This conclusion is clearly a possible view based on the material placed before the learned arbitrator. Construction of a contract is a matter strictly

within the jurisdiction of the arbitrator, and so long as the arbitrator construes it on a reasonable interpretation and his construction denotes a possible view, there is nothing for the challenge court to interfere with under Section 34 of the Arbitration and Conciliation Act, 1996 ("Act").

6. There is no denial of the proposition of law laid down by the Supreme Court or our court in the cases cited by learned Counsel for the Petitioner. Prem Nath Motors Limited's case (supra) basically considers the effect of Section 230 of the Contract Act. In that case, it was held that the agent had acted on behalf of a disclosed principal and there was no contract to the contrary placed before the court so as to make the agent liable for the act of the disclosed principal. Even in Vivek Automobiles Limited (supra), the court applied the same principle. The principle of law enunciated by the Supreme Court in these cases merely implies that an agent is not responsible for the acts of a disclosed principal except in case of a contract to the contrary. The real question in the present case is whether, in so far as the agency agreement between the Petitioner and the Respondent is concerned, the Petitioner could be said to be merely acting as an agent of a disclosed principal, namely, KBIL, or was the agreement entered into by the Petitioner acting in its own rights as a principal. On a reasonable construction of the agreement, the arbitrator found that it was the latter case and not the former. The arbitrator held that the relevant clauses of the agreement indicated that the agreement of dealership was entered into by the Petitioner not as an agent of KBIL, but in its individual capacity on a principal to principal basis. That conclusion, as I have noted above, is a possible view based on a reasonable interpretation of the agreement."

(Emphasis supplied)

24.A similar view was taken by the Delhi High Court in ***Vistrat Real Estates Pvt. Ltd. v. Asian Hotels North Ltd.*** reported in **(2022) SCC OnLine Del 1139** wherein the issue before the court was whether the petitioner therein was entitled to initiate arbitration against a third-party who was not a signatory to the arbitration agreement. The Delhi High Court placing reliance on ***Chloro***

Controls (supra), held that in exceptional cases pertaining to either the principle of 'composite performance' or 'implied authority'. even a third party who is not a signatory to the arbitration agreement can be joined in arbitration. It further held that at the stage of appointment of an arbitrator in terms of Section 11 of the Act, 1996, the courts are required only to make a *prima-facie* determination as regards the validity or existence of the arbitration agreement only. Once it is found that there is a valid arbitration agreement in existence, all other issues including whether any relief can be claimed against a third-party or the necessity for impleading such third party would be a matter to be looked into only by the arbitral tribunal by virtue of the powers devolved upon it by the principle of '*kompetenz-kompetenz*'. The relevant observations read as under: -

> *"11. Hon'ble Supreme Court in the decision reported as (2013) 1 SCC 641 Chrolo Controls India Private Ltd. v. Severn Trent Water Purification Inc. though dealing with an international arbitration under Section 45 of the Act, held that even third parties who are not signatories to the arbitration agreement can be joined in arbitration. It laid down categories where the third parties can be impleaded to the arbitration and held that the expression 'claiming through them' should be construed strictly. [...]*
>
> *12. The decision in Chrolo Controls (supra) clearly holds that in exceptional cases applying the principle of "composite performance" or implied authority, even a third party who is not a signatory to the arbitration agreement can be joined in arbitration.*
>
> *13. Hon'ble Supreme Court in Vidya Drolia (supra) further considering the issue as to who would decide the non-arbitrability of the claim held that there cannot be a straightforward universal answer. Reiterating the law laid down in Shin Etsu Chemical Co.*

Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234, it was held that the correct approach to the review of the arbitration agreement is restricted to prima facie finding that there exists an arbitration agreement that is not null and void, inoperative or incapable of being performed. The key rationale for holding that the courts' review of the arbitration agreement should be limited to a prima facie standard is the principle of competence-competence. Further, if the courts are empowered to fully scrutinise the arbitration agreement, an arbitral proceeding would have to be stayed until such time that the court seized of the matter renders a decision on the arbitration agreement. This would defeat the credo and ethos of the Arbitration and Conciliation Act which is to enable expeditious arbitration without avoidable intervention by the judicial authorities. The rule of priority in favour of the arbitrators is counterbalanced by the courts' power to review the existence and validity of the arbitration agreement at the end of the arbitral process. It was further held that if on a bare perusal of the agreement it is found that a particular dispute is not relatable to the arbitration agreement, then, perhaps the court may decide the relief sought for by a party in a Section 11 petition. However, if there is a contestation with regard to the issue as to whether the dispute falls within the realm of the arbitration agreement, then the best course would be to allow the arbitrator to form a view in the matter.

14. Therefore, once a valid arbitration agreement exists between the parties, the issue whether the petitioner is entitled to any relief in the absence of a third party to the agreement or that third party is required to be impleaded in the proceedings, is covered by the Doctrine of Competence-Competence and it will be for the Arbitrator to decide the said issue. Thus, the issue whether in the absence of a third party, the petitioner can claim the refundable security deposit would be for the learned Arbitrator to determine."

(Emphasis supplied)

25. In ***Cardinal Energy and Infra Structure Pvt. Ltd. v. Subramanya Construction and Development Co. Ltd.*** reported in **(2024) SCC OnLine Bom 964**, the Bombay High Court diverging from the views expressed in its earlier decision of ***Oil and Natural Gas Corporation Ltd.*** (supra) and the

decision of the Madras High Court in ***V.G. Santhosam*** (supra), held that the arbitral tribunal does have the power or authority to implead a non-signatory even if such impleadment was never sought at the referral stage. The said decision is in three-parts: -

(i) **First,** placing reliance on the decision of this Court in ***Cox and Kings (I)*** (supra), it held that the question whether a non-signatory is bound by the arbitration agreement or not, is for the arbitral tribunal to decide and not the referral court. Thus, even if the non-signatory was not impleaded at the time of filing of application under Section 11 of the Act, 1996, it would be incorrect to say that the same would exclude the arbitral tribunal from impleading such party by applying the 'group of companies' doctrine on its own accord. The relevant observations read as under: -

> *"40. The Sole Arbitrator has referred to the decision of the Supreme Court in Cox and Kings (Supra) where the Supreme Court has enunciated the 'Group of Companies' doctrine and in particular the impleadment of a non-signatory to an Arbitration Agreement in arbitral proceedings based on such doctrine. The Supreme Court in the said decision has considered a case where an Application was made to the Referral Court to join a non-signatory to the Arbitration Agreement and it was in such scenario that the Supreme Court held that, the Referral Court is required to prima facie rule on the existence of the Arbitration Agreement and whether the nonsignatories is a veritable party to the Arbitration Agreement. The Supreme Court has held that in view of the complexity of such a determination, the Referral Court should leave it for the Arbitrator to decide, whether the non-signatory party is indeed a party to the Arbitration Agreement on the basis of*

the factual evidence and application of legal doctrine. It is necessary to reproduce paragraphs 171 and 172 of the said decision [...]

41. Thus from the conclusions of the Supreme Court, it is clear that the Supreme Court has held that where at a referral stage impleadment of a non-signatory to the Arbitration Agreement is raised, the Referral Court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the Arbitration Agreement. Thus, it is clear that the Arbitral Tribunal has the power to decide whether the non-signatory is bound by the Arbitration Agreement and to implead the non-signatory if answered in the affirmative.

42. I do not find from a reading of the decision of the Supreme Court in Cox and Kings Ltd. (Supra) that merely by there being no prayer for impleadment of a non-signatory in the Section 11 Application, the applicability of the doctrine of 'group of companies' by the Sole Arbitrator is excluded. [...]"

(Emphasis supplied)

(ii) The arbitral tribunal being the appropriate forum to determine the issue as to joinder of a non-signatory to an arbitration agreement, would undoubtedly have the power to implead such non-signatory. Although, at the referral stage the court is bound to decide whether there is an arbitration agreement and whether the parties before it are bound by such agreement or not, yet this does not preclude the arbitral tribunal from deciding these issues after the proceedings have commenced on its own accord, particularly when such issues were not conclusively decided by the courts in the first instance. The relevant observations read as under: -

"42. [...] The Arbitrator does have the power/authority to implead the non-signatory if such non-signatory is otherwise liable to be impleaded on the basis of the 'group of companies' doctrine. Thus, the Supreme Court has infact considered that the Arbitral Tribunal is the appropriate forum to determine the issue as to joinder of a non-signatory to an Arbitration Agreement. I thus find no merit in the submission of Mr. Rustomjee that in the event the issue of joinder of a non-signatory to an Arbitration Agreement is not raised before the Referral Court, the Arbitral Tribunal on its own accord does not have the power to determine this issue and/or allow the impleadment of a non-signatory to an Arbitration Agreement. I do not find there to be any estoppel on the Arbitral Tribunal determining this issue.

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44. There have been submissions made by Mr. Rustomjee on the power of the Referral Court to determine whether the Arbitration Agreement exists and/or validity of the Arbitration Agreement and which would include whether the Arbitration Agreement is applicable to non-signatories to the Agreement. The Supreme Court in National Insurance Company Ltd. (Supra) at paragraph 22 has referred to the issues which the Chief Justice or his designate is bound to decide and which includes whether there is an Arbitration Agreement and whether the party who has applied under Section 11 of the Act is a party to such agreement. However, this will not preclude the Arbitral Tribunal from deciding the issue of impleadment of a non-signatory to an Arbitration Agreement, particularly when this issue was not before the Referral Court. Thus, in my view, the Sole Arbitrator in the present case was perfectly justified in determining the issue of whether the Petitioners as non-signatories to the Arbitration Agreement could be impleaded as parties to the arbitration.

(Emphasis supplied)

(iii) **Thirdly,** it observed that although the power of impleadment cannot be traced to any provision of the Act, 1996, yet such power has been recognized to exist with the arbitral tribunal by virtue of the law expounded by ***Cox and Kings (I)*** (supra). It then held that such power to implead can be traced to the arbitral tribunal's power to determine its own jurisdiction under Section 16 of the Act, 1996, which includes the power to determine whether the arbitral tribunal has jurisdiction over non-signatories to the arbitration agreement in question. Moreover, under the scheme of Act, 1996, it is always open to the parties to challenge such impleadment by leading evidence on these issues before the arbitrator and thereafter before the courts by taking recourse to Section 34 of the Act, 1996 after the award is passed. The relevant observations read as under: -

> *"43. I further find much substance in the argument of Mr. Sarda on behalf of the Respondent Nos. 1 and 2 that the Arbitral Tribunal is obliged to follow the law laid down by the Supreme Court and/or judge made law. This would be the case despite the Arbitral Tribunal not having specific power to consider an application for impleadment and/or the power of the Civil Court under Order I Rule 10 of the CPC. The Delhi High Court in Abhibus Services India Private Ltd. (Supra), paragraph 136 has the recognized concept of judge made law. <u>However, it has been held that in the absence of any trace of such power in the entire scheme of the Act, the power of impleadment cannot be said to be conferred upon the Tribunal on the basis of judge made law. This decision of the Delhi High Court was prior to the decision of the Supreme Court in Cox and Kings (Supra) which in my view has changed the law with regard to impleadment of non-signatories to the Arbitration</u>*

Agreement on the 'group of companies' doctrine and has left it to the Arbitral Tribunal to determine this issue.

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45. The aforementioned findings are on the premise that the impugned Order is an interim award. However, one cannot lose sight of the fact that the Arbitrator under Section 16 of the Arbitration Act has the power to determine issues of jurisdiction which in my view would include whether the Arbitrator has jurisdiction over nonsignatories to an Arbitration Agreement. Any such decision taken by the Arbitrator can always be the subject matter of a challenge by the Petitioners in a Petition filed under Section 34 of the Arbitration Act after the final Award is passed. Further, I do not find merit in the submission of Mr. Rustomojee that the aforesaid points for determination namely, issue Nos. (ii), (iii) and (v) which have been extracted above have been finally determined. It is always open for the Petitioners to lead evidence on these issues and invite final adjudication by the learned Sole Arbitrator on these issues. The decisions of the Delhi High Court in National Highway Authority of India (Supra) and Goyal MG Gases Pvt. Ltd. (Supra) are apposite."

(Emphasis supplied)

26. Similarly, the Delhi High Court in ***Indraprastha Power Generation Co. Ltd. v. Hero Solar Energy Pvt. Ltd.*** reported in **(2024) SCC OnLine Del 6080** held that although ***Arupri Logistics*** (supra) when it was rendered was correct in holding that an arbitral tribunal cannot join or delete parties, or proceed on principles akin to Order I Rule 10 of the CPC, and that such power vests only with the courts, yet after the decisions of this Court in ***Cox and Kings (I)*** (supra) and ***Cox and Kings (II)*** (supra), it is crystal clear that arbitral tribunals do indeed have the power to implead a non-signatory. It observed that since,

Cox and Kings (II) (supra) has held that the question whether a non-signatory is bound by the arbitration agreement or not should be left to the arbitral tribunals to decide, the obvious corollary to the aforesaid would be that if the arbitral tribunal were to arrive at a finding that such non-signatory is indeed bound by the arbitration agreement, it would necessarily have to include (sic implead) such party to the arbitration proceedings. Accordingly, it held that the arbitral tribunal would possess the jurisdiction to implead non-signatories who may be bound by the outcome of the arbitral proceedings, if there exists some kind of connection or positive act or conduct by the non-signatory that would indicate its connection to the contractual duties of the signatories. The relevant observations read as under: -

> *"20. In Arupri Logistics, as Mr. Ghose correctly points out, a coordinate Bench of this Court has clearly held that an Arbitral Tribunal cannot join or delete parties, or proceed on principles akin to Order I Rule 10 of the Code of Civil Procedure 1908. The power to join or delete parties in a proceeding, it is held, vests only in Court. As such, it is only the Referral Court which, at the stage of referring the dispute to arbitration, can join non-signatories to the arbitral proceedings. The Arbitral Tribunal is bound to decide the issue inter se the parties who are before it and cannot carry out any addition or deletion thereto.*
>
> *21. Arupri Logistics thus, holds that an Arbitral Tribunal cannot add parties to the proceedings before it, and that the jurisdiction to do so vests only in the referral Court.*
>
> *22. After the decision was rendered by the Coordinate Bench in Arupri Logistics, however, the Constitution Bench of the Supreme Court has rendered its decision in Cox and Kings-II on 6 December 2023, and the issue of whether an Arbitral Tribunal can join parties may once again be debatable after the said decision. [...]*

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> *24. These passages indicate that the Section 11 Court should leave, to the Arbitral Tribunal, the decision as to whether a non-signatory to the arbitration agreement should be bound by it. The corollary would obviously be that if the Arbitral Tribunal were to find that a nonsignatory is bound by arbitration agreement, it would necessarily have to include such non-signatory in the arbitration proceedings. Following Cox and Kings-II, therefore, it may be possible to argue that an Arbitral Tribunal does possess the jurisdiction to implead non-signatories who may be bound by the outcome of the arbitral proceedings.*
>
> *26. The impugned order of the Arbitral Tribunal has observed that, in the above passages from Cox and Kings-I as endorsed in Cox and Kings-II, a non-signatory could be impleaded in arbitral proceedings only if there is some kind of connection or positive act by the conduct of the non-signatory subsequent to the execution of the contract, or participation by the non-signatory in the negotiation, performance or termination of the contract indicating a connection in the contractual duties of the parties. [ ]"*

27. In yet another decision of the Delhi High Court in ***KKH Finvest Private Ltd. v. Jonas Haggard & Ors.*** reported in **(2024) SCC OnLine Del 7254** although the issue primarily entailed whether the non-signatories therein could be regarded as a 'veritable party' to the arbitration agreement and thus, be referred to arbitration or not, yet the observations therein could be said to be a trail blazer on the issue of whether the arbitral tribunal has the power to implead a non-signatory or not. It observed that as per the decision of this Court in ***Ajay Madhusudan Patel*** (supra), at the stage of deciding an application under Section 11 of the Act, 1996, the referral courts are only required to *prima-facie* determine if the non-signatories are a veritable party

to the arbitration clause or not. It held that as per ***Cox and Kings (I)*** (supra) the definition of "*party*" under Section 2(1)(h) of the Act, 1996 is inclusive of both signatories and non-signatories, provided that such non-signatory actively participates in the performance of a contract, and its actions align with those of the other members of the group. Furthermore, the court, taking note of the contradictory views expressed by two coordinate benches in ***Arupri Logistics*** (supra) and ***Indraprastha Power Generation Co. Ltd.*** (supra), observed that since the findings of a referral court is only limited to a bird's eye view of whether a non-signatory is a veritable party or not, the issue of whether such party can be impleaded and made part of the arbitration proceedings or not ought to be decided by the arbitral tribunal based on the pleadings and arguments. The relevant observations read as under: -

> *"75. Hence, at this stage, this Court being a referral court is only required to take a prima facie view on whether there exists an arbitration agreement and whether the respondents who are non-signatories to the MoS are veritable parties to the arbitration agreement.*
>
> *xxx xxx xxx*
>
> *78. In cases where impleadment of non-signatories to arbitration proceedings is necessary, courts have delineated various approaches. It can be achieved via : a) consent-based theories, which emphasize identifying the mutual intent of the parties and include concepts like agency, implied consent, and the assignment or transfer of contractual rights; and b) non-consensual theories, which are rooted in equity and encompass doctrines such as alter ego/piercing the corporate veil, estoppel, succession, and apparent authority [refer to Cox & Kings (supra), para 192]. At this stage and as a referral court, as per Ajay Madhusudan Patel (supra), the test is whether prima facie the respondents are*

veritable parties to the MoS containing the arbitration clause. This has been dealt with in detail in Issue I.

79. It is settled position of law that the definition of parties under the 1996 Act [as envisaged under Section 2(1)(h)] is inclusive of both signatories and non-signatories. The Hon'ble Supreme Court in Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 observed that if a nonsignatory party actively participates in the performance of a contract, and its actions align with those of the other members of the group, it gives the impression that the non-signatory is a "veritable" party to the contract which contains the arbitration agreement. Based on this impression, the other party may reasonably assume that the non-signatory is indeed a veritable party to the contract and bind it to the arbitration agreement. [...]

80. Thus, the assessment required to be undertaken by this Court - to give prima facie observations on whether the respondents are veritable parties or not - is primarily an assessment regarding the conduct, role, and involvement of the non-signatory in the underlying contract i.e. the MoS. At the outset, it is to be noted that the term "veritable parties" applies to both persons and entities [refer to Cox & Kings (supra), para 96]. In order to assess the same, this Court is required to consider factors such as mutual intent, relationship between the signatories and non-signatories, commonality of subject matter, composite nature of transactions and performance of the contract.

81. The intention of the parties to be bound by an arbitration agreement is to be gathered from the circumstances surrounding the involvement of a non-signatory party in the negotiation, performance, and termination of the underlying contract containing the agreement. If the non-signatory's actions align with those of the signatories, it could reasonably lead the signatories to believe that the non-signatory was a veritable party to the contract containing the arbitration clause. To infer the non-signatory's consent, its participation/involvement in the negotiation or performance of the contract must be positive, direct, and substantial, rather than merely incidental. The burden of proof to establish the same lies on the party seeking to implead the non-signatories to the arbitration proceedings, in this case, the petitioners.

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101. Two coordinate benches of this Court have taken contrary views on whether the arbitral tribunal is vested with the power to implead parties in arbitration proceedings. While Arupri Logistics (P) Ltd. v. Vilas Gupta, 2023 SCC OnLine Del 4297 holds that the arbitral tribunal lacks the jurisdiction to implead, Indraprastha Power Generation Co. Ltd. v. Hero Solar Energy (P) Ltd., 2024 SCC OnLine Del 6080 holds that following Cox and Kings (supra), such jurisdiction may be conferred upon the arbitral tribunal. Since I have referred respondent Nos. 2 to 5 to arbitration, the only issue that remains to be adjudicated is whether respondent Nos. 2 to 5 are, in fact, proper and necessary parties. The same shall be decided by the arbitrator in accordance with law. The finding of the referral court which takes a bird's eye view and does not go into minute details is only for the purpose of referring the parties to arbitration. The respondents will be at liberty to agitate this issue before the arbitrator, who shall take an independent view based on the pleadings and arguments of the parties."

