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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION (L) NO. 15700 OF 2026

Mr. Palwinder Singh Samra

Aged: 55 years
2501, A-Wing Bhumiraj Hermitage,
Sector 18, Sanpada, Navi Mumbai,
Maharashtra – 400705. **...Applicant**

Versus

Mr. Sukhvinder Singh Samra

Aged: 45 years
2502/2503, A-Wing Bhumiraj Hermitage
Sector 18, Sanpada, Navi Mumbai,
Maharashtra – 400705. **...Respondent**

Mr. Rohaan Cama *a/w Mr. Siddharth Samantrai and Mr. Mohit Mokal i/b Abheek Melwani, for the Applicant.*

Mr. Mayur Khandeparkar *a/w Mr. Vatsal Gosalia, Mr. Devansh Shah, Mr. Chandresh Rao and Mr. Aakash Naik, for the Respondent.*

CORAM : ARUN R. PEDNEKER, J.
RESERVED ON : 29th JUNE 2026
PRONOUNCED ON : 02nd JULY 2026

JUDGMENT:-

1. Heard Mr. Rohaan Cama, learned counsel for the Applicant and Mr. Mayur Khandeparkar, learned counsel for the Respondent.

2. The present Application is filed under Section 11 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), seeking appointment of an Arbitral Tribunal, as the parties have failed to collectively appoint an Arbitral Tribunal. It is stated that as per Family Settlement Deed dated 15th November 2017, the dispute arising therein has to be settled by the provisions of Clause 15 thereof, which provides for arbitration. Clause 15 of the Family Settlement Deed dated 15th November 2017 is reproduced below for ready reference:

> *"15. All disputes, differences and questions whatsoever which shall arise either during the continuance of this Agreement or afterwards between the parties hereto or touching these presents or the construction of application thereof or as to any act, deed or omission of any of the parties hereto in any way relating to these presents in implementation thereof shall be referred to a sole arbitrator in case the parties to the dispute agree upon one or otherwise to two arbitrators and to an umpire to be appointed by such arbitrators before entering upon the reference and such arbitration shall be held in accordance with the Arbitration and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force. The entire Arbitration proceedings shall be held, conducted and proceeded in the Navi Mumbai only."*

3. It is stated that the Applicant and Respondent are real brothers and were carrying joint partnership businesses. Thereafter, on account of disputes, parties desired to separate their partnership businesses and decided to distribute their properties. For that purpose, they executed the Family Settlement Deed dated 15th November 2017, which provided for resolution of disputes by Arbitrator. The disputes could not

be resolved. As such, notice under Section 21 of the Arbitration Act was issued on 28th January 2026, invoking the Clause 15 of the Family Settlement Deed dated 15th November 2017. Since there was no concurrence on appointment of an Arbitrator, the present Application for appointment of Arbitrator is filed.

4. Mr. Rohaan Cama, the learned counsel for the Applicant, has taken me through Clause 15 of the Memorandum of Understanding of 2017 ("MoU of 2017"), prima facie, showing the existence of the arbitration clause so also the invocation notice and submits that the Sole Arbitrator be appointed.

5. Per contra, Mr. Mayur Khandeparkar, the learned counsel for the Respondent, has objected the appointment of the Arbitrator on the following grounds:

(i) The Application under Section 11 is barred by limitation, as the claim made therein is a stale claim.

As regards limitation, it is submitted that the stipulated transfer as claimed in the invocation notice was to take place on 9th February 2018. However, neither party took steps in terms of Clause 5 as the MoU of 2017 and thus, the notice invoking arbitration dated 28th January 2026 is ex facie barred by limitation.

It is also stated that the Applicant has filed Civil Suit No. 2335 of 2022 before the Civil Judge, Junior Division Amritsar,

Punjab against the Respondent and the third party purchaser in respect of the subject property wherein, the Applicant claimed therein that the Respondent had only 50% share in the subject property and that the Respondent could not transfer the same to the third party. It is submitted that the Suit is filed on 29th July 2022 and the notice invoking arbitration under Section 21 is dated 28th January 2026 and thus is beyond three years and barred by limitation.