(Emphasis supplied)

28. What is discernible from the aforesaid is that despite the wide recognition of the doctrinal principles of 'group of companies', 'alter-ego', agency, implied consent, assignment or transfer of contractual rights, estoppel, 'apparent authority' etc. to law of arbitration, the High Courts throughout the country remained averse to accepting the application of these principles by the arbitral tribunals. Even after the decision of this Court in ***Chloro Controls*** (supra) allowing non-signatories to an arbitration agreement to be referred and enjoined to arbitration on the basis of their conduct, role, and involvement in the underlying contract, the High Courts consistently held that such power to

refer or implead a non-signatory was only available to the courts and not to the arbitral tribunals. It is only after the decision of this Court in in ***Cox and Kings (I)*** (supra), that the position of law as regards the power of an arbitral tribunal to implead a non-signatory underwent a significant change, whereby many High Courts which had earlier refused to recognize such power of the arbitral tribunal, came around to recognizing it.

b. Evolution of the law on referral or joinder of Non-Signatories to arbitration proceedings and the Aversion to the power of Arbitral Tribunals to implead a Non-Signatory.

29. For a better exposition, it would be apposite to first understand the evolution of the law pertaining to the referral or joinder of even non-signatories to an arbitration agreement as a party to the arbitration proceedings. In other words, to better cull out the reasons for why there existed a divergence of views among various High Courts and the general reluctance to recognise the arbitral tribunal's power — as opposed to that of a court — in impleading such non-signatories to arbitration proceedings.

I. Decision of Chloro Controls and the Arbitration and Conciliation (Amendment) Act, 2015.

30. It all started with the three-Judge Bench decision of this Court in ***Chloro Controls*** (supra) when this Court was called upon to determine an arbitral

reference in case of multi-party agreements where performance of the ancillary agreements was substantially dependent upon effective execution of the principal agreement. This Court held that in exceptional cases involving composite transactions with multi-party agreements, a non-signatory could be subjected to arbitration by virtue of the 'group of companies' doctrine, provided there was a clear intention of the parties to bind both the signatory as well as non-signatory parties to the arbitration agreement. It observed that although the scope of am arbitration agreement is limited to the parties who entered into it, yet the doctrine of 'group of companies' has found favour albeit in a limited sense both under the English Law which was the original genesis of the Act, 1996 and under the international commercial arbitration landscape, particularly in the United States and French jurisdictions. The relevant observations read as under: -

> *"71. Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the courts under the English law have, in certain cases, also applied the "group of companies doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates. This theory has been applied in a number of arbitrations so as to justify a tribunal taking jurisdiction over a party who is not a signatory to the contract containing the arbitration agreement. [Russell on Arbitration (23rd Edn.)]*
>
> *72. This evolves the principle that a non-signatory party could be subjected to arbitration provided these transactions were with*

group of companies and there was a clear intention of the parties to bind both, the signatory as well as the non-signatory parties. In other words, "intention of the parties" is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties.

73. A non-signatory or third party could be subjected to arbitration without their prior consent, but this would only be in exceptional cases. The court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject-matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of the mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the court would have to examine whether a composite reference of such parties would serve the ends of justice. Once this exercise is completed and the court answers the same in the affirmative, the reference of even non-signatory parties would fall within the exception afore-discussed."

31. The aversion or misconception that loomed before the various High Courts as regards the inhibition of an arbitral tribunal to resort to the principles of 'group of companies', 'alter-ego', agency etc. or to put it more simply, to implead a non-signatory to the arbitration proceedings on its own accord can be deftly traced to two pertinent observations that were made in ***Chloro Controls*** (supra).

32. Apart from the aforesaid reasons of economic reality and judicial comity justifying the recognition of 'group of companies' in the modern regime of the law of arbitration including that of India, ***Chloro Controls*** (supra) further

reinforced the genesis of recognizing this doctrine within the scheme of Act, 1996 by tracing it to Section 45 of the Act, more particularly the expression "*parties or any person claiming through or under him*" used therein. It held that the aforesaid language of Section 45 reflects a legislative intent of enlarging the scope beyond "parties" who are signatories to the arbitration agreement to include non-signatories. It observed that Section 8 of the Act, 1996 does not import the same expression; "*parties or any person claiming through or under him*" which can be found in Section 45 and simpliciter uses the expression "*parties*" without any extension, even though Section 8 is a contemporary counter-part of Section 45 for the purpose of domestic arbitrations under Part I. This clearly indicates that the legislature consciously and deliberately opted to incorporate the aforesaid expression to give the provision a wider import to encourage arbitration and bring it in tune with the prevalent best international practices. Thus, this very ostensible legislative intent cannot be ignored by the courts and must be given due weightage. The relevant observations read as under: -

> *"69. We have already noticed that the language of Section 45 is at a substantial variance to the language of Section 8 in this regard. In Section 45, the expression "any person" clearly refers to the legislative intent of enlarging the scope of the words beyond "the parties" who are signatory to the arbitration agreement. Of course, such applicant should claim through or under the signatory party. Once this link is established, then the court shall refer them to arbitration. The use of the word "shall" would have to be given its proper meaning and cannot be equated with the word "may", as liberally understood in its common parlance. The expression "shall" in the language of Section 45 is intended to*

require the court to necessarily make a reference to arbitration, if the conditions of this provision are satisfied. To that extent, we find merit in the submission that there is a greater obligation upon the judicial authority to make such reference, than it was in comparison to the 1940 Act. However, the right to reference cannot be construed strictly as an indefeasible right. One can claim the reference only upon satisfaction of the prerequisites stated under Sections 44 and 45 read with Schedule I of the 1996 Act. Thus, it is a legal right which has its own contours and is not an absolute right, free of any obligations/limitations.

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93. As noticed above, the legislative intent and essence of the 1996 Act was to bring domestic as well as international commercial arbitration in consonance with the Uncitral Model Rules, the New York Convention and the Geneva Convention. The New York Convention was physically before the legislature and available for its consideration when it enacted the 1996 Act. Article II of the Convention provides that each contracting State shall recognise an agreement and submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration. Once the agreement is there and the court is seized of an action in relation to such subject-matter, then on the request of one of the parties, it would refer the parties to arbitration unless the agreement is null and void, inoperative or incapable of performance.

94. Still, the legislature opted to word Section 45 somewhat dissimilarly. Section 8 of the 1996 Act also uses the expression "parties" simpliciter without any extension. In significant contradistinction, Section 45 uses the expression "one of the parties or any person claiming through or under him" and "refer the parties to arbitration", whereas the rest of the language of Section 45 is similar to that of Article II(3) of the New York Contention. The court cannot ignore this aspect and has to give due weightage to the legislative intent. It is a settled rule of interpretation that every word used by the legislature in a provision should be given its due meaning. To us, it appears that the legislature intended to give a liberal meaning to this expression.

95. The language of Section 45 has wider import. It refers to the request of a party and then refers to an Arbitral Tribunal, while under Section 8(3) it is upon the application of one of the parties that the court may refer the parties to arbitration. There is some element of similarity in the language of Section 8 and Section 45 read with Article II(3). The language and expressions used in Section 45, "any person claiming through or under him" including in legal proceedings may seek reference of all parties to arbitration. Once the words used by the legislature are of wider connotation or the very language of the section is structured with liberal protection then such provision should normally be construed liberally.

96. Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers."

(Emphasis supplied)

33. However, this rudimentary understanding of the expression "*parties*" and "*parties or any person claiming through or under him*" in Section(s) 8 and 45 of the Act, 1996 respectively by ***Chloro Controls*** (supra) for the import of the doctrine of 'group of companies' into the Act, 1996 was one of the two-fold reasons that eventually convoluted the position of law as regards impleadment of non-signatories, which we shall further discuss.

34. After having established the foundational basis of the doctrine of 'group of companies' in the Act, 1996, ***Chloro Controls*** (supra) then proceeded to explain the manner in which the aforesaid doctrine is to be applied. Since any

application under Section 45 of the Act, 1996 for appointment of an arbitrator would be governed by Section 11 sub-section (6) of the Act, it as a natural corollary would necessarily entail the adjudication and disposal of objections contemplated thereunder, more particularly the validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time, etc as mandated by sub-section (7) of Section 11 of the Act. For the aforesaid proposition, reliance was placed on the seven-Judge Bench decision of this Court in ***SBP & Co. v. Patel Engg. Ltd.*** reported in **(2005) 8 SCC 618** and the subsequent decision of ***Shree Ram Mills Ltd.* v. *Utility Premises (P) Ltd.*** reported in **(2007) 4 SCC 599** which held that the primarily it is for the courts to decide all preliminary issues at the referral stage under Section 11(6) of the Act, and the principle of *kompetenz-kompetenz* enshrined in Section 16 empowering the arbitral tribunal to rule on its own jurisdiction, applies only when the parties go before the tribunal without having taken recourse to Section(s) 8 or 11 respectively of the Act, 1996 or where these issues are explicitly left open to the arbitral tribunal to decide by the referral court. Accordingly, ***Chloro Controls*** (supra) held that Section 45 of the Act, 1996 which envisages the same test as Section(s) 8 and 11 of the Act, insofar as the preliminary determination for making a reference to an arbitral tribunal is concerned, would as a natural corollary to the ratio of ***SBP & Co.*** (supra) contemplate the determination of all fundamental issues for making such reference by the courts, including the

issue whether a non-signatory could be said to be bound by the arbitration agreement. In the last, it further observed that even the legislative intent behind Section 45 of the Act, 1996, without any ambiguity contemplates determination of these issues in the very first instance by the judicial forum, evident from the absence of any provision analogous to Section 16 of the Act, 1996 in Part II of the Act. The relevant observations read as under: -

> *"118. An application for appointment of the Arbitral Tribunal under Section 45 of the 1996 Act would also be governed by the provisions of Section 11(6) of the Act. This question is no more res integra and has been settled by decision of a Constitution Bench of seven Judges of this Court in SBP & Co. v. Patel Engg. Ltd., wherein this Court held that power exercised by the Chief Justice is not an administrative power. It is a judicial power. It is a settled principle that the Chief Justice or his designate Judge will decide preliminary aspects which would attain finality unless otherwise directed to be decided by the Arbitral Tribunal.*
>
> *119. [...]This aspect of the arbitration law was explained by a two-Judge Bench of this Court in Shree Ram Mills Ltd. v. Utility Premises (P) Ltd. wherein, while referring to the judgment in SBP & Co. particularly the above paragraph (para 39) of SBP case[21], this Court held that the scope of order under Section 11 of the 1996 Act would take in its ambit the issue regarding territorial jurisdiction and the existence of the arbitration agreement. The Court noticed that if these issues are not decided by the Chief Justice or his designate, there would be no question of proceeding with the arbitration. [...] Thus, the Bench while explaining the judgment of this Court in SBP & Co. has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the Arbitral Tribunal to decide.*
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> *xxx xxx xxx*
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> *121. [...] The expressions "Chief Justice does not in strict sense decide the issue" or "is prima facie satisfied", will have to be construed in the facts and circumstances of a given case. Where*

the Chief Justice or his designate actually decides the issue, then it can no longer be prima facie, but would be a decision binding in law. On such an issue, the Arbitral Tribunal will have no jurisdiction to redetermine the issue. In Shree Ram Mills, the Court held that the Chief Justice could record a finding where the issue between the parties was still alive or was dead by lapse of time. Where it prima facie found the issue to be alive, the Court could leave the question of limitation and also open to be decided by the Arbitral Tribunal.

122. The above expressions are mere observations of the Court and do not fit into the contours of the principle of ratio decidendi of the judgment. The issues in regard to validity or existence of the arbitration agreement, the application not satisfying the ingredients of Section 11(6) of the 1996 Act and claims being barred by time, etc. are the matters which can be adjudicated by the Chief Justice or his designate. Once the parties are heard on such issues and the matter is determined in accordance with law, then such a finding can only be disturbed by the court of competent jurisdiction and cannot be reopened before the Arbitral Tribunal. [...]

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128. [ ] However, as already noticed, the Court clearly took the view that the findings returned by the Chief Justice while exercising his judicial powers under Section 11 relatable to Section 8 are final and not open to be questioned by the Arbitral Tribunal. Sections 8 and 45 of the 1996 Act are provisions independent of each other. But for the purposes of reference to arbitration, in both cases, the applicant has to pray for a reference before the Chief Justice or his designate in terms of Section 11 of the 1996 Act. [...] We are conscious of the fact that the above dictum of the Court in SBP case is in relation to the scope and application of Section 11 of the 1996 Act. It has been held in various judgments of this Court but more particularly in SBP which is binding on us that before making a reference, the Court has to dispose of the objections as contemplated under Section 8 or Section 45, as the case may be, and wherever needed upon filing of affidavits. Thus, to an extent, the law laid down by this Court on Section 11 shall be attracted to an international arbitration which takes place in India as well as domestic arbitration. This, of course, would be applicable at pre-award stage. Thus, there exists a direct legal link, limited to that extent.

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130. [ ] The more important aspect as far as Chapter I of Part II of the 1996 Act is concerned, is the absence of any provision like Section 16 appearing in Part I of the same Act. Section 16 contemplates that the arbitrator may determine its own jurisdiction. Absence of such a provision in Part II Chapter I is suggestive of the requirement for the court to determine the ingredients of Section 45, at the threshold itself. It is expected of the court to answer the question of validity of the arbitration agreement, if a plea is raised that the agreement containing the arbitration clause or the arbitration clause itself is null and void, inoperative or incapable of being performed. Such determination by the court in accordance with law would certainly attain finality and would not be open to question by the Arbitral Tribunal, even as per the principle of prudence. It will prevent multiplicity to litigation and reagitating of same issues over and over again. The underlining (sic underlying) principle of finality in Section 11(7) would be applicable with equal force while dealing with the interpretation of Sections 8 and 45. Further, it may be noted that even the judgment of this Court in SBP & Co. takes a view in favour of finality of determination by the Court despite the language of Section 16 in Part I of the 1996 Act. Thus, there could hardly be any possibility for the Court to take any other view in relation to an application under Section 45 of the 1996 Act. Since, the categorisation referred to by this Court in National Insurance Co. Ltd. is founded on the decision by the larger Bench of the Court in SBP & Co., we see no reason to express any different view. The categorisation falling under para 22.1 of National Insurance Co. case would certainly be answered by the Court before it makes a reference while under para 22.2 of that case, the Court may exercise its discretion and decide the dispute itself or refer the dispute to the Arbitral Tribunal. Still, under the cases falling under para 22.3, the Court is expected to leave the determination of such dispute upon the Arbitral Tribunal itself. But wherever the Court decides in terms of categories mentioned in paras 22.1 and 22.2, the decision of the Court is unreviewable by the Arbitral Tribunal.

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131.2. The issue of jurisdiction normally is a mixed question of law and facts. Occasionally, it may also be a question of law alone. It will be appropriate to decide such questions at the beginning of the proceedings itself and they should have finality.

xxx *xxx* *xxx*

131.4. Applying the analogy thereof will fortify the view that determination of fundamental issues as contemplated under Section 45 of the 1996 Act at the very first instance by the judicial forum is not only appropriate but is also the legislative intent. Even the language of Section 45 of the 1996 Act suggests that unless the court finds that an agreement is null and void, inoperative and incapable of being performed, it shall refer the parties to arbitration.

(Emphasis supplied)

35. This rudimentary understanding and legislative position of the extent of judicial scrutiny and determination at the referral stage in terms of Section 11 of the Act, 1996, could be said to be the second reason why arbitral tribunals were not found to be empowered to identify and implead a non-signatory to the arbitration agreement.

36. In the aftermath of ***Chloro Controls*** (supra), the Law Commission of India in its 246th Report observed that a party to an arbitration agreement does not necessarily mean only the signatory to such agreement, and that internationally it has been widely accepted that even non-signatories may be parties to the arbitration agreement. It further took note of the decision of ***Chloro Controls*** (supra), more particularly how this Court has recognized this concept in the phrase "*claiming through or under*" in Section 45 of the Act,

1996. However, noticing the absence of the same expression in the corresponding provision of Section 8 and other relevant provisions where the context requires recognition of non-signatories, the Law Commission suggested that Section 2(1)(h) of the Act, 1996 which defines "*party*" be amended and the phrase "*person claiming through or under such party*" be inserted to cure this anomaly. The relevant observations read as under: -

> *"62. However, a party does not necessarily mean only the "signatory" to the arbitration agreement. In appropriate contexts, a "party" means not just a signatory, but also persons "claiming through or under" such signatory – for instance, successors-of-interest of such parties, alter-ego's of such parties etc. This is particularly true in the case of unincorporated entities, where the issue of "personality" is usually a difficult legal question and raises a host of other issues. This principle is recognized by the New York Convention, 1985 which in article II (1) recognizes an agreement between parties "in respect of a defined legal relationship, whether contractual or not."*
>
> *63. The Arbitration and Conciliation Act, 1996 under section 7 borrows the definition of the "arbitration agreement" from the corresponding provision at article 7 of the UNCITRAL Model Law which in turn borrows this from article II of the New York Convention. However, the definition of the word "party" in section 2(1)(h) refers to a "party" to mean "a party to an arbitration agreement." This cannot be read restrictively to imply a mere "signatory" to an arbitration agreement, since there are many situations and contexts where even a "non-signatory" can be said to be a "party" to an arbitration agreement. This was recognized by the Hon'ble Supreme Court in Chloro Controls v. Severn Trent Water Purification, (2013) 1 SCC 641, where the Hon'ble Supreme Court was dealing with the scope and interpretation of section 45 of the Act and, in that context, discussed the scope of the relevant doctrines on the basis of which "non-signatories" could be said to be bound by the arbitration agreement, including in cases of inter-related contracts, group of companies doctrine etc.*

> 64. *This interpretation given by the Hon'ble Supreme Court follows from the wording of section 45 of the Act which recognizes the right of a "person claiming through or under [a party]" to apply to a judicial authority to refer the parties to arbitration. The same language is also to be found in section 54 of the Act. This language is however, absent in the corresponding provision of section 8 of the Act. It is similarly absent in the other relevant provisions, where the context would demand that a party includes also a "person claiming through or under such party". To cure this anomaly, the Commission proposes an amendment to the definition of "party" under section 2 (h) of the Act."*
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> (Emphasis supplied)

37. Based on the suggestions made by the Law Commission, the legislature promptly introduced the Arbitration and Conciliation (Amendment) Act, 2015 whereby *inter-alia* although Section 8 sub-section (1) of the Act, 1996 was amended and the phrase "*a party to an arbitration agreement or any person claiming through or under him*" was inserted yet for reasons unknown, the suggestion for amending Section 2(1)(h) of the Act by the Law Commission did not see the light of day.

38. At this juncture it would be apposite to briefly explain the object of Section(s) 8 and 45 of the Act, 1996 respectively and the nature of the said provisions. Section(s) 8 and 45 of the Act, 1996 empowers the parties who have approached the courts with a subject-matter which is covered by an arbitration agreement to refer such dispute to an arbitral tribunal, with the only difference between the two being that the former pertains to domestic arbitrations whereas the latter deals with international arbitrations in terms of the New

York Convention. In essence, it entitles any party that is before a court or judicial forum to seek a reference to arbitration subject to the conditions laid down in the subsequent sub-sections. As held in ***Hema Khattar v. Shiv Khera*** reported in **(2017) 7 SCC 716**, Section(s) 8 and 45 of the Act, 1996 are peremptory in nature that obligates the courts to refer the parties to arbitration where there is an arbitration agreement.

39. Since ***Chloro Controls*** (supra) recognized the applicability of the principles of 'group of companies', (sic) 'alter-ego', agency etc. for enjoining a non-signatory to the arbitration proceedings only from an interpretation of the phrase "*a party to an arbitration agreement or any person claiming through or under him*" which by virtue of the Arbitration and Conciliation (Amendment) Act, 2015, found place only in Section(s) 8 and 45 of the Act, 1996, which as discussed above deals with only the power of the courts or judicial authorities to make a reference to arbitration, and no such phrase was inserted in the substantive definition of "*party*" in Section 2(1)(h), the net effect of the decision of ***Chloro Controls*** (supra) and the Arbitration and Conciliation (Amendment) Act, 2015 was that only the courts by virtue of Section(s) 8 and 45 of the Act, 1996 were empowered to implead a non-signatory to the arbitration proceedings, and not the arbitral tribunals. The omission of amending Section 2(1)(h) of the Act, 1996 further fortified the notion that the exercise of authority and power by the arbitral tribunal would

continue to be confined to the ordinary substantive definition of "*party*" under the said provision and not by the enlarged understanding of the term "party … or any person claiming through or under him" as used for the courts under Section(s) 8 and 45 of the Act, 1996, except where an arbitral tribunal has been constituted specifically by the courts. This along with the standard of scrutiny that was expected by the referral courts under Section 11 of the Act, 1996 in terms of ***SBP & Co.*** (supra) meant that, unless a non-signatory is referred to arbitration by a court after a thorough application of mind and after a final determination by such referral courts as to whether the non-signatory is said to bound by the arbitration agreement or not, no non-signatory can be subjected to arbitration.