(ii) There is abandonment of the MoU of 2017 and the arbitration clause therein for the following reasons:

The Applicant, having filed the aforesaid Civil Suit in respect of the same subject matter, has abandoned the arbitration remedy in the MoU of 2017. It is also submitted that in terms of the High Court (Original Side) Rules, proceedings can also be filed under the Arbitration and Conciliation Act for relief against the third parties. It is further submitted that the afore-noted Civil Suit No.2355 of 2022 was withdrawn, in view of the statement made by the Respondent that the Respondent would not alienate specific portion of the subject property. He submits that once the Suit is withdrawn without liberty to file an arbitration application, subsequent arbitration application under Section 11 would be barred under Order XXIII, Rule 1 of the Code of Civil Procedure.

It is also stated that the Applicant has also filed an application

under Section 111 of the Punjab Land Revenue Code before the Tahsildar, Dist. Amritsar, for partition of its 50% undivided share in the subject property by meets and bound, which runs counter to the claim in arbitration application.

6. It is also submitted that the agreement was destroyed and there are witnesses to that effect. As such, the arbitration agreement was abandoned and once there is a specific stand taken by the Respondent that the arbitration agreement is destroyed and does not exist, it was obligatory on the part of the Applicant to produce the original MoU of 2017 or the certified copy in terms of Rule 8.3.3 of the High Court (Original Side) Rules. In the instant case, neither the original MoU of 2017 nor its duly certified copy is provided. As such, in absence of the original document or its certified copy, this Court cannot render a finding on the existence of the MoU of 2017 and an arbitration clause therein and as such, the Application be dismissed.

7. The learned counsel for the Respondent relies upon the following judgment/orders:

i) **Rajiv Gaddh Vs. Subodh Parkash.**[1]

ii) **Elfit Arabia and Anr. Vs. Concept Hotel Barons Ltd. and Ors.**[2]

iii) **Food Corporation of India Vs. Sreekanth Transport.**[3]

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1 2026 SCC Online SC 507

2 2024 SCC Online SC 1739

3 (1999) 4 SCC 491

iv) **Bharti Televentures Ltd. Vs. DSS Enterprises Pvt. Ltd. and Ors.**[4]

v) **Krishna Sarma Vs. Ramesh Kumar Joshi and Ors.**[5]

vi) **Beena Thomas W/o Saji Mathew, Vadakkedathu House, Thudangadu P.O., Muttam Vs. Smitha Jody.**[6]

vii) **E. D. Enterprises Pvt. Ltd. Vs. Kalser Begum and Anr.**[7]

8. In response to the submissions made by the Respondent objecting to the arbitration application, Mr. Cama submits that the role of this Court is limited to ascertain the existence of the arbitration clause in the agreement. He also submits that the arbitration agreement is not disputed by the Respondent in the response to the notice under Section 21 of the Arbitration Act and the original MoU of 2017 is not with the Applicant. Once the agreement itself is not disputed and only the subsequent conduct of destruction of the agreement is put up as a defence, the same has to be adjudicated by the Arbitral Tribunal and not by this Court. He further submits that even as regards the limitation in filing the application under Section 11 is concerned, the learned counsel submits that it has to be adjudicated by the Arbitral Tribunal in terms of the law laid down in **SBI General Insurance Company Ltd. Vs. Krish Spinning.**[8] He submits that the law in **In Re:**

4 2005 SCC Online Del 862

5 2006 SCC OnLine AP 173

6 2018 SCC OnLine Ker 1631

7 2022 SCC OnLine Cal 4428

8 (2024) 12 SCC1

Interplay Between Arbitration Agreement under The Arbitration and Conciliation Act, 1996 and The Indian Stamp Act, 1899[9], the Seven Judges Bench of the Supreme Court has held that in exercise of power under Section 11, this Court has to only look at the existence of the arbitration agreement and leave everything else to the determination of the arbitral tribunal.

9. In support of his submissions, he relies upon the following judgments/Orders:

(i) **In Re: Interplay between Arbitration Agreements under The Arbitration and Conciliation Act 1996 and The Indian Stamp Act 1899**. (supra)

(ii) **SBI General Insurance Company Ltd.** (supra)

(iii) **Rajuram Sawaji Purohit Vs. The Shandar Interior Private Limited.**[10]

(iv) **Tata Capital Ltd. Vs. Priyanka Communications**.[11]

(v) **Priyanka Communications Vs. Tata Capital.**[12]

(vi) **Sukanya Holdings (P) Ltd. Vs. Jayesh H. Pandya.**[13]

(vii) **Motilal Oswal Financial Services Ltd. Vs. Santosh Cordeiro.**[14]