40. Thus, due to the aforesaid, a misconception plagued the position of law that an arbitral tribunal does not have the authority or power to implead a non-signatory to the arbitration proceedings, and that only the courts are empowered to do so. It was largely in this backdrop that the decisions of ***Oil and Natural Gas Corporation Ltd.*** (supra), ***Balmer Lawrie & Co. Ltd.*** (supra), ***Sudhir Gopi*** (supra), ***V.G. Santhosam*** (supra) and other decisions of various different High Courts came to be rendered.

II. Decision of Cox and Kings (I) and the Judicial Rectification of the first misconception by Chloro Controls.

41. In ***Cox and Kings (I)*** (supra) a five-Judge Bench of this Court wherein one of us (J.B. Pardiwala J.) was part of the Bench were called upon to determine the validity and applicability of the 'Group of Companies' doctrine in the jurisprudence of Indian arbitration. This Court after an extensive examination of the international practices and the scheme of Act, 1996 held that the 'Group of Companies' doctrine was invariably a part of the larger arbitration framework that has been developing across the world and was in tune with the avowed object of the Act, 1996 which aims to make the Indian arbitration law more responsive to the contemporary requirements. The relevant observations read as under: -

> *"128. [...] This approach ensures that a dogmatic emphasis on express consent is eschewed in favour of a modern approach to consent which focuses on the factual analysis, complexity of commercial projects, and thereby increases the relevance of arbitration in multi-party disputes. Moreover, it is also keeping in line with the objectives of the Arbitration Act which aims to make the Indian arbitration law more responsive to the contemporary requirements.*
>
> *148. [...] The group of companies doctrine has important utility in determining the mutual intention of the parties in the context of complex transactions involving multiple parties and multiple agreements. Moreover, the doctrine has been substantively entrenched in the Indian arbitration jurisprudence. We are aware of the fact that the group of companies doctrine has not found favor in some other jurisdictions, including in English law. However, we deem it appropriate to retain the doctrine which has held the field in Indian jurisprudence though by firmly establishing it within the realm of the mutual consent or the mutual*

intent of the parties to a commercial bargain. This will ensure on the one hand that Indian arbitration law retains a sense of dynamism so as to respond to contemporary challenges. At the same time, structuring the doctrine in the manner suggested so as to ground it in settled principles governing the elucidation of mutual intent is necessary. This will ensure that the doctrine has a jurisprudential foundation in party autonomy and consent to arbitrate."

42. ***Cox and Kings (I)*** (supra) further held that the approach adopted by ***Chloro Controls*** (supra), so far as infusing or reading the doctrine of 'Group of Companies' into the expression "*a party to an arbitration agreement or any person claiming through or under him*" is concerned, was incorrect. It held that the words "*any person*" in Section 45 of the Act, 1996 by itself does not connote a wider import to the term "party". The aforesaid phrase cannot be singled out and construed devoid of the context provided in the subsequent phrase "*claiming through or under*". It held that the entire expression only refers and includes persons / parties acting in a derivative capacity such as in the instances of successors in interest or assignees of any such interest that have been devolved upon them by the original signatories / parties. The import of the expression "*a party to an arbitration agreement or any person claiming through or under him*" only refers to that persons which it is deriving its claim or right by virtue of it standing in the shoes of the original signatory party. The expression "*claiming through or under*" can only bind those third parties who irrespective of being a non-signatory to the arbitration agreement are nevertheless bound by it, by virtue of them substituting the signatory party in

their derivative capacity. However, the 'Group of Companies' doctrine functions on a completely different tangent whereby, a non-signatory is held bound by the arbitration agreement in its own individual capacity **AND** in addition to the signatories on the basis of mutual consent, regardless of whether they may have derived any rights or benefits from the signatories and independent of the identity of the signatories. It observed that since consent forms the cornerstone of arbitration, merely because any party shares certain interests or benefits from a contract, they would not be covered under the expression "*claiming through or under*" just because they happen to share a legal or commercial relationship. Thus, ***Chloro Controls*** (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" was held to be erroneous and against the well-established principles of contract and commercial law. The relevant observations read as under: -

> *"137. The word "claim" is of very extensive significance embracing every species of legal demand. In the ordinary sense, it means to demand as one's own or as one's right.114 A "claim" also means assertion of a cause of action.115 The expression "through" connotes "by means of, in consequence of, by reason of."116 The term "under" is used with reference to an inferior or subordinate position. P Ramanatha Aiyar's Law Lexicon defines "claiming under" or "claiming under him" to denote a person putting forward a claim under derived rights.117 When the above definitions are read harmoniously, it gives rise to an inference that a person "claiming through or under" is asserting their legal demand or cause of action in an intermediate or derivative capacity. We can also conclude that a person "claiming through or under" has inferior or subordinate rights in comparison to the party from which it is deriving its claim or right. Therefore, a person "claiming through or under" cannot be a "party" to an*

arbitration agreement on its own terms because it only stands in the shoes of the original signatory party.

144. The first proposition of law relies on the construction of the expression "any person" to conclude that the language of Section 45 has wider import. However, the expression "any person" cannot be singled out and construed devoid of its context. The context, in terms of Section 8 and 45, is provided by the subsequent phrase – "claiming through or under". Therefore, such "any persons" are acting only in a derivative capacity. Since an arbitration agreement excludes the jurisdiction of national courts, it is essential that the parties consent, either expressly or impliedly, to submit their dispute to the arbitral tribunal.

145. The second and third proposition of law states that a non-signatory party may claim through or under a signatory party by virtue of its legal or commercial relationship with the latter. However, this proposition is contrary to the common law position as evidenced in Sancheti (supra) and Tanning Research Laboratories (supra) according to which a mere legal or commercial connection is not sufficient to allow a non-signatory to claim through or under a party to the arbitration agreement. [...] Therefore, even though a subsidiary derives interests or benefits from a contract entered into by the company within a group, they would not be covered under the expression "claiming through or under" merely on the basis that it shares a legal or commercial relationship with the parties.

146. [...] The group of companies doctrine is founded on the mutual intention of the parties to determine if the non-signatory entity within a group could be made a party to the arbitration agreement in its own right. Such non-signatory entity is not "claiming through or under" a signatory party. As mentioned above, the phrase "claiming through or under" is used in the context of successors in interest that act in a derivative capacity and substitute the signatory party to the arbitration agreement. To the contrary, the group of companies doctrine is used to bind the non-signatory to the arbitration agreement so that it can agitate the benefits and be subject to the burdens that it derived or is conferred in the course of the performance of the contract. The doctrine can be used to bind a non-signatory party to the arbitration agreement regardless of the phrase "claiming through

or under" as appearing in Sections 8 and 45 of the Arbitration Act.

147. In Chloro Controls (supra), this Court joined the non-signatory entities as parties to the arbitration agreement in their own rights on the basis that they were signatories to ancillary agreements which were closely interlinked with the performance of the principal agreement containing the arbitration agreement. This Court in Chloro Controls (supra) reasoned that the non signatory entities, being part of the same corporate group as the signatory parties, were subsidiaries in interest or subsidiary companies, and therefore were "claiming through or under" the signatory parties. As held above, the phrase "claiming through or under" only applies to entities acting in a derivative capacity and not with respect to joinder of parties in their own right. Therefore, we hold that the approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract and commercial law. As observed above, the existence of the group of companies doctrine is intrinsically found on the principle of the mutual intent of parties to a commercial bargain."

(Emphasis supplied)

43. ***Cox and Kings (I)*** (supra) observed that the correct legal basis for the application of the doctrine of 'group of companies' (sic and other allied principles of mutual consent) can be found in the Act, 1996 from a conjoint reading of the provisions of Section(s) 2(1)(h) and 7, respectively. The aforesaid may be understood as under: -

(i) **First,** it observed that Section 7 of the Act, 1996 which defines an "*Arbitration Agreement*" lays down in sub-section (4) the various circumstances where a legal relationship is said to exist of such nature as if there is an agreement in writing for arbitration. Section 7 more

particularly sub-section (4)(b) provides the circumstances where the existence of an arbitration agreement can be inferred from various documents that indicate a manifestation of consent of persons or entities through their actions of exchanging documents, even if there is no formal agreement executed between such persons in the conventional sense. Similarly, Section 7 sub-section (4)(c) which provides that if there is an assertion of the existence of an arbitration agreement by one party which was never denied or disputed by the other, then such agreement would be considered a valid arbitration agreement, is one another provision that lays down the circumstances when the existence of an arbitration agreement may be assumed based on the conduct of a person or entity. The relevant observations read as under: -

> *"70. Section 2(h) of the Arbitration Act defines a "party" to mean a party to an arbitration agreement. Section 7 defines an arbitration agreement to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a "defined legal relationship." Section 7 requires that an arbitration agreement has to be in writing. Section 7 indicates the circumstances in which it is regarded as an agreement in writing. Such an agreement may be embodied in a document, an exchange of communications, including in the electronic form, or in a statement of claim which is not traversed in the defence. In Vidya Drolia v. Durga Trading Corporation, this Court observed that a legal relationship means a relationship which gives rise to legal obligations and duties, and confers a right. Such a right may be contractual or non-contractual. In case of a non-contractual legal relationship, the cause of action arises in tort, restitution, breach of statutory duty, or some other non-contractual cause of action. Thus, the legislative intent*

underlying Section 7 suggests that any legal relationship, including relationships where there is no contract between the persons or entities, but whose actions or conduct has given rise to a relationship, could form a subject matter of an arbitration agreement under Section 7. [...]

72. Section 7(4)(b) provides the second circumstance, according to which an arbitration agreement is in writing if it is contained in an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement. According to this provision, the existence of an arbitration agreement can be inferred from various documents duly approved by the parties.60 Section 7(4)(b) dispenses with the conventional sense of an agreement as a document with signatories. Rather, it emphasizes on the manifestation of the consent of persons or entities through their actions of exchanging documents. However, the important aspect of the said provision lies in the fact that the parties should be able to record their agreement through a documentary record of evidence. In Great Offshore Ltd. v. Iranian Offshore Engineering and Construction Company, this Court observed that Section 7(4)(b) requires the court to ask whether a record of agreement is found in the exchange of letters, telex, telegrams, or other means of telecommunication.61 Thus, the act of agreeing by the persons or entities has to be inferred or derived by the courts or tribunals from the relevant documents and communication, neither of which can be equated with a conventional contract.

73. The third circumstance is provided under Section 7(4)(c), according to which an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. A two-Judge Bench of this Court clarified in S N Prasad v. Monnet Finance Limited62 that there will be an "exchange of statements of claim and defence" for the purposes of Section 7(4)(c) if there is an assertion of the existence of an arbitration agreement in any suit, petition or application filed before any court or tribunal, and if there is no denial of it in the defence, counter, or written statement. Thus, in

the third circumstance the court proceeds on the assumption that the conduct of the person or entity in not denying the existence of an arbitration agreement leads to the conclusive proof of its existence. [...]"

(ii) **Secondly,** it found that Section 7 of the Act, 1996 is unique in nature inasmuch as it has two distinct features; **(I)** that sub-section (1) provides that for there to be a valid arbitration agreement, there must exists a defined legal relationship to arbitration, and **(II)** that sub-section (4) goes one step beyond the traditional understanding of legal relationship, by laying down circumstances where mutual intention of creating such legal relationship to arbitrate may be assumed or gathered from the conduct of the parties. The relevant observations read as under: -

"73. [...] All the three circumstances contained in Section 7(4) are geared towards determining the mutual intention of the parties to be bound by the arbitration agreement.

74. Section 7 of the Arbitration Act contains two aspects: a substantive aspect and a formal aspect. The substantive aspect is contained is Section 7(1) which allows parties to submit disputes arising between them in respect of a defined legal relationship to arbitration. The legal relationships between and among parties could either be contractual or non-contractual. For legal relations to be contractual in nature, they ought to meet the requirements of the Indian contract law as contained in the Contract Act. It has been shown in the preceding paragraphs that a contract can either be express or implied, which is inferred on the basis of action or conduct of the parties. Thus, it is not necessary for the persons or entities to be signatories to a contract to enter into a legal relationship – the only important aspect to be determined is whether they intended or consented to enter into the legal relationship by the dint of their action or conduct."

(iii) **Thirdly,** it observed that Section 7 sub-section (3) of the Act, 1996 stipulates that where there is a record of agreement to arbitrate, then there would be no requirement for having a written arbitration agreement. Furthermore, Section 2(h) read with Section 7 of the Act, 1996 also places no requirement that the "party" to an arbitration agreement must be a signatory to such agreement. The natural corollary to the aforesaid would be that an arbitration agreement may be entered into in any form, for example orally or tacitly, as long as the content of the agreement is recorded. It eliminates the requirement of the signature of parties or an exchange of messages between the parties. Thus what emanates is that even non-signatories can be regarded as a "party" to an arbitration agreement. The relevant observations read as under: -

> *"75. The second aspect is contained in Section 7(3) which stipulates the requirement of a written arbitration agreement. A written arbitration agreement need not be signed by the parties if there is a record of agreement.63 The mandatory requirement of a written arbitration agreement is merely to ensure that there is a clearly established record of the consent of the parties to refer their disputes to arbitration to the exclusion of the domestic courts.*
>
> *76. Section 2(h) read with Section 7 does not expressly require the "party" to be a signatory to an arbitration agreement or the underlying contract containing the arbitration agreement. [...] The above provision states that an arbitration agreement may be entered into in any form, for example orally or tacitly, as long as the content of the agreement is recorded. It eliminates the requirement of the*

signature of parties or an exchange of messages between the parties."

44. Accordingly, ***Cox and Kings (I)*** (supra) made a significant shift from the original understanding and legal basis of the doctrine of 'group of companies' and other allied principles of determining mutual consent in ***Chloro Controls*** (supra). It held that the legal basis for the application of the 'Group of Companies' doctrine lies in the very definitions of "*party*" and "*arbitration agreement"* under Section(s) 2(1)(h) and Section 7, respectively, and not in the expression "*claiming through or under*" in Section(s) 8 and 45 of the Act, 1996. The relevant observations read as under: -

"78. Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions: first, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the important determination for the courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a written arbitration agreement does not exclude the possibility of binding non signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and seventh, once the validity of an arbitration agreement is established, the court or tribunal can determine the issue of which parties are bound by such agreement.

79. It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement.

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153. The group of companies doctrine is based on determining the mutual intention to join the non-signatory as a "veritable" party to the arbitration agreement. Once a tribunal comes to the determination that a non-signatory is a party to the arbitration agreement, such non-signatory party can apply for interim measures under Section 9 of the Arbitration Act. Establishing the legal basis for the application of the group of companies doctrine in the definition of "party" under Section 2(1)(h) read with Section 7 of the Arbitration Act resolves the anomality pointed out by Chief Justice Ramana."

45. The net effect of the aforesaid is that at the time when the decision of ***Chloro Controls*** (supra) occupied the field, the applicability of various principles of determining mutual consent was confined only to Section(s) 8 and 45 of the Act, 1996, which empowered only the courts to make a reference to arbitration. In the same manner, since the definition of "*party*" in Section

2(1)(h) of the Act, 1996 was understood to be at significant variance from Section(s) 8 and 45 of the Act, 1996, more particularly the expression "*any person claiming through or under"* with the former being construed to be much narrow in scope and include only the signatories to the arbitration agreement, there was misconceived assumption, that the authority and jurisdiction of an arbitral tribunal was only limited to this narrowly misconstrued definition of "*party*", unlike that of the courts who had been endowed with the power and jurisdictional reach to even non-signatories by virtue of the enlarged meaning of "*party*", couched in the very language of Section(s) 8 and 45 of the Act, 1996. Thus, it was assumed and rather wrongly, that an arbitral tribunal does not itself have the power to lift the corporate veil or apply the doctrine of 'Group of Companies' and by extension to implead a non-signatory to partake in arbitration by taking recourse to these principles of implied mutual consent.

46. However, as discussed, the decision of ***Cox and Kings (I)*** (supra) has made it abundantly clear that the legal basis for the application of the 'Group of Companies' doctrine or any other principle for determining mutual consent is in the definition of "*party*" under Section 2(1)(h) read with the meaning of "arbitration agreement" under Section 7 of the Act, 1996. Since both the aforesaid provisions are not confined in their scope to either the courts or the arbitral tribunal, and rather exists ubiquitously on the statute book and is

common or indifferent to both the courts and arbitral tribunals, there cannot be any gainsaying that even the arbitral tribunal now after the decision of ***Cox and Kings (I)*** (supra) could be said to be clothed with the power to take recourse to the various principles for determining mutual consent, and thereby implead a non-signatory to the arbitration, if such person is found to be bound to the arbitration agreement.

III. Decision of Krish Spinning and the Judicial Rectification of the second misconception emanating from SBP & Co.

47. As discussed in the foregoing paragraphs, the second reason why the various High Courts were hesitant from recognizing the arbitral tribunal's power to implead a non-signatory on its own accord, stemmed from the understanding and position of law that existed then as regards the scope and extent of judicial scrutiny of the courts which was required at the referral stage under Section 11 of the Act, 1996, before the subject matter could be referred to arbitration and an arbitral tribunal be constituted.

48. In ***Konkan Railway Corpn. Ltd. v. Rani Construction (P) Ltd.*** reported in **(2002) 2 SCC 388**, a five-Judge Bench of this Court observed that the power exercised by the referral court under Section 11 of the Act, 1996 is an administrative power and thus the Chief Justice or his designate do not have to decide any preliminary issue at that stage. Any issue pertaining to non-

arbitrability, validity and existence of the arbitration agreement ought to be decided by the arbitrator.

49. The aforesaid view occupied the field till the seven-Judge Bench decision of this Court in ***SBP & Co.*** (supra) which held that the power conferred upon the Chief Justice or his designate under Section 11 of the Act, 1996 is a judicial power and not merely an administrative power. It held that being a judicial power, the Chief Justice or his designate had the right to decide all preliminary issues at the referral stage under Section 11(6) of the Act, 1996, and that the power of the arbitral tribunal to rule on its own jurisdiction under Section 16 would come into the picture only when the parties go before the arbitral tribunal without recourse to the courts either under Sections 8 or 11 respectively of the Act, 1996.

50. The ultimate effect of the *ratio* of ***SBP & Co.*** (supra) was that the scope for interference available to the referral courts when acting under Section 11 of the Act, 1996 was substantially expanded, and the referral courts were not only empowered but also expected to conduct mini trials and indulge in the appreciation of evidence on various issues concerned with the subject matter of arbitration.

51. Overtime, the decision of ***SBP & Co.*** (supra) insofar as the extent of judicial scrutiny that was required under Section 11 of the Act, 1996 was concerned,

proved to be counter serving as the enlarged scope of judicial interference at the referral stage induced significant delays in the process of appointment of arbitrators and constitution of arbitral tribunals, thereby rendering the very framework of arbitration in India, ineffective, unviable and cumbersome.

52. The Law Commission of India in its 246th Report taking note of the aforesaid problem *inter-alia* suggested that the scope of interference under Section(s) 8 and 11 respectively of the Act, 1996 should be restricted to a *prima-facie* satisfaction of the existence and validity of the arbitration agreement. It further opined that except in cases where the court finds that no arbitration agreement exists or is null and void, the ordinary approach of the courts under Section 11 of the Act, 1996 should be to appoint an arbitrator and refer the parties to arbitration, leaving all issues including those which it has *prima-facie* determined for final adjudication by the arbitral tribunals. The relevant observations read as under: -

> *"33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then*

it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. [...]"

53. The aforesaid recommendations of the Commission were taken note of by the Parliament and accordingly Section 11 sub-section (6A) came to be inserted in the Act, 1996 by way of the Arbitration and Conciliation (Amendment) Act, 2015. As per the said provision, the referral courts in exercise of their jurisdiction under Section 11 were now required to only look into one aspect — the existence of an arbitration agreement — nothing more, nothing less. All other issues were now to be invariably left for the final determination by the arbitral tribunal. [See: ***Duro Felguera, S.A. v. Gangavaram Port Ltd***. reported in **(2017) 9 SCC 729**]

54. A two-Judge Bench of this Court in ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.*** reported in **(2020) 2 SCC 455** held that the issue of limitation being a mixed question of law and fact should be best left to the tribunal to decide and that the referral court should restrict its examination only to the existence of an arbitration agreement between the parties.

55. Then came the decision of this Court in ***Vidya Drolia & Ors v. Durga Trading Corporation*** reported in **(2021) 2 SCC 1**, which *inter-alia* held that although

Section(s) 8 and 11 of the Act, 1996 are at some variance inasmuch as the former requires the referral courts to determine the "*validity*" of an arbitration agreement whereas the latter requires determining only the "*existence*", yet since both the provisions are complementary to each other insofar as they both deal with the power of courts to refer the parties to arbitration, the aspect of "*existence*" as specified under Section 11 should be seen construed along with the aspect of "*validity*" as specified under Section 8. It held that both the provisions insofar as the standard of scrutiny by the referral courts is concerned, ought to be compositely construed, irrespective of whether the jurisdiction is being exercised by the courts under Section 8 or 11 of the Act, 1996. Accordingly, it held that the exercise of power of *prima facie* judicial review to examine the existence of arbitration agreement also includes going into the validity of the arbitration agreement and even objections as to the arbitrability of the subject-matter. It also held that the referral court, while exercising its powers under Section(s) 8 and 11 respectively of the Act, 1996 is empowered, to enter scrutiny for determining and ultimately knocking down *ex facie* meritless, frivolous and dishonest litigation so as to ensure expeditious and efficient disposal at the referral stage and prevent unnecessary subjugation to arbitration. The relevant observations read as under: -

> *"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.

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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."

"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". [...]

(Emphasis supplied)

56. The final conclusion of this Court in ***Vidya Drolia*** (supra) read 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."

(Emphasis supplied)

57. As is clear from the aforesaid extract, ***Vidya Drolia*** (supra) held that although the arbitral tribunal is the preferred first authority to determine the questions pertaining to non-arbitrability, yet the referral court may exercise its limited jurisdiction to refuse reference to arbitration in cases which are ex-facie frivolous and where it is certain that the disputes are non-arbitrable.

58. What can be discerned from the aforesaid is that while the enlarged scope and extent of judicial intervention at the referral stage as held in ***SBP & Co.*** (supra) was legislatively overruled by the insertion of Section 11 sub-section (6A) in the Act, 1996, the avowed legislative intent of minimal judicial intervention was still far from being achieved, partly due to the misconception created in the position of law as regards ambit of scrutiny under Section 11 of the Act, 1996 by ***Vidya Drolia*** (supra). Although, ***Vidya Drolia*** (supra) predominantly found favour with the principal of minimal interference at the stage of Section 11 sub-section (6) petitions by referral courts in light of the introduction of Section 11sub-section (6A) to the Act, 1996, yet it still proceeded in a somewhat wrong direction on two counts; ***first,*** by conflating the scope and

standard of scrutiny by the referral courts under Section 8 with that under Section 11 and ***secondly,*** by carving out an exceptional category of cases in which interference by the referral court was permissible, that being disputes where it is manifestly and *ex-facie* certain that the arbitration agreement is non-existent, invalid or the dispute is meritless or non-arbitrable.

59. The precarious situation that was created by ***Vidya Drolia*** (supra) is evident from the subsequent decisions of this Court in ***DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.*** reported in **(2021) 16 SCC 743** and ***BSNL v. Nortel Networks (India) (P) Ltd.***, reported in **(2021) 5 SCC 738** and a catena of other decisions wherein it was held that while undertaking a *prima facie* review under Section 11 of the Act, 1996, the interference of the courts in certain aspects and merits of the subject-matter may be warranted in exceptional cases, to weed out any frivolous or vexatious claims and prevent wastage of public and private resources.

60. The next chapter in the saga of scope and ambit of Section 11 of the Act, 1996 came in the form of the seven-Judge Bench decision of this Court in ***In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899*** reported in **2023 INSC 1066** wherein one of us (J.B. Pardiwala J.) as part of the Bench, undertook a comprehensive analysis of Section(s) 8 and 11 respectively of the Act, 1996

and, *inter alia*, made poignant observations about the nature of the power vested in the Courts insofar as the aspect of appointment of arbitrator is concerned. It held that the referral court, be it the High Court or the Supreme Court under Section 11 of the Act, 1996 **shall** examine only the existence of a prima facie arbitration agreement and not any other issues. The relevant observations read as under: -

> *"185. The corollary of the doctrine of competence-competence is that courts may only examine whether an arbitration agreement exists on the basis of the prima facie standard of review. The nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp-duty has not been paid or is inadequate is such as cannot be decided on a prima facie basis. Objections of this kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. Obligating the court to decide issues of stamping at the Section 8 or Section 11 stage will defeat the legislative intent underlying the Arbitration Act.*
>
> *186. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain the domain of the arbitral tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). [...]*
>
> *209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated*

goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]"

(Emphasis supplied)

61. In ***SBI General Insurance Co. Ltd. v. Krish Spinning***, reported in **2024 INSC 532** one of us (J.B. Pardiwala J.) taking note of the state of flux surrounding the legal position on the scope and extent of judicial scrutiny permissible under Section 11 of the Act, 1996, held that the courts at the referral stage should not venture into contested questions involving complex facts. It was held that the observations made in ***Vidya Drolia*** (supra) insofar as it allowed the referral courts under Section 11 of the Act, 1996 to intervene and refuse appointment of an arbitrator in matters that were *ex-facie* meritless, frivolous, vexatious or deadwood, no longer could be said to hold field in view of the observations made in the subsequent and larger bench decision of ***In Re: Interplay*** (supra). The relevant observations read as under: -

"98. What follows from the negative facet of arbitral autonomy when applied in the context of Section 16 is that the national courts are prohibited from interfering in matters pertaining to the jurisdiction of the arbitral tribunal, as exclusive jurisdiction on those aspects vests with the arbitral tribunal. The legislative mandate of prima facie determination at the stage of Sections 8 and 11 respectively ensures that the referral courts do not end up venturing into what is intended by the legislature to be the exclusive domain of the arbitral tribunal.

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113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in In Re: Interplay (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall

examine the existence of a prima facie arbitration agreement and not any other issues. [...]

114. In view of the observations made by this Court in In Re: Interplay (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in Vidya Drolia (supra) and adopted in NTPC v. SPML (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re: Interplay (supra).

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."

62. ***Krish Spinning*** (supra) further held that, the scope of Section 8 is markedly different from the scope of Section 11 of the Act, 1996 as although, both provisions deal with the power of the courts to refer the parties to arbitration, yet the reason why Section 8 envisages a more stricter test of determining the "validity" of the arbitration agreement as opposed to mere "existence" under Section 11 is owed to the fact that, Section 8 specifically enables the commencement or continuation of arbitration during the pendency of an

application under the said provision, thus, there is no inherent danger or harm to subjecting the substantive rights of the parties to arbitrate in a state of limbo or worse, remediless, if the courts themselves decide to proceed in determining the validity of the arbitration agreement while the arbitral tribunal simultaneously continues with the substantive claims. However, Section 11 on the other hand, is the very first step in commencement of arbitration proceedings, no arbitration proceedings can commence or continue unless the application under the said provision is decided. Furthermore, the determination by a judicial authority under Section 8 of the Act, 1996 can be assailed by way of an appeal under Section 37, however, a determination under Section 11 of the Act, 1996 is not appealable, thus, the approach which the courts are expected to undertake under Section 8 viz-à-viz Section 11, must be reflective of these nuanced differences in the scope of these provisions. Thus, it held that the observations of ***Vidya Drolia*** (supra) in conflating the nature of the test envisaged under Section 8 of the Act, 1996 with that under Section 11, cannot be said to be a good law. The relevant observations read as under: -

> *"108. Section 11 of the Act, 1996 is provided to give effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an arbitrator(s). The parameters of judicial review laid down for Section 8 differ from those prescribed for Section 11. The view taken in SBP & Co. (supra) and affirmed in Vidya Drolia (supra) that Sections 8 and 11 respectively of the Act, 1996 are complementary in nature was legislatively overruled by the introduction of Section 11(6-A) in 2015. Thus, although both these*

provisions intend to compel parties to abide by their mutual intention to arbitrate, yet the scope of powers conferred upon the courts under both the sections are different.

109. The difference between Sections 8 and 11 respectively of the Act, 1996 is also evident from the scope of these provisions. Some of these differences are:

i. While Section 8 empowers any 'judicial authority' to refer the parties to arbitration, under Section 11, the power to refer has been exclusively conferred upon the High Court and the Supreme Court.

ii. Under Section 37, an appeal lies against the refusal of the judicial authority to refer the parties to arbitration, whereas no such provision for appeal exists for a refusal under Section 11.

iii. The standard of scrutiny provided under Section 8 is that of prima facie examination of the validity and existence of an arbitration agreement. Whereas, the standard of scrutiny under Section 11 is confined to the examination of the existence of the arbitration agreement.

iv. During the pendency of an application under Section 8, arbitration may commence or continue and an award can be passed. On the other hand, under Section 11, once there is failure on the part of the parties in appointing the arbitrator as per the agreed procedure and an application is preferred, no arbitration proceedings can commence or continue.

110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

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123. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to

approach for the adjudication of its claims, if it Section 11 application is rejected.

124. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. [...]"

63. Accordingly, ***Krish Spinning*** (supra) held that the scope of enquiry at the referral stage under Section 11 of the Act, 1996 is confined to a *prima facie* determination of the existence of the arbitration agreement, and does not permit a contested or laborious enquiry into all other issues including the conclusive existence of such arbitration agreement, which is for the arbitral tribunal alone to 'rule' under Section 16. Under Section 11, the referall court's enquiry is limited to examining whether the application under the said provision is filed before the correct court or not, the said application is within limitation or not in light of the decision of ***M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.*** reported in **2024 INSC 155**, and to the *prima-facie* existence of an arbitration agreement. Such an approach gives true meaning to the legislative intent underlying Section 11 sub-section (6A) of the Act, 1996 and also to the view taken in ***In Re: Interplay*** (supra). The relevant ovservations read as under: -

"111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

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133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re: Interplay (supra).

64. When the decision of this Court in ***Chloro Controls*** (supra) came, the position of law as regards the standard of scrutiny expected by the referral courts was governed by the decision of ***SBP Co.*** (supra), which as already discussed, was premised on the rudimentary understanding that the arbitral tribunals are not empowered to determine issues as regards the validity and existence of the arbitration agreement and whether the claims are time-barred or vexatious due to the non-applicability of Section 16 in instances of court referred

arbitrations. The understanding which stemmed from ***SBP Co.*** (supra) was that the referral courts were required to conduct mini trials and indulge in the appreciation of evidence on the aforesaid issues, even though they were inextricably linked with the substantive merits of the subject-matter.

65. Accordingly, when ***Chloro Controls*** (supra) held that a non-signatory to the arbitration agreement may be bound by the arbitration agreement by the doctrine of 'Group of Companies', the test which it laid down for applying the said doctrine had been evolved, squarely keeping in mind the decision of ***SBP Co.*** (supra). Which is why, ***Chloro Controls*** (supra) held that before a non-signatory can be held to be bound by the arbitration agreement, the referral courts would have to make a determination of all issues fundamental to making a reference to arbitration including the issue whether a non-signatory could be said to be bound by the arbitration agreement. The net effect of the aforesaid was that, arbitral tribunals were deemed to be incompetent to identify and implead a non-signatory to the arbitration agreement on its own accord, as it was understood from ***SBP Co.*** (supra), that such duty had been cast only upon the referral courts to determine.

66. However, with the subsequent developments, particularly in light of two key decisions of this Court being ***In Re: Interplay*** (supra) and ***Krish Spinning*** (supra), it is no more *res-integra*, that the extent of scrutiny of the referral

courts under Section 11 of the Act, 1996 is extremely narrow, and confined to only one aspect i.e., the *prima-facie* determination of the "existence" of the arbitration agreement. ***Krish Spinning*** (supra) has categorically held that only those questions which inextricably attacks or questions the "existence" of the arbitration agreement, should be looked into by the referral courts, that only for the purpose of a *prima-facie* satisfaction, all other questions, particularly mixed questions of law and fact fall within the exclusive jurisdiction of the arbitral tribunal, and cannot be looked into by the referral court, even for a *prima-facie* determination. Questions which involve examination of contested question of facts and appreciation of evidence, should be left to the arbitral tribunals to decide, as it is equally, if not more capable to decide such questions, as it has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral courts. Although the aforesaid observations were in the context of "accord and satisfaction" yet, the principles laid therein, would, nevertheless apply with equal force to all other issues entrenching upon the exercise of jurisdiction under Section 11 of the Act, 1996. The relevant observations read as under: -

> *"115. The dispute pertaining to the "accord and satisfaction" of claims is not one which attacks or questions the existence of the arbitration agreement in any way. As held by us in the preceding parts of this judgment, the arbitration agreement, being separate and independent from the underlying substantive contract in which it is contained, continues to remain in existence even after the original contract stands discharged by "accord and satisfaction".*

116. The question of "accord and satisfaction", being a mixed question of law and fact, comes within the exclusive jurisdiction of the arbitral tribunal, if not otherwise agreed upon between the parties. Thus, the negative effect of competence-competence would require that the matter falling within the exclusive domain of the arbitral tribunal, should not be looked into by the referral court, even for a prima facie determination, before the arbitral tribunal first has had the opportunity of looking into it.

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125. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the arbitral tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the arbitral tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."

67. Thus, the archaic understanding that an arbitral tribunal is incapable or incompetent to identify and implead a non-signatory to the arbitration agreement on its own accord, is not the correct position of law, in view of the decisions of this Court in ***In Re: Interplay*** (supra) and ***Krish Spinning*** (supra). We find, that the limited nature and scope of inquiry which the referral courts are expected to undertake as regards the "existence" of the arbitration agreement, would as a logical sequitur obligate the arbitral tribunal also to look into this question. Such a question, by no stretch, can be regarded as falling within the exclusive domain or jurisdiction of the referral courts, so as

to render any examination of it by the arbitral tribunal a usurpation of the referral courts authority and duty.

c. How Cox and Kings (I) contemplates determination of mutual intention of Non-Signatories to arbitration agreements.

68. However, even though an arbitral tribunal undoubtedly would be empowered to identify and implead a non-signatory to the arbitration agreement on its own, yet the question still remains, if the arbitral tribunal could be considered to be the appropriate forum for deciding this issue? In other words, whether, the issue that a non-signatory is bound by the arbitration agreement could be termed to be a question which inextricably attacks or questions the "existence" of the arbitration agreement, and thus, should be looked into by the referral courts?

69. The seminal importance of the aforesaid question lies in the contention that has been vehemently put forward before us by the appellants herein. It has been contended that when the application under Section 11 of the Act, 1996 was filed by the respondent no. 1 herein, the appellant herein was never made a party. In fact, in the entire application under Section 11, the respondent no. 1 never imputed any allegations or put forth any claims against the appellants herein, which would suggest its intention to implead the appellant herein in the arbitration proceedings, or that it is bound by the arbitration agreement. In

such circumstances, it was contended by the appellant herein, that in the absence of the appellant herein being a party to the application under Section 11 and in the absence of the referral court directing or leaving the question of impleadment of the appellant for the arbitral tribunal to decide, the appellant herein could not have been impleaded to the arbitration proceedings by the arbitral tribunal.

70. To put it simply, the argument of the appellant herein is that, where the non-signatory is a party to the application under Section 11 of the Act, 1996, the referral court must first make a *prima-facie* determination as to whether such non-signatory is bound by the arbitration agreement or not, before leaving the conclusive determination of such question to the arbitral tribunal. Conversely, where the non-signatory sought to be enjoined in arbitration is not a party to the application under Section 11, the referral court must give leave or direct the arbitral tribunal to examine whether such non-signatory is bound by the arbitration agreement or not, before it can be impleaded by the arbitral tribunal on its own accord.

71. In other words, the question that has been canvassed before us for our consideration is whether, the question that a non-signatory is bound by the arbitration agreement could be termed to be a question which inextricably attacks or questions the "existence" of the arbitration agreement, such that in the absence of any examination or application of mind by the referral court to

such question would render the very arbitration proceedings that has been commenced pursuant to the application under Section 11 of the Act, 1996 to be *non-est*, insofar as such non-signatory is concerned.

I. The nature and extent of the test laid down in Cox and Kings (I) for determining Non-Signatories who are bound by the arbitration agreements.

72. In order to answer the aforesaid question, we must once again look into the decision of this Court in ***Cox and Kings (I)*** (supra), to ascertain the nature of the question whether a non-signatory is bound by the arbitration agreement or not, and the manner in which the referral courts and the arbitral tribunal are expected to tackle such a question.

73. ***Cox and Kings (I)*** (supra) after an exhaustive examination of the question of existence or applicability of the 'Group of Companies' doctrine in a particular case, is fundamentally a fact-intensive exercise that involves a nuanced determination of the consent of parties from diverse factual elements and circumstances. The said doctrine and by extension any other principle for determining mutual consent, broadly requires ascertaining the intention of the parties by analysing the factual circumstances surrounding the contractual arrangements, particularly factors such as the level of involvement of the non-signatory in the negotiation, conclusion (sic execution), performance or

termination of the contract, to what extent such conduct may be indicative its position as a veritable party to the arbitration agreement and common intention to be bound by it. Thus, it was held that the primary test for ascertaining the applicability of the 'Group of Companies' doctrine lies in the determination of the intention of the parties, which is to be inferred from the surrounding factual matrix, or in other words, the inquiry or test is, by its very nature, predominantly factual. The relevant observations read as under: -

> *96. [...] The level of the non-signatory party's involvement was to the extent of making the other party believe that it was a veritable party to the contract, and the arbitration agreement contained under it. Therefore, the group of companies doctrine is applied to ascertain the intentions of the parties by analysing the factual circumstances surrounding the contractual arrangements.*
>
> *101. [...] Rather, the courts need to determine: first, the existence of a group of companies; and second, the conduct of the signatory and non-signatory parties which indicate their common intention to make the non-signatory a party to the arbitration agreement.95 Thus, the group of companies doctrine is similar to other consent based doctrines such as agency, assignment, assumption, and guarantee to the extent that it is ordinarily applied as a means of identifying the common intention of the parties to bind the non-signatory to the arbitration agreement.*
>
> *102. [...] Thus, the existence of a group, of companies is a factual element that the court or tribunal has to consider when analysing the consent of the parties. It inevitably adds an extra layer of criteria to an exercise which at its core is preponderant on determining the consent of the parties in case of complex transactions involving multiple parties and agreements.*
>
> *105. In multi-party agreements, the courts or tribunals will have to examine the corporate structure to determine whether both the signatory and non signatory parties belong to the same group. This evaluation is fact specific and must be carried out in accordance with the appropriate principles of company law. Once*

> *the existence of the corporate group is established, the next step is the determination of whether there was a mutual intention of all the parties to bind the non-signatory to the arbitration agreement.*
>
> *109. [...] The primary test to apply the group of companies doctrine is by determining the intention of the parties on the basis of the underlying factual circumstances. The application of the group of companies doctrine will serve to stymie satellite litigation by non-signatory members of the corporate group, thereby ensuring the efficacy of the agreement between the parties.*

74. From above, it is manifest that the test for determining the applicability of the 'Group of Companies' doctrine is intrinsically factual in nature, necessitating a close and context-specific inquiry. However, ***Cox and Kings (I)*** (supra) did not merely stop at just establishing the factual nature of such an exercise, but further proceeded to expound, the extent and depth in which the aforementioned factual factors must be determined in the course of such exercise by laying down the threshold standards for determining the applicability of the said doctrine. Placing reliance on one another decision of this Court in ***Oil and Natural Gas Corporation Ltd. v. Discovery Enterprises Pvt. Ltd.*** reported in **(2022) 8 SCC 42,** it held that the test for determining applicability of the 'Group of Companies' doctrine envisages a cumulative and holistic determination of the factual aspects such as the relationship between and among the legal entities within the corporate group structure, their underlying contractual obligations, the commonality of the subject matter and the composite nature of the transactions undertaken, and their overall

participation in the project / subject-matter for achieving a common purpose. The relevant observations read as under: -

> *"110. In Discovery Enterprises (supra), this Court refined and clarified the cumulative factors that the courts and tribunals should consider in deciding whether a company within a group of companies is bound by the arbitration agreement:*
>
> > *"40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
> > *(i) The mutual intent of the parties;*
> > *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
> > *(iii) The commonality of the subject-matter;*
> > *(iv) The composite nature of the transactions; and*
> > *(v) The performance of the contract."*

75. ***Cox and Kings (I)*** (supra) observed that doctrines such as 'Group of Companies' being a consent-based theory, as a necessary implication requires that the inquiry must not be superficial or perfunctory but must instead involve a comprehensive and holistic assessment of the composite relationship among the entities concerned, the underlying transactions, and the attendant circumstances evincing mutual intention to be bound by the arbitration agreement. Endorsing the view taken in ***Discovery Enterprises*** (supra), it held that mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The evaluation must be indicative that the involvement of the non-signatory was of such manner

which was sufficient to lead the other parties to legitimately believe that the non-signatory was a veritable party to the contract. The relevant observations read as under: -

> *"111. Since the group of companies doctrine is a consent based theory, its application depends upon the consideration of a variety of factual elements to establish the mutual intention of all the parties involved. In other words, the group of companies doctrine is a means to infer the mutual intentions of both the signatory and non-signatory parties to be bound by the arbitration agreement. The relationship between and among the legal entities within the corporate group structure and the involvement of the parties in the performance of the underlying contractual obligations are indicators to determine the mutual intentions of the parties. The other factors such as the commonality of the subject matter, composite nature of the transactions, and the performance of the contract ought to be cumulatively considered and analysed by courts and tribunals to identify the intention of the parties to bind the non-signatory party to the arbitration agreement. [...]*
>
> *112. [...] However, we clarify that mere presence of a commercial relationship between the signatory and non-signatory parties is not sufficient to infer "legal relationship" between and among the parties. If this factor is applied solely, any related entity or company may be impleaded even when it does not have any rights or obligations under the underlying contract and did not take part in the performance of the contract. The group of companies doctrine cannot be applied to abrogate party consent and autonomy. The doctrine, properly conceptualised and applied, gives effect to mutual intent and autonomy.*
>
> *121. Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely*

on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.