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9 (2024) 6 SCC 1

10 2025 SCC OnLine Bom 3906

11 2024 SCC OnLine Bom 3306

12 Supreme Court order dt 13/5/2025 in SLP no. 27566 of 2024

13 (2003) 5 SCC 531

14 2026 SCC OnLine SC 6

(viii) **Aditya Birla Finance Ltd. Vs. Paul Packaging Pvt. Ltd.**[15]

(ix) **HPCL Bio-Fuels Vs. Shahaji Bhad.**[16]

Analysis:

10. The scope of judiciary interference under the 1996 Act has undergone a significant change after the judgment of the Supreme Court in the case of **Interplay** (supra) and it has been explained further by a Three Judge Bench Judgment in the case of **SBI General Insurance Company Ltd.** (supra). The relevant paragraphs of the judgment in **SBI General Insurance Company Ltd.** (supra) dealing with the scope of enquiry including on an issue of limiation in an application under Section 11 is noted as under:

> *"113. 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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> *117. In view of the observations made by this Court in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re, 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 and adopted in NTPC Ltd. v. SPML Infra Ltd.*

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15 2024 SCC OnLine Bom 3682

16 2024 SCC OnLine SC 3190

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 Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re.

131. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the 1996 Act. Further, we also held that it is the duty of the Referral Court to examine that the application under Section 11(6) of the 1996 Act is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963 i.e. 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in para 57 of the said decision that: (Arif Azim case , SCC p. 340)

130. In Arif Azim, while deciding an application for appointment of arbitrator under Section 11(6) of the 1996 Act, two issues had arisen for our consideration:

130.1. (i) Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the petition filed by M/s Arif Azim was barred by limitation?

130.2. (ii) Whether the Court may decline to make a reference under Section 11 of the 1996 Act where the claims are ex facie and hopelessly time-barred?

131. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the 1996 Act. Further, we also held that it is the duty of the Referral Court to examine that the application under Section 11(6) of the 1996 Act is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963 i.e. 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to

when the right to apply would accrue, we had observed in para 57 of the said decision that: (Arif Azim case, SCC p. 340)

> *"57. the limitation period for filing a petition under Section 11 (6) of the 1996 Act can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on the part of that other party in complying with the requirements mentioned in such notice."*

132. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim do not require any clarification and should be construed as explained therein.

133. On the second issue it was observed by us in para 68 of Arif Azim case that the Referral Courts, while exercising their powers under Section 11 of the 1996 Act, are under a duty to "prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process".

134. Our findings on both the aforesaid issues have been summarised in para 92 of the said decision thus: (Arif Azim case, SCC p. 357)

> *"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the courts should satisfy themselves on two aspects by employing a two-pronged test first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an Arbitral Tribunal."*

135. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the

observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia and NTPC Ltd. v. SPML Infra Ltd. However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re.

136. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the 1996 Act, 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. 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 Interplay Between Arbitration Agreements under the Arbitration Act, 1996 & the Stamp Act, 1899, In re"

11. The Supreme Court in the case of **Interplay** (supra) has held that the scope of enquiry at the stage of appointment of Arbitrator is limited to scrutiny of prima facie existence of the arbitration agreement and nothing else. Thus, in **SBI General Insurance Company Ltd.** (supra), the Supreme Court held that the observations in the case **Vidya Drolia Vs. Durga Trading**

Corpn.[17] and adopted in **NTPC Ltd. v. SPML Infra Ltd.**[18] 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 not continue to apply despite the subsequent decision. Tests like "eye of the needle" and "ex facie meritless", although try to minimise the extent of judicial interference, yet the Referral Court to examine contested facts and appreciate prima facie evidence (however limited the scope of enquiry may be) and thus are not in conformity with the principles of modern arbitration which place autonomy and judicial non-interference on the highest pedestal.

12. The Supreme Court while considering the issue of limitation in **SBI General Insurance Company Ltd.** (supra) has clarified that 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 Co. LTD Vs. Aptech Ltd.**[19] In **Arif Azim** (supra), the date of commencement of limitation period for filing a petition under Section 11(6) of the 1996 Act can only commence once a valid notice invoking arbitration has been sent by the

17 (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549

18 (2023) 9 SCC 385 : (2023) 4 SCC (Civ) 342

19 (2024) 5 SCC 313 : (2024) 3 SCC (Civ) 358 : 2024 INSC 155

Applicant to the other party and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice. Thus, the Supreme Court has observed that only the limitation period in filing application under Section 11(6) can be examined by the Referral Court in an application under Section 11 i.e. from the date of notice under Section 21 till the filing of the application. As regard the claim in the arbitration application is concerned, the observations in **Vidya Drolia** (supra) and **NTPC Ltd.** (supra) for weeding out non-arbitrable and frivolous dispute and for that purpose deciding whether an ex facie claim is barred by limitation is not available to the Referral Court under Section 11 of the Arbitration Act.