122. [...] Rather, the courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non signatory to be bound by the underlying contract or its arbitration agreement.

127. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under Discovery Enterprises (supra) are applied holistically. For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject matter would suggest that the claims against the non-signatory were strongly inter-linked with the subject matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject matter, are not actually strangers to the dispute between the signatory parties.

128. We hold that all the cumulative factors laid down in Discovery Enterprises (supra) must be considered while determining the applicability of the group of companies doctrine. However, the application of the above factors has to be fact-specific, and this Court cannot tie the hands of the courts or tribunals by laying down how much weightage they ought to give

to the above factors. This approach ensures that a dogmatic emphasis on express consent is eschewed in favour of a modern approach to consent which focuses on the factual analysis, complexity of commercial projects, and thereby increases the relevance of arbitration in multi-party disputes. [...]

(Emphasis supplied)

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

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

77. In order to resolve the question whether the issue of a non-signatory being bound by an arbitration agreement could be said to be inextricably intertwined with the determination of the "existence" of the arbitration agreement, it is apposite to once again advert to **Cox and Kings (I)** (supra), more particularly, as to the manner in which it envisages the identification and determination of

the binding effect of an arbitration agreement upon a non-signatory, based on the factual aspects delineated by it, as mentioned in the foregoing paragraphs.

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

underlying contract is the most crucial factor to discern the intention of the parties.

> *"112. Section 7 of the Arbitration Act broadly talks about an agreement by the parties in respect of a defined legal relationship, whether contractual or not. Such a legal relationship must give rise to legal obligations and duties. In a corporate group, a company may have various related companies. The legal relationship must be analysed in the context of the underlying contract containing the arbitration agreement. The nature of the contractual relationship can either be formally encrusted in the underlying contract, or it can also be inferred from the conduct of the signatory and non-signatory parties with respect to such contract. [...]*
>
> *115. In case of multiple parties, the necessity of a common subject-matter and composite transaction is an important factual indicator. An arbitration agreement arises out of a defined legal relationship between the parties with respect to a particular subject matter. Commonality of the subject matter indicates that the conduct of the non-signatory party must be related to the subject matter of the arbitration agreement. For instance, if the subject matter of the contract underlying the arbitration agreement pertains to distribution of healthcare goods, the conduct of the non-signatory party should also be connected or in pursuance of the contractual duties and obligations, that is, pertaining to the distribution of healthcare goods. The determination of this factor is important to demonstrate that the non-signatory party consented to arbitrate with respect to the particular subject matter.*
>
> *116. In case of a composite transaction involving multiple agreements, it would be incumbent for the courts and tribunals to assess whether the agreements are consequential or in the nature of a follow-up to the principal agreement. This Court in Canara Bank (supra) observed that a composite transaction refers to a situation where the transaction is interlinked in nature or where the performance of the principal agreement may not be feasible without the aid, execution, and performance of the supplementary or ancillary agreements.*

117. The general position of law is that parties will be referred to arbitration under the principal agreement if there is a situation where there are disputes and differences "in connection with" the main agreement and also disputes "connected with" the subject-matter of the principal agreement In Chloro Controls (supra), this Court clarified that the principle of "composite performance" would have to be gathered from the conjoint reading of the principal and supplementary agreements on the one hand, and the explicit intention of the parties and attendant circumstances on the other. The common participation in the commercial project by the signatory and non signatory parties for the purposes of achieving a common purpose could be an indicator of the fact that all the parties intended the non-signatory party to be bound by the arbitration agreement. [...]"

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

(a) preliminary negotiations between the parties;
(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned; and
(f) usages.

(Emphasis supplied)

79. What can be discerned from the above is that, the entire exercise of determining whether a non-signatory is bound by an arbitration agreement, in

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

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

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

82. In this regard, reliance may be placed on the concurring opinion of P.S. Narasimha J. in ***Cox and Kings (I)*** (supra), who observed that the existence of an arbitration agreement *qua* a non-signatory is a matter of interpretation and construction of the written material in terms of Section 7(4)(b) from which a non-signatory's consent and intention can be deciphered. For ascertaining the true meaning of the express words, the court or tribunal may look into the surrounding circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract. The relevant observations read as under: -

> *"52. [...] An arbitration agreement, being a contract, must necessarily be in writing, as against an oral agreement, but need not be signed by the parties. The written arbitration agreement can be in the form of a document signed by the parties, or be evidenced in the record of agreement. Section 7(4)(b) prescribes the written material from which a non-signatory's consent and intention can be deciphered by a court or arbitral tribunal.*

53. The existence of an arbitration agreement with a non signatory is a matter of interpretation and construction. The express words employed by the parties enable the court to ascertain the intention of the parties and their agreement to resolve disputes through arbitration. For ascertaining the true meaning of the express words, the court or tribunal may look into the surrounding circumstances such as nature and object of the contract and the conduct of the parties during the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle. It may be adopted by courts or arbitral tribunals while interpreting the record of agreement to determine whether the non signatory company is a party to it.

54. Although the application of the Group of Companies doctrine in India has until now been independent of Section 7, its juxtaposition with Section 7(4)(b) case-law shows that the inquiry under both is premised on determining the mutual intention of parties to submit to arbitration. The mutual intention of the parties is discernible from their conduct in the performance of the contract and this inquiry is common to Section 7(4)(b) jurisprudence and the Group of Companies doctrine. Even the precedents on the doctrine, national and international, look to additional factors beyond the non-signatory being in the same group of companies, such as commonality of subject-matter, composite nature of transaction, and interdependence of the performance of the contracts to determine mutual intent."

83. The subsequent observations of P.S. Narasimha J. in his concurring opinion in ***Cox and Kings (I)*** (supra) are of significance, and read as under: -

"55. Since the fundamental issue before the court or tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b). Consequently, the record of agreement that evidences conduct of the non-signatory in the formation, performance, and termination of the contract and surrounding circumstances such as its direct

relationship with the signatory parties, commonality of subject matter, and composite nature of transaction, must be comprehensively used to ascertain the existence of the arbitration agreement with the non-signatory. In this inquiry, the fact of a no signatory being a part of the same group of companies will strengthen its conclusion. In this light, there is no difficulty in applying the Group of Companies doctrine as it would be statutorily anchored in Section 7 of the Act."

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

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

86. Once, the "existence" of the arbitration agreement is said to have been established, the condition stipulated in terms of Section 11 sub-section (6A) of the Act, 1996, is said to have been fulfilled, and the referral courts have no option but to refer the dispute to arbitration, notwithstanding whether the intention of a non-signatory as a veritable partly to such agreement is established or not. Apart from the pre-condition of examining the "existence" of an arbitration agreement, Section 11 of the Act, 1996 does not either contemplate or require determination of the "*defined legal relationship*" in terms of Section 7, nor does it mandate an assessment of the *futuro* intention of the parties, whether signatories or non-signatories, from the "express words" of the arbitration agreement. This limited inquiry does not extend to the substantive legal consequences or implications of such arbitration

agreement. The question of whether a non-signatory is bound by the arbitration agreement is entirely separate from the question of its "existence." The latter is a relatively straightforward, procedural determination based on the formal presence of the agreement, whereas the former involves a substantive and contextual inquiry into the mutual intent of the parties, which may be examined by the arbitral tribunal.

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

88. Thus, even in the absence of the non-signatory being made a party to the proceedings before the referral court, and where the question of its impleadment has neither been raised nor addressed or left open to the arbitral

tribunal by the referral court, the arbitral tribunal would be full empowered to examine this issue in the first instance and determine whether any non-signatory is bound by the arbitration agreement based on the factual circumstances of the case, and if necessary, implead such non-signatory to the arbitration proceedings.

89. P.S. Narasimha J. in his concurring opinion in ***Cox and Kings (I)*** (supra), observed that the exercise of determining the binding nature of an arbitration agreement *qua* a non-signatory is an inquiry pertaining to the interpretation and construction of the agreement for determining the mutual intention, and not the existence of such agreement. We are conscious of the fact that, at paragraph 55, P.S. Narasimha J. observed that the inquiry is to "*ascertain the existence of the arbitration agreement with the non-signatory*" Semantically, the exercise may well be said to be one for determining the "existence" of an arbitration agreement with the non-signatory, however, the aforesaid observations cannot be singled out and construed devoid of its context. It must be seen in light of the observations made in the majority opinion at paragraphs 102 and 103, wherein this issue of "existence of the arbitration agreement with the non-signatory" or to put it simply, whether the non-signatory is a veritable party to the arbitration agreement or not, was described as an "extra layer of criteria" and that such an exercise is only to "discern the true "party" in interest". The relevant observations read as under: -

> *"102. [...] Thus, the existence of a group of companies is a factual element that the court or tribunal has to consider when analysing the consent of the parties. It inevitably adds an extra layer of criteria to an exercise which at its core is preponderant on determining the consent of the parties in case of complex transactions involving multiple parties and agreements.*
>
> *103. [...] the group of companies doctrine helps in decoding the layered structure of commercial arrangements to unravel the true intention of the parties to bind someone who is not formally a signatory to the contract, but has "assumed" the obligation to be bound by the actions of a signatory. This court explained the purport of the doctrine to discern the "true" party in interest [...]"*
>
> (Emphasis supplied)

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

91. In ***Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.*** reported in **2024 INSC 710**, this Court comprising one of us, (J.B. Pardiwala J.) further brought this distinction into perspective by observing that the issue concerning the "existence of the arbitration agreement *qua* the non-signatory" is, in

substance an issue of "consent", as it involves determining the manifestation of consent of parties or entities through their actions and conduct of exchange of documents (sic or otherwise) in terms of Section 7 sub-section (4) of the Act, 1996, and not one of "existence of arbitration agreement" simpliciter, as such an issue *inter-alia* requires examination and thorough consideration of the underlying contract in addition to the arbitration agreement. The relevant observations read as under: -

> *"66. It is well settled that an arbitration agreement, in order to qualify as a valid agreement, has to satisfy the requirements stipulated under Section 7 of the Act, 1996 along with the principles of law under the Indian Contract Act, 1872. Having regard to the submissions of both the Respondent Groups i.e., JRS and SRG, it can be said that they have raised manifold objections to the present petition, however, none of those objections question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the Petitioner AMP Group. In fact, the JRS Group has no objection to resolve the disputes with the AMP Group by way of arbitration. Their primary objection is only that the SRG Group cannot be a part of the arbitration proceedings. Therefore, the requirement of prima facie existence of an arbitration agreement, as stated under Section 11 of the Act, 1996 is satisfied.*
>
> *67. However, the core issue that falls for our consideration is whether the SRG Group, being a non-signatory to the FAA can also be referred to arbitration and whether they are "veritable" parties to the arbitration agreement.*
>
> *68. [...] Persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may also intend to be bound by the terms of the agreement. Further, the requirement of a written agreement under Section 7 of the Act, 1996 does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. Therefore, the issue as to who is a "party" to an arbitration*

agreement is primarily an issue of consent. Actions or conduct could be an indicator of the consent of a party to be bound by the arbitration agreement. This aspect is also evident from a reading of Section 7(4)(b) which emphasises on the manifestation of the consent of persons or entities through actions of exchanging documents."

(Emphasis supplied)

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

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

to arbitrate — not the formal existence of the arbitration agreement — that is the heart of this inquiry.

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

95. Even if it is assumed for a moment that the referral court in its jurisdiction under Section 11 of the Act, 1996 has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of ***Cox and Kings (I)*** (supra), the referral court should only refrain but rather loathe the exercise of such discretion. Any discretion which is conferred upon any authority, be it referral courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. Any determination even if *prima-facie* by a referral court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the referral courts opine that a non-

signatory in question is not a veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the arbitral tribunal to decide, as such party can always take recourse to Section 16 of the Act, 1996 and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the arbitral tribunal would be well within its powers to also impose costs.

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

96. The aforesaid may be looked at from one another angle. This Court in ***Cox and Kings (I)*** (supra) also discussed the role and scope of jurisdiction of the referral courts and arbitral tribunals under Section(s) 11 and 16 of the Act, 1996, particularly in the context of binding a non-signatory to the arbitration agreement. It reiterated that under Section 11, the referral court only has to determine the *prima-facie* existence of an arbitration agreement. Whereas, the issue of determining parties to an arbitration agreement is quite distinct from "existence" of the arbitration agreement, as such issue goes to the very root of the jurisdiction competence of the arbitral tribunal, and thus, empowered to

decide the same under Section 16. Placing reliance on the decision of this Court in ***Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd.*** reported in, **(2005) 7 SCC 234**, it held that the referral court should not unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction for deciding such issues. The relevant observations read as under: -

> *"157. When deciding the referral issue, the scope of reference under both Sections 8 and 11 is limited. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the existence of the examination of an arbitration agreement.*
>
> *158. Section 16 of the Arbitration Act enshrines the principle of competence competence in Indian arbitration law. The provision empowers the arbitral tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The doctrine of competence competence is intended to minimize judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.*
>
> *161. The above position of law leads us to the inevitable conclusion that at the referral stage, the court only has to determine the prima facie existence of an arbitration agreement. If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal. unnecessarily interfere with arbitration proceedings, and rather allow the arbitral tribunal to exercise its primary jurisdiction. In Shin-Etsu Chemical Co Ltd v. Aksh Optifibre Ltd,125 this Court observed that there are distinct advantages to leaving the final determination on matters pertaining to the validity of an arbitration agreement to the tribunal [...]"*
>
> (Emphasis supplied)

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

> *"163. [...] Thus, when a non-signatory person or entity is arrayed as a party at Section 8 or Section 11 stage, the referral court should prima facie determine the validity or existence of the arbitration agreement, as the case may be, and leave it for the arbitral tribunal to decide whether the non signatory is bound by the arbitration agreement.*
>
> *164. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge: first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the arbitral tribunal to decide whether the non signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the tribunal should comply with the requirements of principles of natural justice such*

as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the arbitral tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by arbitral tribunal under Section 16."

(Emphasis supplied)

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

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

taking into consideration the evidence adduced before it by the parties and the principles enunciated under ***Cox and Kings (I)*** (supra).

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

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

102. Furthermore, the legislative intent underlying Section 11 of the Act, 1996 — particularly sub-section (6A) — is to ensure the expeditious disposal of

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

103. At this juncture, it would be apposite to refer to the three-judge Bench decision of this Court in ***Pravin Electricals Pvt Ltd v. Galaxy Infra and Engineering Pvt Ltd.*** reported in **(2021) 5 SCC 671**. In the said decision, this Court was called upon to determine the existence of an arbitration agreement on the basis of the documentary evidence produced by the parties. Although, this Court *prima-facie* opined that there was no conclusive evidence to infer the existence of a valid arbitration agreement between the parties, yet it referred the dispute along with the issue of existence of the arbitration agreement to the arbitral tribunal to decide after conducting a detailed examination of documentary evidence and cross-examination of witnesses. Thus, even where the referrals courts either find that there is no arbitration agreement in "existence" or as a logical sequitur never embarked upon determining such "existence", for whatever reasons, the matter should still nevertheless be referred to arbitration.

104. It is not difficult to comprehend why the above approach, endorsed in ***Pravin Electricals*** (supra) ought to be adopted and followed. The rationale behind this, as explained in ***Krish Spinning*** (supra), is that there exists no right to appeal under the Act, 1996 against an order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Any refusal for appointment runs the risk of leaving the claimant in a situation

wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected. However, on the contrary, appointment of an arbitrator causes no prejudice, as all these issues can again be espoused by leading cogent evidence and material before the arbitral tribunal under Section 16 of the Act, 1996 and thereafter, in appeal under Section 37.

105. ***Cox and Kings (I)*** (supra) at paragraph 164, observes that in case of joinder of non-signatory parties to an arbitration agreement, two scenarios will prominently emerge; first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party and second, where a non-signatory party itself seeks invocation of an arbitration agreement. It then holds that in both scenarios **the referral court** (emphasis) will be required to *prima facie* rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party.

106. However, this by no stretch means that all issues or instances of joinder or impleadment of a non-signatory will have to be first brought before the referral court, who in turn may leave it for the arbitral tribunal to decide. It by no stretch precludes a scenario where the issue of joinder of a non-signatory although never brought before the referral court, yet is later raised for the first time before the arbitral tribunal. We say so, because the aforesaid decision of ***Pravin Electricals*** (supra) where this Court referred the matter to the arbitral

tribunal despite *prima-facie* opining that there is no existence of arbitration agreement was approvingly referred to by ***Cox and Kings (I)*** (supra) to hold that "*If the referral court cannot decide the issue, it should leave it to be decided by the arbitration tribunal*". The natural corollary to the aforesaid is that, where the referral court is either unable to decide the issue as to whether, the non-signatory is a veritable party to the arbitration agreement, or finds in its opinion that such non-signatory is not a veritable party, or in the extreme alternative, had no occasion to decide such an issue, still it would be open for the arbitral tribunal to look into the issue and decide the same.

107. The only thing the arbitral tribunal needs to be mindful of when deciding such an issue is that it adheres to the principles of natural justice by affording the non-signatory a fair opportunity to raise objections with regard to the jurisdiction of the arbitral tribunal, earnestly makes an endeavour to determine this issue at the earliest possible stage to prevent any grave prejudice being occasioned to such non-signatory, makes all possible efforts — whether by way of imposition of costs or through other appropriate measures —to mitigate and deter the possibility of any abuse by the signatories who might seek to coerce or arm twist the non-signatory by frivolously or vexatiously subjecting it to arbitration, and lastly, that its decision is grounded in the factors and threshold requirements laid down in ***Cox and Kings (I)*** (supra) as explained by us.