13. Thus, the issue of limitation as regards the claim made in the arbitration is concerned, the same cannot be inquired into by the Referral Court while considering the application under Section 11(6). Limitation period for claim made under arbitration stops on service of notice under Section 21 of the Act on the Respondent. Section 11 application is required to be filed within 3 years of process under section 21. The reference court can only examine limitation for filing application under section 11(6) as within of three years from the serivce of notice under section 21. The arbitral claim being ex-facie barred by limitation cannot be examined by the reference court.

14. Coming to the next issue raised that the MoU of 2017 along with the arbitral clause therein stands abandoned by the filing of the Civil Suit on the same subject matter for which relief could be obtained in the arbitral proceedings and that the application under Section 11(6) of the Arbitration Act is also barred in view of the withdrawal of the Suit without liberty to file the Section 11 application. In the case of **Interplay** (supra), the Seven-Judge Bench of the Supreme Court examined the scope of enquiry of the Referral Courts under Section 11(6) of the Arbitration Act at paragraph nos. 156, 158, 165, 166, 219 and 220 has observed as under:

> *"156. The effect and impact of the 2015 Amendment Act was subsequently clarified by this Court. In Duro Felguera, S.A. v. Gangavaram Port Ltd., Kurien Joseph, J. noted that the intention of the legislature in incorporating Section 11(6-A) was to limit the scope of the Referral Court's jurisdiction to only one aspect - the existence of an arbitration agreement. To determine the existence of an arbitration agreement, the Court only needs to examine whether the underlying contract contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. This Court further held that Section 11(6-A) incorporates the principle of minimal judicial intervention: (SCC p. 765, para 59)*
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> > *"59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. and Boghara Polyfab. This position continued till the amendment brought about in 2015. After the amendment, all that the Courts need to see is whether an arbitration agreement exists-nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of*

appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

158. In Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman, a three-Judge Bench of this Court affirmed the reasoning in Duro Felguera by observing that the examination under Section 11(6-A) is "confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense". Moreover, it held that the position of law prior to the 2015 Amendment Act, as set forth by the decisions of this Court in Patel Engg. and Boghara Polyfab, has been legislatively overruled. Thus, this Court gave effect to the intention of the legislature in minimising the role of the Courts at the pre-arbitral stage to the bare minimum.

165. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera, this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement - whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia in the context of Section 8 and Section 11 of the Arbitration Act.

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

219. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:

> *"6. (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days.*
>
> *(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."*

220. 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 agreement and not other issues". These other issues not 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 time-bound process, and therefore does not align with the stated

goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. Therefore, even though the Law Commission of India Report or the Statement of Objects and Reasons of the 2015 Amendment Act do not specifically refer to SMS Tea Estates, it nevertheless does not make any difference to the position of law as has been set out above."

15. The Seven-Judge Bench in the case of **Interplay** (supra) has observed that Section 11(6) had a long chequered history and that in **Vidya Drolia** (supra), it is noted that Section 11 has undergone another amendment vide Act 33 of 2019 with effect from 9-8-2019. However, **Vidya Drolia** (supra) proceeded on the presumption that Section 11(6-A) was effectively omitted from the statute books by the 2019 Amendment Act. The Supreme Court in the Seven-Judge Bench in **Interplay** (supra) observed that **Vidya Drolia** (supra) is erroneous because the omission of Section 11(6-A) has not been notified and, therefore, the said provision continues to remain in full force.

16. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the examination of the existence of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral courts under the said provisions is

intended to be different. Thus, 2015 Amendment Act has legislatively overruled the dictum of **SBP and Co. Vs. Patel Engg. Ltd.,**[20] wherein it was held that Sections 8 and 11 are complementary in nature. The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In **Duro Felguera, S. A. Vs. Gangavaram Port Ltd.,**[21] the Supreme Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement – whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7.

17. The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. For the doctrine of competence-competence, only

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20 (2005) 8 SCC 618

21 (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764

prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The scope of interference by the Court in proceedings under Section 11 prior to the judgment of **Interplay** (supra) was relatively wide. However, the judgment of the Supreme Court in **Interplay** (supra) has narrowed it down.