108. Moreover, one must not lose sight of the fact that, the provision of Section 11 of the Act, 1996 only comes into the picture where there has been a failure in appointment of an arbitrator. Could it be said that where, the signatories have consensually appointed an arbitrator in terms of the arbitration agreement, then in such cases, the arbitral tribunal that has been so constituted, would not be empowered to implead a non-signatory as-well, merely because, the referral court did not either determine the 'existence of the arbitration agreement *qua* the non-signatory' or did not leave such question for determination of the arbitral tribunal, even though no such occasion had arisen for the referral court to do so? The answer to the aforesaid, must be an emphatic "no". *Arguendo* even if one were to proceed on a stretch and rather strained construction of the law, that where a notice of invocation is served by a party to both the signatories and the non-signatories, pursuant to which an arbitral tribunal has been constituted consensually by the signatories, yet there would still be a failure in appointment of an arbitrator inasmuch as the non-signatory has not agreed to appoint and arbitrator, and the only recourse here would be to prefer to move a referral court under Section 11 of the Act, 1996, the aforesaid contention, merits outright rejection. Not only does it reflect a hyper-technical and overly dogmatic approach to the procedural framework of arbitration — which is to be construed in a manner that facilitates, rather than frustrates, party autonomy and consensual resolution — but it also

fundamentally misunderstands the legislative purpose and limited procedural function of Section 21 of the Act, 1996, which we shall now discuss, in the later parts of this judgment.

ii. <u>Arbitral Tribunal has the authority and power to implead Non-Signatories to the arbitration agreement on its own accord</u>.

a. There is no inhibition in the scheme of Act, 1996 which precludes the Arbitral Tribunal from impleading a Non-Signatory on its own accord.

109. From the above exposition of law, it can be seen that there is nothing within the scheme of the Act, 1996, which prohibits or restrains an arbitral tribunal from, impleading a non-signatory to the arbitration proceedings on its own accord. So long as such impleadment is undertaken upon a consideration of the applicable legal principles — including, but not limited to, the doctrines of 'group of companies', 'alter ego', 'composite transaction', and the like — the arbitral tribunal is fully empowered to summon the non-signatory to participate in the arbitration. This autonomy stems from the broad jurisdiction conferred upon arbitral tribunals under the Act, 1996 to rule upon their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, as enshrined under Section 16. The impleadment of a non-signatory, being fundamentally a question of jurisdiction and consent,

falls squarely within the province of the tribunal's powers, free from any statutory prohibition.

110. The aversion towards recognizing such power of the arbitral tribunal to implead a non-signatory, that previously prevailed, had stemmed from two major misconceptions – a lack of power being vested on the arbitral tribunal and a corresponding entrustment of this duty to implead a non-signatory to the referral courts alone.

(i) **First,** the initial understanding of ***Chloro Controls*** (supra) that the legal basis for the doctrine of 'group of companies' and other alike principles for determining mutual consent was only under the provisions which empowered the courts to make a reference to arbitration i.e., under Section(s) 8 and 45 of the Act, 1996, was construed to mean that only the courts have the power to resort to and apply the aforesaid principles for determining mutual consent. Similarly, the unaltered general definition of "*party*" under Section 2(1)(h) of the Act, 1996 as opposed to the wide meaning assigned to the term "*party*" under Section(s) 8 and 45 of the Act, 1996, was misconstrued as a positive indicium that an arbitral tribunal lacks the power to implead a non-signatory as the scope and exercise of its jurisdiction is confined to the narrow meaning of "*party*" under Section 2(1)(h) i.e., only signatories or those specifically referred to arbitration, whereas the power and jurisdictional reach of the

courts extends to the wider meaning of "*party*" i.e., "*a party to an arbitration agreement or any person claiming through or under him*" under Section(s) 8 and 45 of the Act, 1996 i.e., it extends to even non-signatories.

(ii) **Secondly,** the position of law which existed at the time of ***Chloro Controls*** (supra), required the referral courts to make a determination of all issues fundamental to making a reference to arbitration including the issue whether a non-signatory could be said to be bound by the arbitration agreement. Since this primary duty of identifying and then in turn impleading a non-signatory who is bound by the arbitration agreement was cast upon the courts, it was presumed that the arbitral tribunal even if empowered is incapable or incompetent to undertake this task, as otherwise it would tantamount to usurping the jurisdiction of the referral courts.

111. Thus, the combined effect of the aforesaid was that an arbitral tribunal could not, on its own accord, resort to or apply the various principles for determining mutual consent, and thereby implead a non-signatory since both **(i)** the power to do so was presumed lie within the exclusive domain and jurisdiction as-well as the **(ii)** the corresponding duty to undertake this exercise was understood to have been entrusted solely to the referral courts.

112. However, with the advent of ***Cox and Kings (I)*** (supra), the legal foundation for the application of the 'Group of Companies' doctrine, or any analogous principles designed to determine mutual consent was clarified to exist in the definition of "party" under Section 2(1)(h) read with the meaning of "arbitration agreement" under Section 7 of the Act, 1996. Unlike Section(s) 8 and 45 of the Act, 1996, the provisions of Section(s) 2(1)(h) and 7 are not confined in their applicability to only judicial forums or courts, and rather extend equally to both courts and arbitral tribunals, as these provisions form the bedrock of the framework of arbitration under the Act, 1996. The logical sequitur of this is that arbitral tribunals, too, are vested with the requisite authority to engage with and apply principles, such as the 'Group of Companies' doctrine, when determining whether a non-signatory may be bound by an arbitration agreement.

113. It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in ***Cox and Kings (I)*** (supra) nor in ***Ajay Madhusudhan*** (supra), this Court has said that it is only the reference courts that are empowered to determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both 'courts and tribunals' are fully empowered to decide the issues of impleadment

of a non-signatory and Arbitral Tribunals have been held to be preferred forum for the adjudication of the same.

114. In the case of ***Ajay Madhusudhan*** (supra), this Court, placing reliance on ***Cox and Kings (I)*** (supra), has expressly held that Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal and the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal.

115. The case of ***Ajay Madhusudhan*** (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the 'courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non-signatory with a signatory, commonality of the subject matter, the composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement'.

116. Recently, a coordinate bench of this Court in ***Adavya Projects Pvt. Ltd. v. M/s Vishal Strcturals Pvt. Ltd. & Ors.*** reported in **2025 INSC 507,** also held that an arbitral tribunal under Section 16 of the Act, 1996 has the power to implead the parties to an arbitration agreement, irrespective of whether they are signatories or non-signatories, to the arbitration proceedings. This Court speaking through P.S. Narasimha J. observed that since an arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, any person or entity who is found to be a party to the arbitration agreement can be made a part of the arbitral proceedings, and the tribunal can exercise jurisdiction over him. Section 16 of the Act, 1996 which empowers the arbitral tribunal to determine its own jurisdiction, is an inclusive provision that covers all jurisdiction question including the determination of who is a party to the arbitration agreement, and thus, such a question would be one which falls within the domain of the arbitral tribunal. It further observed that, although most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, yet an arbitral tribunal can direct the joinder of a person or entity, even if no such provision exists in the statute, as long as such person or entity is a party to the arbitration agreement. Accordingly, this Court held that since the respondents therein were parties to the underlying contract and the arbitration agreement, the arbitral tribunal would have the power to implead them as parties to the arbitration proceedings in exercise of

its jurisdiction under Section 16 of the Act, 1996. The relevant observations read as under: -

> *"24. As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement, and the scope of disputes referrable to arbitration under the agreement. Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement.*
>
> *25. This view finds support in the jurisprudence and practice of international commercial arbitration. It is notable that while most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, this must be done with the consent of all the parties. Gary Born has taken the view that the arbitral tribunal can direct the joinder of parties when the arbitration agreement expressly provides for the same. However, he states that in reality, most arbitration agreements, whether ad hoc or providing for institutional arbitration, neither expressly preclude nor expressly permit the arbitral tribunal to join parties. In such cases, the power must be implied,25 particularly when there is a multi-party arbitration clause in the same underlying contract that does not expressly address the joinder of parties in the arbitral proceedings. He states that: "In these circumstances, there is a substantial argument that the parties have impliedly accepted the possibility of consolidating arbitrations under their multi-party arbitration agreement and/or the joinder or intervention of other contracting parties into such arbitrations… the parties' joint acceptance of a single dispute resolution mechanism, to deal with disputes under a single contractual relationship, reflects their agreement on the possibility of a unified proceeding to resolve their disputes, rather than necessarily requiring fragmented proceedings in all cases." Further, in jurisdictions where there is*

no provision in the national arbitration statute authorising the courts to consolidate arbitrations or to join parties, it is left to the arbitral tribunal to determine this issue at the first instance.

26. Therefore, as per the legal principles under the ACA as well as in international commercial arbitration, it is a foundational tenet that the arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, which must be recorded in an arbitration agreement. The proper judicial inquiry to decide a jurisdictional issue under Section 16 as to whether a person/entity can be made a party to the arbitral proceedings will therefore entail an examination of the arbitration agreement and whether such person is a party to it. If the answer is in the affirmative, such person can be made party to the arbitral proceedings and the arbitral tribunal can exercise jurisdiction over him as he has consented to the same.

39. [...] Since they are parties to the underlying contract and the arbitration agreement, the arbitral tribunal has the power to implead them as parties to the arbitration proceedings while exercising its jurisdiction under Section 16 of the ACA and as per the kompetenz-kompetenz principle."

(Emphasis supplied)

117. As observed in ***Adavya Projects*** (supra), Gary Born in his seminal work; the International Commercial Arbitration, Vol 2 (3rd edn, Kluwer Law International 2021) as held that consolidation and joinder/intervention may be ordered by an arbitral tribunal, arbitral institution, as long as the same is pursuant to parties (unanimous) agreement thereto. He has observed that "*In almost all cases, the approach taken by national law is that consolidation and joinder/intervention may be ordered by an arbitral tribunal, arbitral institution, or a national court, but only pursuant to the parties' (unanimous) agreement thereto. If the parties have not so agreed, both the tribunal and*

local courts will lack the authority under national law to order either consolidation or joinder/intervention." Since the aspect of joinder of a party to the arbitration agreement, either signatory or non-signatory stems from a conjoint reading of Section(s) 2(1)(h) and 7 of the Act, 1996 as explained by ***Cox and Kings (I)*** (supra) and by us in the foregoing paragraphs, even if the parties are to agree that a tribunal or for that matter a referral court will not have the power to implead any party to the arbitration proceeding, such an agreement will only operate to the extent that (i) the arbitration agreement is not governed by the Act, 1996 i.e., does not fall under Part I of the Act, 1996 and (ii) that such party is not otherwise bound by the arbitration agreement. This is because such an agreement is an agreement in respect of the rules of procedure of the arbitration, and as per Section 19 of the Act, 1996, more particularly sub-section (2), any such agreement is subject to Part I i.e., the parties are free to agree on the procedure to be followed by the arbitral insofar as it is not inconsistent with Part I. Since, the legal basis for the joinder or impleadment of any party who is bound by the arbitration agreement originates from the substantive provisions of the Act, 1996 i.e., Section(s) 2(1)(h) and 7, respectively, the parties cannot denude the arbitral tribunal of such power in terms of the non-obstante clause of Section 19(2) of the Act, 1996. Gary Born, further observes that "*this approach is consistent with that prescribed by the New York Convention and with the general respect for the parties' procedural autonomy in international arbitration".* Thus, it

acknowledges, that such stipulation as to consolidation or joinder is purely within the realm of procedural autonomy, hence Section 19 of the Act, 1996 which is the source of procedural autonomy will be subject to the conditions stipulated therein.

118. Further, it is true that the entire scheme of Act, 1996 is silent on the power of a court or arbitral tribunal to join or implead a party to the arbitration proceedings. Gary Born argues, that "*In the absence of specific statutory provisions, the topics of consolidation and joinder/intervention are generally subject to the Model Law's basic requirement that arbitration agreements be recognized and enforced in accordance with the parties' intentions. That is, consolidation and joinder/intervention should be both permitted and required – as an element of the parties' agreement to arbitrate"* The UNCITRAL Model Law being the genesis of the Act, 1996, even if there is no explicit statutory provision recognizing such power of impleadment, it nevertheless should not only be permitted but also required, as long as it is exercised within the confines of the intention of the parties and the scope of arbitration agreement, which is exactly what has also been laid down in so many words by ***Cox and Kings (I)*** (supra).

119. He says that, more often than not arbitration agreements, particularly for *ad hoc* arbitration "*will neither expressly preclude nor expressly authorize*

consolidation". But, "*there is no reason, however, that an agreement authorizing (or forbidding) consolidation or joinder/intervention cannot be implied ... various aspects of an arbitration agreement are routinely implied (such as confidentiality, a tribunal's power to order provisional relief or disclosure, the choice of applicable law and the like".* He accordingly, advocates that "*The same approach can, and indeed must, be taken to questions of consolidation and joinder/intervention"* where the "*questions of implied agreement to consolidation and joinder/intervention depend in substantial part on the structure of the parties' contractual relations and the terms of their agreements to arbitrate*".

120. Thus, the natural corollary to the aforesaid is that even in the absence of any express statutory provision, such power exists impliedly. In this regard, we may profitably refer to the recent five Judge-Bench decision of this Court in ***Gayatri Balasamy v. M/s ISG Novasoft Technologies Ltd.*** reported in **2025 INSC 605**, wherein this Court recognized the applicability of the doctrine of 'implied power' to the Act, 1996, in the context of Section 34. The majority opinion held that, the doctrine of implied power may be read into the Act, 1996 for the purpose of effectuating and advancing its object and to avoid hardship. The relevant observations read as under: -

> *"The doctrine of implied power is to only effectuate and advance the object of the legislation, i.e., the 1996 Act and to avoid the*

hardship. It would, therefore, be wrong to say that the view expressed by us falls foul of express provisions of the 1996 Act."

121. K.V. Vishwanathn J. in his dissenting opinion in ***Gayatri Balasamy*** (supra) observed that if a statute confers a power and circumscribes its exercise on certain conditions, any power which is inconsistent with those express conditions cannot be implied. He observed that the doctrine of implied powers is invoked to effectuate the final power, where it is impossible to effectuate the final power for doing something which although not provided in express terms but nevertheless is required to be done. In such scenarios, the power by virtue of the doctrine of implied powers will be supplied as a necessary intendment of the legislation, to advance its object and avoid grave hardship. The relevant observations read as under: -

"100. Undeterred, an attempt was made to fall back upon the doctrine of implied powers to somehow vest in Section 34 Court a power to modify the award. It is well settled that if a statute conferring a power to be exercised on certain conditions, the conditions prescribed are normally held to be mandatory and a power inconsistent with those conditions is impliedly negatived. No doubt, there is a principle in law that a Court must as far as possible adopt a construction which effectuates the legislative intent and purpose and that an express grant of a statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.

xxx xxx xxx

102. As is clear, the doctrine of implied powers is invoked to effectuate the final power. Where it is impossible to effectuate the final power unless something not authorized in express terms be also done, in such an event, the power will be supplied by necessary intendment as an exception. The exceptional situation

is to advance the object of the legislation under consideration and to avoid grave hardship."

122. Reliance was also placed on the decision of ***Savitri v. Govind Singh Rawat***, reported in **(1985) 4 SCC 337**, wherein it was held that "*Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means passed to subsist until the final order is passed*." It further, observed that "*Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim "ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest" (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist)*".

123. What can be discerned from the above is that the recourse to doctrine of implied powers would be permissible, if without it, it is impossible to effectuate a final power, and such exercise of implied power would effectuate and advance the object of the legislation.

124. ***Cox and Kings (I)*** (supra) has elaborately acknowledged the unique complexities posed by contemporary business transactions to the traditional framework of arbitration. Historically, arbitration gained prominence in the context of straightforward and linear bilateral transactions under the mercantile system of law. While over the past century, the nature of modern commercial transactions has undergone a profound transformation with the involvement of multifaceted obligations between multiple parties and complex contractual structures more sophisticated than the linear parent-subsidiary type of organization, that has rendered the traditional dyadic paradigms of business obsolete, particularly in areas such as construction contracts, financing transactions, reinsurance contracts, the framework of arbitration has, to a significant extent remained unchanged, leading to a mismatch between procedural form and commercial substance.

125. For arbitration to remain a viable and effectively alternative mechanism for dispute resolution, it is imperative to ensure that commercial reality does not outgrow this mechanism. The mechanisms of arbitration must be sufficiently elastic to accommodate the complexities of multi-party and multi-contract arrangements without compromising foundational principles such as consent and party autonomy. The approach of courts and arbitral tribunal in particular

must be responsive to the emerging commercial practices and expectations of the parties who submit themselves to it.

126. It was in this backdrop and the emerging best international practices that ***Cox and Kings (I)*** (supra) recognized the applicability of the 'Group of Companies' doctrine and other principles of determining mutual consent, to bind even non-signatories to the arbitration agreement as parties, as long as they were a veritable party and found to have impliedly consented to such agreement. The legal basis of these principles were traced to not only the object of the Act, 1996, but to the substantive provisions of Section(s) 2(1)(h) and 7 thereto. However, mere recognition of this principles which ultimately seeks to make the Indian arbitration law more responsive to the contemporary requirements, would be a farce, if the power to actually effectuate such principles, is not recognized, merely due to the absence of any explicit provision in this regard. We are of the considered opinion, that recognition of the power of joinder or impleadment of a non-signatory by an arbitral tribunal is a necessary intendment of the express provisions of Section(s) 2(1)(h) and 7 and the overall scheme and object of the Act, 1996 as well as the fundamental cannons of the law of arbitration of providing an effective alternative dispute resolution mechanism.

127. Thus, even in the absence of an express provisions in the Act, 1996 empowering the arbitral tribunal to implead or join a party who is otherwise bound by the arbitration agreement, the arbitral tribunal does possess such power by virtue of the doctrine of implied powers, as long as the same is in tandem with the scheme of Act, 1996 i.e., as long as the parties had either expressly or impliedly consented to the arbitration agreement as held in ***Cox and Kings (I)*** (supra).

b. Doctrine of Kompetenz-Kompetenz and the Jurisdictional Reach of an Arbitral Tribunal.

128. The aforesaid may be looked at from one another angle, through the 'Always Speaking' statutory interpretation rule. The said rule dictates that the words of a statute should be treated as ambulatory, speaking continuously in the present and conveying a contemporary meaning. This approach entails that if things not known or understood at the time when the enactment came into force, fall, on a fair construction, within its words, those things should be held to be included or intended by the statute. It lays that the context or application of a statutory expression may change over time, but the meaning of the expression itself cannot change'. It therefore provides for a statute to be applied to new circumstances and developments without the need for legislative revision or amendment. In other words, the core meaning of a statute is fixed but its

context or application may change which is inherently capable of 'embracing future changes in the subject matter.

129. Historically, the rule of interpretation of statutes, was premised on the understanding that statutes were to be construed in accordance with their natural meaning as at the date of their enactment. It was based on the Latin maxim "*contemporanea expositio est optima et fortissima in lege*" which means "Contemporary exposition is the best and strongest in law". However, over time the courts started recognizing the problems underlying this orthodoxic rule of interpretation. Sir Peter Benson Maxwell, On the Interpretation of Statutes, ed Frederick Stroud (Sweet and Maxwell, 5th ed, 1912) explained that the use of "*contemporanea expositio est optima et fortissima in lege*" for interpretation of statutes had largely been abandoned except perhaps in the construction of ambiguous language used in very old statutes where the language itself may have had a rather different meaning.

130. The modern approach to statutory interpretation insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and include such things as the existing state of the law and the mischief which, by legitimate means such as reference to reports of law reform bodies, one may discern the statute was intended to remedy.

131. If close consideration of a statutory text in its wider context and by reference to its purpose establishes that Parliament has deliberately chosen words to provide for its application to new circumstances and developments then the application of the 'always speaking' approach is judicially required. The interpretive process with the 'always speaking' approach is, in essence, to put the cart before the horse.

132. Section 16 of the Act, 1996, which enshrines the principle of "*kompetenz-kompetenz*" could be said to be one such provision when seen in light of the object of the Act, 1996, which requires the courts to adopt a pragmatic and 'always speaking' approach in its interpretation.

133. Section 16 of the Act, 1996 empowers the arbitral tribunal to rule on its own jurisdiction. The policy rationale underlying this provision is twofold: first, to respect and uphold the intention of the parties to resolve their disputes through arbitration by empowering the forum they have contractually chosen; and second, to prevent a fragmentation of proceedings through premature judicial intervention, which can frustrate the efficacy of arbitration by causing delays and fostering multiplicity of litigation.

134. The negative aspect of competence-competence is aimed at restricting the interference of the courts at the referral stage by preventing the courts from examining the issues pertaining to the jurisdiction of the arbitral tribunal

before the arbitral tribunal itself has had the opportunity to entertain them **AND** to also enable the arbitral tribunal to exercise necessary powers without any dependency upon the national courts, with the courts taking a back-seat and being permitted to review the exercise of power of the arbitral tribunal and its decision at a later stage.

135. The legislative choice of the word "rule" in Section 16 is both deliberate and significant. It does not merely suggest that the arbitral tribunal is competent to "consider" or "review" questions of its jurisdiction, but rather that it is vested with the authority to decisively adjudicate and pronounce upon such issues. It connotes that the arbitral tribunal is not only *competent* to entertain jurisdictional questions, but also *capable* — in terms of procedural and substantive mandate — to exercise necessary power for effectually issuing binding rulings thereon during the course of the proceedings. It endows the tribunal with the necessary powers to formulate its ruling. It illustrates the intention of the legislature to endow the arbitral tribunal with all powers and jurisdictional reach for effectively deciding its jurisdiction, even where no challenge is made by either parties, and to exercise the necessary powers for making such rulings.

136. Redfern and Hunter on International Arbitration (5th edn, Oxford University Press 2009), have observed that an arbitral tribunal's jurisdiction is derived

"*from the will of the parties to the arbitration agreement and therefore joinder or intervention is generally only possible with the consent of all parties concerned"* and "*such consent may be either express, implied, or by reference to a particular set of arbitration rules agreed to by the parties that provide for joinder*" However, "*unlike litigation in state courts, in which third parties can often be joined to proceedings, the jurisdiction of an arbitral tribunal to allow for the joinder or intervention of third parties to an arbitration is limited"* to the arbitration agreement and parties bound by it.

137. ***Adavya Projects*** (supra) has observed that Section 16 of the Act, 1996 is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement, and the scope of disputes referrable to arbitration under the agreement and thus, the arbitral tribunal's jurisdiction must also be determined against the touchstone of the arbitration agreement.

138. It is often loosely said that an arbitral tribunal does not have any jurisdiction except what has been conferred by the parties. While the same may on the surface be correct, however much significance of an arbitral tribunal's jurisdiction often finds itself lost and obscured due to the semantics of the above statement. The misconception arises when the acts of party is conflated with the source of legal authority.

139. The present case is a classic textbook example of this misconception. What has ben argued by the appellants herein in so many words, is that since it was never a party to the proceedings under Section 11 of the Act, 1996 before the referral court, and the arbitral tribunal was constituted by the referral court without arraying the appellant herein, the arbitral tribunal had no jurisdiction later to implead it. The crux of this argument is that, the jurisdiction of the arbitral tribunal is only confined to the act of the parties and the manner in which the referral court, had constituted the arbitral tribunal. It stems from a failure to appreciate that while the parties' conduct may set in motion the arbitral process, it is not the determinant of the arbitral tribunal's jurisdiction in a legal sense. Rather, it is the arbitration agreement itself—once validly concluded—that creates the jurisdictional foundation upon which the arbitral edifice rests.

140. It erroneously presumes that jurisdiction is derived solely from the act of appointment rather than from the arbitration agreement that preceded and necessitated such appointment. The arbitration agreement, not the referral court's order nor the procedural formalities attendant to the tribunal's constitution, is the true source of jurisdiction. The act of the referral court in constituting the arbitral tribunal is but an enabling mechanism to activate a tribunal whose jurisdiction was already latent in the arbitration agreement itself. This Court in ***M/s Arif Azim Co. Ltd. v. M/s Micromax Informatics***

Fze, wherein, one of us (J.B. Pardiwala J.) had had held that referral courts are only a conduit or means to arbitration, and the sum and substance of the arbitration has to be derived from the choices of the parties and their intentions contained in the arbitration agreement.

141. The jurisdiction of an arbitral tribunal is not created by the mere subjective intent or volition of the parties. Rather, it is the *arbitration agreement*—a legally cognisable and objective instrument—that operates as the foundational source of jurisdiction in the eyes of the law. Just as the creation of a property automatically vests jurisdiction in the territorial courts competent to adjudicate over such property, the conclusion of an arbitration agreement *ipso jure* brings into existence the jurisdiction of the arbitral tribunal. This jurisdiction exists in a *de jure* sense from the moment the arbitration agreement is validly executed, regardless of whether the tribunal has been formally constituted.

142. In other words, it is not the tribunal's subsequent constitution through procedural steps — whether by the parties themselves or by the intervention of a court under Section 11 of the Act, 1996 — that bestows jurisdiction upon it. Rather, such procedural mechanisms merely activate or operationalise a jurisdiction that is already in existence by virtue of the arbitration agreement. The arbitral tribunal, upon being constituted, steps into an already established legal framework of jurisdiction, rooted in the consensual and binding nature

of the arbitration agreement. The arbitral tribunal is not a creature of mere procedural will but of substantive legal consequence flowing from the arbitration agreement. To hold otherwise would be to invert the fundamental cannons of law of arbitration which treats the arbitration agreement as the cornerstone of arbitral competence.

143. It was in this background, that ***Adavya Projects*** (supra) held, and rightly so, that the jurisdiction of the arbitral tribunal to implead a person depends on whether such person is a party to the arbitration agreement.

c. Requirement of Notice of Invocation under Section 21 of the Act, 1996.

144. At this juncture, it would apposite to explain the modalities for the exercise of such power of joinder / impleadment by an arbitral tribunal. The appellant herein has vehemently contended that even if it is assumed that it is bound by the arbitration agreement, the impugned order is nevertheless liable to be set-aside, inasmuch as the appellant herein has been improperly arrayed as a party to the arbitration solely on the basis of a separate statement of claim / counter-claim filed by respondent no. 1, without the issuance of any notice of invocation as mandated under Section 21 of the Act, 1996. It was argued that once the arbitral tribunal had been constituted for the dispute between the respondent no. 1 and 3 herein, if at all the respondent no. 1 was of the opinion

that the appellant herein was bound by the arbitration agreement, it ought to have impleaded it by initiating an independent, fresh arbitration proceedings by first issuing a notice under Section 21 of the Act, 1996, and only thereafter filing a statement of claim against the appellants herein, rather than proceeding to implead it directly on the basis of a purported statement of claim in the arbitration proceedings that had been originally commenced solely between BCSPL and SPCL, i.e., respondent nos. 1 and 3 respectively, with no prior or contemporaneous invocation or commencement of arbitration viz-à-viz the appellant. According to the appellant, this approach not only contravenes the procedural mandate of the Act, 1996, more particularly, the purpose of Section 21 but also undermines the principles of natural justice and party consent, which lie at the heart of consensual arbitration.

145. The marginal note appended to Section 21 of the Act, 1996 makes it abundantly clear, that the notice to be issued thereunder is for the purpose of "*commencement of arbitration proceedings*". The substantive provision further makes it clear that, the date on which a request / notice of invocation for referring a dispute is received by the respondent, would the date on which the arbitral proceedings in respect of a particular dispute commences. The words "particular dispute" assumes significance in the interpretation of this provision and its underlying object. It indicates that the provision is concerned only with determining when arbitration is deemed to have commenced for the specific dispute mentioned in the notice. The language in which the said

provision is couched is neither prohibitive or exhaustive insofar as reference of any other disputes which although not specified in the notice of invocation yet, nonetheless falls within the scope of the arbitration agreement. The term "particular dispute", does not mean all disputes, nor does it confine the jurisdiction of the arbitral tribunal which is said to be one emanating from the 'arbitration agreement' to only those disputes mentioned in the notice of invocation, as it would tantamount to reading a restriction into the jurisdiction of the arbitral tribunal to the bounds of the notice of invocation instead of the arbitration agreement. Thus, there is no inhibition under Section 21 of the Act, 1996 for raising any other dispute or claim which is covered under the arbitration agreement in the absence of any such notice. Section 21 is procedural rather than jurisdictional — it does not serve to create or validate the arbitration agreement itself, nor is it a precondition for the existence of the tribunal's jurisdiction, but merely operates as a statutory mechanism to ascertain the date of initiation for reckoning limitation.

146. The aforesaid is further fortified from the distinct manner in which the scheme of the Act, 1996 treats and refers to a 'notice of invocation' under Section 21 and the subsequent filing of a 'statement of claim' or 'counter-claim' under the Section 23. Section 23 of the Act, 1996 reads as under: -

> ***23. Statements of claim and defence.—***
> *(1) Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the*

facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

(2) The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.

(3) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

(4) The statement of claim and defence under this section shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing of their appointment.

147. Section 23 sub-section (1) places an obligation upon the claimant to state the facts supporting his "claim", the points at issue and the relief or remedy sought by way of its statement of claim, before the arbitral tribunal. Notably, the legislature, in the first part of the said sub-section, has deliberately and consciously used the term "claim" as opposed to "particular dispute" employed in Section 21 of the Act, 1996. Although, it could said that the term "particular dispute" under Section 21 connotes a larger umbrella within which the term "claim" under Section 23 would be subsumed, thereby suggesting that there is no scope to deviate from what was sought to be referred by the

notice of invocation, we do not think so. We say so because, the requirement for providing the points at issue and the relief or remedy sought that exists in sub-section (1) of Section 23 of the Act, 1996 is patently absent in Section 21 of the Act, 1996, which clearly shows that the scope and object of these two provisions are at variance to each other. Further this, sub-section does not stipulate either explicitly or implicitly, that such "claim" must be the same or in tandem with the "particular dispute" in respect of which the notice of invocation was issued under Section 21 of the Act, 1996. This distinction in terminology is neither incidental nor redundant; rather, it reflects a conscious legislative design to demarcate the procedural objective of Section 21 from the substantive function served by Section 23. Unlike Section 23, Section 21 does not require any articulation of the relief sought or the framing of issues —its sole purpose is to indicate when arbitration is deemed to have commenced, for the limited purpose of computing the limitation period.

148. This is further fortified from the fact that nowhere does the Act, 1996 lay down any specific format or form of notice under Section 21 of the Act, 1996, or any strict requirement of the contents to be stipulated therein. This was noticed by this Court in ***Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*** reported in **(2004) 7 SCC 288**, wherein it was held that Section 21 of the Act, 1995 must be construed in tune with its analogous counter-part provisions of Article 21 of the UNCITRAL Model Law read with Article 3 of the UNCITRAL

Arbitration Rules and Section 14 of the English Arbitration Act, 1996 wherein at least the form of notice and strict adherence thereto has become redundant due to the absence of any specific form or requirement of such notice. The relevant observations read as under: -

> *"69. The UNCITRAL Model Rules of Arbitration vis-à-vis provision of Section 14 of the English Arbitration Act, 1996 must be construed having regard to the decisions of the English courts as also this Court which addressed the form of notice to be given in order to commence the arbitration for the purpose of Section 34(3) of the Limitation Act. By reason of Section 14, merely the form of notice and strict adherence thereto has become redundant, as now in terms of Section 14 of the Arbitration Act there is otherwise no specific requirement as to the form of notice subject to any contract operating in the field. (See paras 5-020, 5-027 and 5-028 of Russell on Arbitration, 22nd Edn.) Section 21 of the 1996 Act must be construed accordingly. It defines the moment of the commencement of arbitral proceedings. [...]"*

149. Similarly, sub-section (2) of Section 23, which enables the respondent to make a counter-claim or plead set-off, does not envisage any requirement that such counter-claim or set-off must be in respect of or correspond to the "particular dispute" in terms of Section 21 of the Act, 1996, thus, suggesting the legislature's intention to give a wide import to the term "claim" and by extension "counter-claim". In order to further obviate any confusion in respect of what claims can be raised, Section 23 sub-section (3) goes one step ahead and stipulates that, unless agreed otherwise by the parties, any party may amend or supplement its "claim" during the course of the arbitral proceedings, and further, that such amendment or supplement may be rejected only if the

arbitral tribunal considers it inappropriate for one and only one reason, that being, the delay in making or seeking such amendment or supplement. What can be discerned from the above is that there is no restriction whatsoever, in the plain words of Section 23 of the Act, 1996, which would be indicative of an inhibition in raising those claims or counter-claims etc., that have no bearing with the notice of invocation under Section 21 of the Act, 1996.

150. The language used in Section 23 of the Act, 1996 makes no reference whatsoever, either explicitly to the provision of Section 21 or the particular words used thereunder, that would be suggestive of any correlation between the two provisions. On the contrary, the singular ground that has been mentioned in Section 23 sub-section (3) upon which an amendment or supplement of claim may be rejected by the arbitral tribunal i.e., if it is deemed inappropriate due to delay, is a positive indicium that that no restriction can be read into the scope of claims that may be raised in the statement of claim or counter-claim beyond what was stipulated in the notice of invocation under Section 21 of the Act, 1996. Any limitation or restriction on the scope of a statement of claim or a counter-claim as the case may be, has to be understood not from the provision of Section 21 but only from the explicit language used in Section 23 of the Act, 1996.

151. Any restriction on the nature or content of claims, counter-claims, or set-offs in arbitration must be sourced solely from the express language of Section 23 and not from Section 21. Section(s) 21 and 23 of the Act, 1996 although overlap in some aspects with each other in terms of the claims that would ordinarily be referred to the tribunal more often than not tend to coincide, yet they are by no means tethered together in such a manner that neither of them can survive without one another. The latter serves only a procedural function and does not condition or limit the tribunal's jurisdiction to adjudicate claims that may not have been specifically invoked at the threshold stage. To read such a limitation into the statutory scheme would run contrary to both the text and the object of the Act.

152. In ***Milkfood*** (supra) this Court was called upon the examine the object underlying Section 21 of the Act, 1996. This Court after a comprehensive examination of a catena of decisions, both under the English Law and pertaining to the Act, 1996, held that the purpose of a notice under Section 21 of the Act, 1996 is for the applicability of the provisions of the Limitation Act, 1963 in terms of Section 43 of the Act, 1996 to the claims sought to be referred to arbitration and when can an appointment of an arbitrator be sought in terms of Section 11 of the Act, 1996. It explained that the date when arbitration proceeding commences would be relevant for the purpose of attracting the

Limitation Act, 1963 or for the purpose of time bar clauses or for the rules applicable in terms of the arbitration agreement, such as for setting into motion the conflict of laws when the proper law of the contract is one law and the law of the arbitral procedure is another. Lastly, that this "commencement of arbitration proceeding" by Section 21 of the Act, 1996 would also be relevant for of applicability of the 1940 Act having regard to Section 85(2)(a). Apart from the aforesaid, no other relevancy of Section 21 of the Act, 1996 was laid down by this Court, much less for the purposes of Section 23 thereunder. The relevant observations read as under: -

> *"26. The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21.*
>
> *29. For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. This indeed is relatable to the other purposes also, as, for example, see Section 29(2) of (English) Arbitration Act, 1950.*
>
> *30. The date when arbitration proceeding commences would depend upon various factors and the purposes which it seeks to achieve. It may be for the purpose of attracting the Limitation Act or for the purpose of time bar clauses or for the rules applicable therefor, as, for example, the rules of the International Chamber of Commerce.*
>
> *31. The date of commencement of an arbitration also affects the position under the conflict of laws when the proper law of the contract is one law and the law of the arbitral procedure is*

another, for then, up to the date of commencement of the arbitration proceeding, the law of the contract must govern, and the law of the procedure will only govern thereafter. [...]

32. Sections 14(3) and (5) of the (English) Arbitration Act, 1996 would also show that commencement of arbitral proceeding is not only for the purpose of limitation but also for the purpose of considering a case when the parties by their contract agree that the arbitration must be commenced within a specified time, failing which the right to arbitration, or indeed the claim itself, is apt to be barred. Determination of time elements in an arbitration is provided for in Section 21 of the 1996 Act clearly indicating as to when such arbitration has officially begun.

72. Keeping in view the fact that in all the decisions, referred to hereinbefore, this Court has applied the meaning given to the expression "commencement of the arbitral proceeding" as contained in Section 21 of the 1996 Act for the purpose of applicability of the 1940 Act having regard to Section 85(2)(a) thereof, we have no hesitation in holding that in this case also, service of a notice for appointment of an arbitrator would be the relevant date for the purpose of commencement of the arbitration proceeding."

(Emphasis supplied)

153. Remarkably, ***Milkfood*** (supra) observes that both under Article 21 of the UNCITRAL Model Law and by extension Section 21 of the Act, 1996, what is necessary in a notice or request under the said proiviosn, is the indication that the claimant seeks arbitration of the dispute. This Court consciously did not hold that such indication must be of what all disputes is sought to be referred to arbitration. The relevant observations read as under: -

"27. Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the 1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the

purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute."

(Emphasis supplied)

154. The aforesaid observations of ***Milkfood*** (supra) when read in conjunction with the other observations made therein, more particularly paragraph 32, shows that this Court consistently held that the purpose of Section 21 of the Act, 1996 is for the determination of various time elements in an arbitration.

155. In ***State of Goa v. Praveen Enterprises*** reported in **(2012) 12 SCC 581**, this Court elucidated the limited but important function of Section 21 of the Act, 1996. It held that, in the absence of any contrary stipulation in the arbitration agreement, the purpose of a notice under Section 21 is only to demarcate the commencement of arbitral proceedings with respect to a particular dispute. The issuance of such notice serves primarily to establish a definite point in time when the arbitral proceedings are in the eyes of law said to have commenced for the purpose of calculating and reckoning the period of limitation for the substantive claims therein. It was further held that once arbitral proceedings have commenced, the claimant is not precluded from raising additional claims that were not mentioned in the original notice of invocation under Section 21 of the Act, 1996. Such claims may be introduced for the first time in the statement of claim, without necessitating a fresh notice

of invocation. The only caveat, however, is that the limitation period for these additional claims shall be computed from the date on which they are actually raised in the proceedings. Similarly, in the case of counter-claims as-well, there is no need to establish a date of 'commencement' by issuing a notice under Section 21 of the Act, 1996, as the period of limitation would be reckoned from the date on which the counterclaim is made before the arbitrator, except where such claim was initially raised by a notice under Section 21 but subsequently raised as a counter-claim instead. The relevant observations read as under: -

> *"15. Taking a cue from the said section, the respondent submitted that arbitral proceedings can commence only in regard to a dispute in respect of which notice has been served by a claimant upon the other party, requesting such dispute to be referred to arbitration; and therefore, a counterclaim can be entertained by the arbitrator only if it has been referred to him, after a notice seeking arbitration in regard to such counterclaim. On a careful consideration we find no basis for such a contention.*
>
> *16. The purpose of Section 21 is to specify, in the absence of a provision in the arbitration agreement in that behalf, as to when an arbitral proceeding in regard to a dispute commences. This becomes relevant for the purpose of Section 43 of the Act. Sub-section (1) of Section 43 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in courts. Sub-section (2) of Section 43 provides that for the purposes of Section 43 and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21 of the Act. Having regard to Section 43 of the Act, any claim made beyond the period of limitation prescribed by the Limitation Act, 1963 will be barred by limitation and the Arbitral Tribunal will have to reject such claims as barred by limitation.*
>
> *xxx xxx xxx*

18. In regard to a claim which is sought to be enforced by filing a civil suit, the question whether the suit is within the period of limitation is decided with reference to the date of institution of the suit, that is, the date of presentation of a plaint. As the Limitation Act, 1963 is made applicable to arbitrations, there is a need to specify the date on which the arbitration is deemed to be instituted or commenced as that will decide whether the proceedings are barred by limitation or not. Section 3 of the Limitation Act, 1963 specifies the date of institution for suit, but does not specify the date of "institution" for arbitration proceedings. Section 21 of the Act supplies the omission. But for Section 21 there would be considerable confusion as to what would be the date of "institution" in regard to the arbitration proceedings. It will be possible for the respondent in an arbitration to argue that the limitation has to be calculated as on the date on which statement of claim was filed, or the date on which the arbitrator entered upon the reference, or the date on which the arbitrator was appointed by the court, or the date on which the application was filed under Section 11 of the Act. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "a request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration proceedings, relevant mainly for deciding whether the claims of the claimant are barred by limitation or not.