18. Following the judgments of the Supreme Court, this Court in the case of **Tata Capital Ltd.** (supra) has observed that the objections raised by the Respondents, (i) that the disputes raised by the Applicant are not non-arbitrable as they are barred by the provisions of the SARFAESI Act and the RDDB Act, (ii) that the Applicant had waived its right to arbitration by filing a Summary Suit in this Court and (iii) that allowing of this application would lead to multiplicity of proceedings, are not objections regarding the existence of an arbitration agreement, on the basis of Section 7 of the Act nor are they objections regarding the validity of the arbitration agreement. In view of Section 7 of the Act, objections as to validity should be restricted to the requirements of formal validity such as the requirement that the agreement be in writing.

19. Considering the judgment of **Interplay** (supra) and **Tata Capital Ltd.** (supra), this Court finds it difficult to enter into the question of abandonment of the arbitration clause based on the objection taken by the Respondent that the Applicant had filed a Civil Suit against the Respondent and another third party and the same amounts to waiver of the arbitration clause. This enquiry could travel beyond the power of the Reference Court under Section 11 as has been held in **Interplay** (supra).

19-A: There is no dispute raised about the existence of arbitral clause in MoU of 2017, the objection is raised that the document i.e. MoU of 2017 was destroyed in presence of witness, indicating that the MoU of 2017 along with its arbitral clause is not acted upon. However, once the MoU of 2017 with its arbitral clause is admitted, the destruction thereof is matter for the arbitral tribunal to be decided on evidence.

20. As regard the reliance made in the judgment of **Rajiv Gaddh** (supre), the Supreme Court therein observed that the jurisdiction under Section 11 of the Act is primarily confined to determining existence of an arbitration agreement. The issue of *res judicate* does not arise in a proceeding under Section 11 proceedings. Order 23 Rule 1 of the Code provides that if the plaintiff either abandons the Suit or part of the claim or withdraws the same without leave of the Court, then

he is precluded from instituting a fresh Suit in respect of such subject matter or such part of the claim. The plaintiff on abandoning a suit or part of the claim or withdrawing the same without leave of the court, also becomes liable to pay such costs. It is observed that the Supreme Court in **HPCL Bio-Fuels Ltd.,** (supra) dealt with the issue, whether a fresh application under Section 11(6) of the Act would be maintainable, when no liberty to file a fresh application was granted at the time of withdrawal of the first application under Section 11(6) of the Act and has observed that the principles of Order 23 Rule 1 of the Code prohibiting the institution of fresh proceeding on the same cause of action without seeking leave of the court to file a fresh application, would apply to proceeding under Section 11(6) of the Act. It further held that in the absence of any liberty at the time of withdrawal of the first application, the fresh application under Section 11 of the Act is not maintainable.

21. The law in the case of **Rajiv Gaddh** (supra) relates to filing of a subsequent Section 11 application, when the first application under Section 11 is withdrawn without liberty to file a fresh application and it does not deal with a situation of withdrawal of the Suit and subsequent filing of application under Section 11 of the 1996 Act. The judgment in the case of **Rajiv Gaddh** (supra), has no application to the facts of the

present case. This issue can also be raised before the arbitral tribunal, for determination.

22. Considering the same, this Court would allow the present Arbitration Application and pass the following order:

O R D E R

(A) **Mr. Aseem Naphade**, an Advocate of this Court is appointed as the sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above. The contact details of the Arbitrator are as under :-

Address	:	Office No.302, 3rd Floor, Vardhaman Chambers, Cawasji Patel Street, Fort, Mumbai – 400001.
Mobile No.	:	9920030695
Email ID	:	aseem1112@gmail.com

(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Applicant within a period of 1 week from the date of uploading of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this order.

(C) Seat of the arbitration would be governed by the provisions of the agreement executed between the parties.

(D) Learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the Advocates for the Applicant so as to enable them to file the same in the Registry of this Court. The Registry of this Court shall retain the said Statement on the file of this Application and a copy of the same shall be furnished by the Advocates for the Applicant to the Respondent.

(E) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by him, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers, if any, of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall

constitute valid service of correspondence in connection with the arbitration.

(F) All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

23. All contentions of the parties are expressly kept open to be raised before the Arbitrator.

24. With the above directions, the Arbitration Application stands disposed of accordingly.

(ARUN R. PEDNEKER, J.)