19. There can be claims by a claimant even without a notice seeking reference. Let us take an example where a notice is issued by a claimant raising disputes regarding Claims A and B and seeking reference thereof to arbitration. On appointment of the arbitrator, the claimant files a claim statement in regard to the said Claims A and B. Subsequently if the claimant amends the claim statement by adding Claim C [which is permitted under Section 23(3) of the Act] the additional Claim C would not be preceded by a notice seeking arbitration. The date of amendment by which Claim C was introduced, will become the relevant date for determining the limitation in regard to the said Claim C, whereas the date on which the notice seeking arbitration was served on the other party, will be the relevant date for deciding the limitation in regard to Claims A and B. Be that as it may.

20. As far as counterclaims are concerned, there is no room for ambiguity in regard to the relevant date for determining the limitation. Section 3(2)(b) of the Limitation Act, 1963 provides that in regard to a counterclaim in suits, the date on which the counterclaim is made in court shall be deemed to be the date of institution of the counterclaim. As the Limitation Act, 1963 is made applicable to arbitrations, in the case of a counterclaim by a respondent in an arbitral proceeding, the date on which the counterclaim is made before the arbitrator will be the date of "institution" insofar as counterclaim is concerned. There is, therefore, no need to provide a date of "commencement" as in the case of claims of a claimant. Section 21 of the Act is therefore not relevant for counterclaims. There is however one exception. Where the respondent against whom a claim is made, had also made a claim against the claimant and sought arbitration by serving a notice to the claimant but subsequently raises that claim as a counterclaim in the arbitration proceedings initiated by the claimant, instead of filing a separate application under Section 11 of the Act, the limitation for such counterclaim should be computed, as on the date of service of notice of such claim on the claimant and not on the date of filing of the counterclaim."

(Emphasis supplied)

156. In ***Adavya Projects*** (supra) this Court held that the purpose of a notice under Section 21 of the Act, 1996 is only to fulfilled the various time-related objects pertaining to the arbitration and the arbitration agreement. The relevant observation reads as under: -

"11. It is clear that by fixing the date of commencement of arbitral proceedings by anchoring the same to a notice invoking arbitration, Section 21 of the ACA fulfils various objects that are time-related. The receipt of such notice is determinative of the limitation period for substantive disputes as well as the Section 11 application, and also the law applicable to the arbitration proceedings."

(Emphasis supplied)

157. ***Adavya Projects*** (supra) explained the aforesaid object of a notice under Section 21 of the Act, 1996 in four parts: -

(i) **First,** that the plain language of Section 21 of the Act, 1996 does not expressly mandate the claimant to send a notice invoking arbitration to the respondents, instead what it mandates is the receipt of such notice for a 'commencement of arbitral proceedings" in terms of the Act, 1996, unless agreed otherwise. The relevant observations read as under: -

> *"9. A plain reading of the provision shows that in the absence of an agreement between the parties, arbitral proceedings are deemed to have commenced when the respondent receives a request to refer disputes to arbitration. It is clear that Section 21 does not expressly mandate the claimant to send a notice invoking arbitration to the respondents. However, the provision necessarily mandates such notice as its receipt by the respondent is required to commence arbitral proceedings, unless the parties have mutually agreed on another date/event for determining when the arbitral proceedings have commenced."*
>
> (Emphasis supplied)

(ii) **Secondly,** placing reliance on ***Milkfood*** (supra) it held that the date of receipt of the Section 21 notice is also used to determine whether a dispute has been raised within the limitation period as specified in the Schedule to the Limitation Act, 1963. The relevant observations read as under: -

> *"10.1 First, the notice is necessary to determine whether claims are within the period of limitation or are time-barred. Section 43(1) of the ACA stipulates that the Limitation Act, 1963 shall apply to arbitrations as it applies*

to court proceedings. Further, Section 43(2) provides that for the purpose of the Limitation Act, an arbitration shall be deemed to have commenced on the date referred to in Section 21. Hence, the date of receipt of the Section 21 notice is used to determine whether a dispute has been raised within the limitation period as specified in the Schedule to the Limitation Act, as held by this Court in Milkfood Ltd. v. GMC Ice Cream (P) Ltd.5 and State of Goa v. Praveen Enterprises."

(Emphasis supplied)

(iii) **Thirdly,** that as held in ***Milkfood*** (supra) the date of receipt of such notice is also relevant for determining either (1) when the *lex-arbitri* or the law governing the arbitration agreement would apply or (2) for ascertaining the applicability of Arbitration Act, 1940 and Foreign Awards (Recognition and Enforcement) Act, 1961 to arbitral proceedings commenced prior to the Act, 1996 in terms of Section 85(2)(a) thereunder. The relevant observations read as under: -

"10.2 Second, the date of receipt of notice is also relevant to determine the applicable law to the arbitral proceedings. This can be understood in two senses: (i) When the arbitral proceedings are governed by a law that is different from the proper law of the contract, the governing law applies only after the arbitral proceedings have commenced, as held in Milkfood Ltd (supra). And, (ii) Section 85(2)(a) of the ACA provides that the Arbitration Act, 1940 and Foreign Awards (Recognition and Enforcement) Act, 1961 will apply to arbitral proceedings that commenced prior to the ACA coming into force, unless otherwise agreed by the parties. Hence, the date of invoking arbitration is necessary to determine which arbitration law applies to the proceedings as per the decisions in Milkfood Ltd (supra) and Geo-Miller & Co (P) Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd. Similarly, the applicability of amendments to the ACA to arbitral proceedings is determined by reference

to the date on which such proceedings commenced as per Section 21."

(Emphasis supplied)

(iv) **Fourthly,** in terms of ***Nortel Networks*** (supra), it is also relevant for determining the 'failure' on part of any party to the arbitration agreement in appointment of an arbitrator to avail the remedy under Section 11 of the Act, 1996 and for the purpose of reckoning the limitation period for filing an application thereunder for seeking appointment of the arbitration through a referral court. The relevant observations read as under: -

> *"10.3 Third, an application before the High Court or this Court under Section 11(6) of the ACA for appointment of arbitrator can be filed only after the respondent has failed to act as per the appointment procedure in the arbitration agreement. Hence, invocation of arbitration as provided in Section 21, and the subsequent failure of the respondent to appoint its arbitrator or agree to the appointment of a sole arbitrator as provided in Sections 11(4) and 11(5), are necessary for invoking the court's jurisdiction under Section 11. This is as per the decision of this Court in BSNL v. Nortel Networks (India) (P) Ltd. Further, the limitation period within which the Section 11 application must be filed is also calculated with reference to the date on which the appointment procedure under the arbitration agreement fails."*
>
> (Emphasis supplied)

158. ***Adavya Projects*** (supra) placing reliance on ***Praveen Enterprises*** (supra) further held that there is nothing in the wording of the provision or the scheme of the Act, 1996 that would indicate that a party to an arbitration agreement – signatory or non-signatory – cannot be impleaded to the arbitral proceedings, merely because no notice under Section 21 was served on them. Non-service of the notice under Section 21 and the absence of a dispute being raised against certain parties therein would not bar their impleadment into the arbitration proceedings. The relevant observations read as under: -

> *"12. [...] However, there is nothing in the wording of the provision or the scheme of the ACA to indicate that merely because such notice was not served on respondent nos. 2 and 3, they cannot be impleaded as parties to the arbitral proceedings. The relevant considerations for joining them as parties to the arbitration will be discussed at a later stage.*
>
> *13. At this point, it is important to note this Court's decision in State of Goa v. Praveen Enterprises (supra) wherein it was held that the claims and disputes raised in the notice under Section 21 do not restrict and limit the claims that can be raised before the arbitral tribunal. The consequence of not raising a claim in the notice is only that the limitation period for such claim that is raised before the arbitral tribunal for the first time will be calculated differently vis-a-vis claims raised in the notice. However, non inclusion of certain disputes in the Section 21 notice does not preclude a claimant from raising them during the arbitration, as long as they are covered under the arbitration agreement. Further, merely because a respondent did not issue a notice raising counter-claims, he is not precluded from raising the same before the arbitral tribunal, as long as such counter-claims fall within the scope of the arbitration agreement.*
>
> *14. A similar rationale may be adopted in this case as well, especially considering the clear purpose served by a Section 21 notice. Extending this logic, non-service of the notice under Section 21 and the absence of disputes being raised against*

respondent nos. 2 and 3 in the appellant's notice dated 17.11.2020 do not automatically bar their impleadment as parties to the arbitration proceedings.

xxx *xxx* *xxx*

21. [...] it is clear that not being served with a Section 21 notice and not being made a party in the Section 11 application are not sufficient grounds to hold that a person cannot be made party to arbitral proceedings."

(Emphasis supplied)

159. It is noteworthy to mention that ***Adavya Projects*** (supra) acknowledge that although the decision of the Delhi High Court in ***Alupro Building Systems Pvt Ltd. v. Ozone Overseas Pvt Ltd*** reported in **2017 SCC OnLine Del 7228**, is correct insofar as it hold that some the functions that a notice under Section 21 of the Act, 1996 serves *inter-alia* includes **(i)** informing the other party as to the claims, which will enable them to accept or dispute the claims; **(ii)** enabling the other party to point out if certain claims are time barred, barred by law, or untenable, or if there are counter-claims; **(iii)** for arriving at a consensus for appointment of arbitrators under the arbitration agreement; **(iv)** for proposing an arbitrator, to enable the other party to raise any objections/issues regarding qualification; **(v)** or for triggering the court's jurisdiction under Section 11 in case the appointment procedure fails; and **(vi)** for fixing the date of commencement of arbitration for the purpose of Section 43(1), yet the decision of ***Alupro Building Systems*** (supra) cannot be construed to have held that hat the notice under Section 21 is a mandatory

requirement before a person can be made party to arbitral proceedings. ***Adavya Projects*** (supra) held that while a notice under Section 21 is mandatory, the non-service of such notice on a party would not nullify the arbitral tribunal's jurisdiction over such party. The other purposes served by such notice as delineated by ***Alupro Building Systems*** (supra) are only incidental and secondary, and the primary purpose of such notice is only to the extent of determination of various time elements in an arbitration. The relevant observations read as under: -

> *"30. The Delhi High Court in Alupro Building Systems Pvt Ltd. v. Ozone Overseas Pvt Ltd. allowed an application under Section 34 of the ACA against an award passed by an arbitrator who was unilaterally appointed by the respondent therein, without issuing a notice to the petitioner therein under Section 21 of the ACA. The High Court proceeded to delineate the various functions served by a Section 21 notice as follows: (i) To inform the other party as to the claims, which will enable them to accept or dispute the claims; (ii) To enable the other party to point out if certain claims are time barred, barred by law, or untenable, or if there are counter-claims; (iii) For arriving at a consensus for appointment of arbitrators under the arbitration agreement; (iv) For parties to inform each other about their proposed arbitrator, to enable the other party to raise any objections/issues regarding qualification; (v) To trigger the court's jurisdiction under Section 11 in case the appointment procedure fails; and (vi) To fix the date of commencement of arbitration for the purpose of Section 43(1).*
>
> *30.1 The decision in Alupro Building Systems (supra) has been relied on by the High Court in its impugned order to hold that the notice under Section 21 is a mandatory requirement before a person can be made party to arbitral proceedings.*
>
> *30.2 While we agree with the decision insofar as holding that the notice under Section 21 is mandatory, unless the contract provides otherwise, we do not agree with the conclusion that non-service of such notice on a party nullifies the arbitral tribunal's jurisdiction*

over him. The purpose of the Section 21 notice is clear – by fixing the date of commencement of arbitration, it enables the calculation of limitation and it is a necessary precondition for filing an application under Section 11 of the ACA. The other purposes served by such notice – of informing the respondent about the claims, giving the respondent an opportunity to admit and contest claims and raise counter-claims, and to object to proposed arbitrators – are only incidental and secondary. We have already held that the contents of the notice do not restrict the claims, and any objections regarding limitation and maintainability can be raised before the arbitral tribunal, and the ACA provides mechanisms for challenging the appointment of arbitrators on various grounds. Hence, while a Section 21 notice may perform these functions, it is not the primary or only mechanism envisaged by the ACA."

(Emphasis supplied)

160. In light of the decision of this Court in ***Adavya Projects*** (supra) and a catena of other decisions as-well as the scope and object of Section 21 of the Act, 1996 in contrast to Section 23 as explained by us in the foregoing paragraphs, mere non-service of a notice of invocation on a party would not nullify the arbitral tribunal's jurisdiction over such party, and that such party can be impleaded and arrayed in the arbitration proceedings if any claim or counter-claim is made against such party by the claimant in statement of claims or counter-claims, or by even amending the memo of parties of the putative statement of claims counter-claims filed by it, provided that such party is found to be bound by the arbitration agreement either by virtue of it being a signatory, or where such party is a non-signatory, in terms of the decision of ***Cox and Kings (I)*** (supra) as explained by us.

161. In the case on hand, as mentioned earlier, the Tribunal has by way of two separate orders passed in Section 16 Applications filed by BCSPL, in the first round, and AISPL and ABPL, in the second round ruled on its jurisdiction and added AISPL and ABPL to the array of parties in the proceedings. This determination under the principle of '*kompetenz-kompetenz*' enshrined in Section 16 of the 1996 Act must be permitted to take its course, given that the arbitral proceedings are in any case nearing conclusion.

162. The High Court in its impugned judgment while upholding the Arbitrator's Orders, has rightly held that ABPL, BCSPL and AISPL 'fall under the same management, and it appears that the substitution in the contract, took place merely for convenience...'. Further, 'all the correspondence is in respect of the contract with ASF and ASF Group of Companies. There is no differentiation between BCSPL, AISPL, or ABPL, all of which are part of the ASF Group.'. In arriving at its conclusion, the High Court correctly applied the test laid down in ***Cox and Kings Ltd. (I)*** (supra), taking note of the communications exchanged, conduct of the ASF Group officials, active involvement of the appellant with contractual obligations, intertwined nature of the agreements involving BCSPL, AISPL, and ABPL and the composite business operations.

163. The conclusion reached by the Arbitral Tribunal and the High Court is premised on the following: -

(i) SPCPL had made out a case supported by material, which cannot be rejected at the preliminary stage, that AISPL and ABPL are inextricably linked to and operationally holding control over the performance of the Works Contract and Settlement Agreement which are the subject matter of the arbitral proceedings.

(ii) SPCPL had rightly invoked the doctrine of Group of Companies to justify inclusion of the non-signatories.

(iii) Having regard to the chronology of events leading to the execution of the Settlement Agreement, prima facie, both ASPL and ABPL are proper parties, if not necessary, even to the claim of BCSPL.

(iv) The High Court, in particular, noted the factor of mutual intent, the same demonstrated by AISPL and ABPL; substantial involvement in the negotiations, performance, and termination of the various contracts entered into between the parties. The continuous use of ASF insignia and the participation of ASF Group officials in correspondences indicate that all entities within the ASF Group intended to be bound by the same arbitration agreement.

(v) AISPL and ABPL, as subsidiaries within the ASF Group, have a direct relationship with BCSPL. They all have common directors, if not the same directors. Their interconnected roles in the Black Canyon project,

as evidenced by their involvement in securing demobilization by SPCPL and other contractual obligations, highlight this relationship.

(vi) The Works Contract, the Novation Agreement, the Settlement Agreement, and the Comfort Letter all pertain to the same redevelopment project of the Black Canyon project. The shared subject matter across these agreements establishes a 'commonality' that justifies the inclusion of AISPL and ABPL in the arbitration proceedings. Further, the various transactions entered into the between the parties must form a cohesive whole, indicating that they cannot be viewed in isolation. The intertwined nature of the agreements involving BCSPL, AISPL, and ABPL demonstrates that these transactions form a composite whole. The responsibilities across the ASF Group entities reflect a composite business operation.

164. The judicial trend is that all issues should be before the Arbitral Tribunal and the power under Section 11 sub-section (6A) is restricted to examination of the existence of an arbitration agreement. The concept of a 'reference' as it existed under the Arbitration Act, 1940 does not find itself in the 1996 Act. Once the Arbitral Tribunal stands appointed, all disputes and issues are to be decided by it as a 'one-stop forum' for adjudication. [See: ***Gammon India Ltd. v. NHAI,*** reported in **2020 SCC OnLine Del 659**]

165. As aforementioned, Section 7(4)(b) of the Act, 1996 provides that an Arbitration Agreement may be contained in exchange of telecommunication, such as emails, which provide a record of the principal agreement. Emails have been exchanged between SPCPL and ASF Group as a whole, where admission of liability on the part of ASF Group to make payment under the Settlement Agreement stands established. Clause 12 of the Settlement Agreement makes the dispute resolution clause of the Works Contract applicable in the present case.

166. In ***Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.***, reported in **(2015) 13 SCC 477**, this Court has held that signature is not a formal requirement under Section 7(4)(b) or 7(4)(c) or under Section 7(5) of the 1996 Act. This position is further supported by the definition of a 'party' in Section 2(h) of the 1996 Act to include a 'party to an arbitration agreement' and not a signatory to an arbitration agreement. Section 7 of the 1996 Act also does not stipulate a qualification that a party must be a signatory to the arbitration agreement or the principal agreement containing the arbitration clause. This was also reiterated in ***Cox and Kings Ltd. (I)*** (supra).

167. Even the non-issuance of Section 21 notice on the appellant cannot be said to be fatal to its impleadment. The principle of consensus *ad idem* for referring disputes to arbitral tribunals applies to the signatories to the arbitration agreement and not non-signatories who are sought to be impleaded.

168. The decision of this Court in ***Praveen Enterprises*** (supra), , on which strong reliance has been placed on behalf of the ABPL, as already discussed, is contrary to their contention and rather fortifies SPCPL's argument in this regard, where this Court held that a notice under Section 21 of the 1996 Act is not relevant for counterclaims.

169. We have looked into the other decisions also relied upon by Mr. Kamat in support of his submissions, however, they are of no avail to the appellant.

D. CONCLUSION

170. Before we close this matter, we would like to say something as regards the litigation which has unfolded before us. The Arbitration Act was the first legislative enactment that dealt with arbitration that came into force in 1940. Fifty years, later, the aforesaid legislation was replaced by the Arbitration and Conciliation Act, 1996. It has been almost, thirty-years, since the Act, 1996 has remained in force. Various amendments to the Act, 1996 have been made over the years so as to ensure that arbitration proceedings are conducted and concluded expeditiously. It is indeed very sad to note that even after these many years, procedural issues such as the one involved in the case at hand, have continued to plaque the arbitration regime of India. The Department of Legal Affairs has now, once again proposed to replace the existing legislation

on arbitration with the Arbitration and Conciliation Bill, 2024. Unfortunately, even the new Bill has taken no steps whatsoever, for ameliorating the position of law as regards the power of impleadment or joinder of an arbitral tribunal. What is expressly missing in the Act, 1996 is still missing in the Arbitration and Conciliation Bill, 2024, despite a catena of decisions of this Court as-well as the various High Courts, highlighting the need for statutory recognition of such power in order to obviate all possibilities of confusion. As observed in ***Gayatri Balasamy*** (supra), any uncertainty in the law of arbitration would be an anathema to business and commerce. We urge, the Department of Legal Affairs, Ministry of Law and Justice to take a serious look at the arbitration regime that is prevailing in India and bring about necessary changes while the Arbitration and Conciliation Bill, 2024 is still being considered.

171. In the overall view of the matter, we are convinced that no error, not to speak of any error of law, could be said to have been committed by the High Court in passing the impugned judgment and order.

172. All other legal contentions available to the parties are kept open to be canvassed before the Arbitral Tribunal.

173. For all the foregoing reasons, this appeal fails and is hereby dismissed.

174. Pending application, if any, also stands disposed of accordingly.

175. The Registry shall forward one copy each of this judgment to all the High Courts across the country and the Principal Secretary, Ministry of Law & Justice.

.....J.
(J.B. Pardiwala)

.....J.
(R. Mahadevan)

New Delhi;
02nd May, 2025