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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./20/2025

M/S HCC-DSD-VNR CONSORTIUM
CONSORTIUM OF HINDUSTAN CONSTRUCTION COMPANY (HCC), M/S
DSD BRUNCKENBAU GMBH (DSD) AND VNR INFRASTRUCTURES
LIMITED HAVING ITS OFFICE SITUATED AT HINCON HOUSE, LBS MARG,
VIKHROLI, (WEST) MUMBAI, 400083 AND IS REPRESENTED BY PROJECT
MANAGER, BOGIBEEL RAIL-CUM-ROAD BRIDGE PROJECT, NAMELY SHRI
RAKESH KUMAR SINGH, AGED ABOUT 55 YEARS, S/O SHRI RANG
BAHADUR SINGH, R/O C-504, LOKHRA SUBHAM GREEN, GUWAHATI-
781034

VERSUS

NORTHEAST FRONTIER RAILWAY AND 2 ORS.
REPRESENTED BY THE GENERAL MANAGER, (CONSTRUCTION), NORTH-
EAST FRONTIER RAILWAY, MALIGAON, GUWAHATI- 11

2:THE CHIEF ADMINISTRATIVE OFFICER (CONSTRUCTION)
NORTH-EAST FRONTIER RAILWAY
MALIGAON
GUWAHATI- 11.

3:THE DEPUTY CHIEF ENGINEER
CONSTRUCTION/TUNNEL
NORTH-EAST FRONTIER RAILWAY
MALIGAON
GUWAHATI- 11

Advocate for the Petitioner : MR. A K SAHEWALLA, MR P GOGOI,MR. W SHARMA

Advocate for the Respondent : DY.S.G.I., MR H GUPTA (C.G.C),MR G GOSWAMI,ASSTT.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

27.01.2026

Heard Mr. Jyotirmoy Roy, learned Senior Advocate assisted by Mr. A.K. Sahewalla, learned counsel for the petitioner. Also Heard Mr. G. Goswami, learned Standing Counsel, Railway for the Respondents.

2. This is an application filed by the petitioner under Section 11(6) of the Arbitration and Conciliations Act 1966, for appointment of an arbitrator. The petitioner is a consortium of Hindustan Construction Company Limited (HCC), M/s DSD Brunckenbau Gmbh (DSD) & VNR Infrastructure Limited. The petitioner on the basis of Memorandum of Understanding dated 10.06.2009 executed by and between the said companies for the purposes of submitting bid proposal for the project work under the Respondent Railways for "*construction of composite welded steel truss girders having a span of 34 x 125m + 2 x 32.6m for the superstructure of Bogibeel Rail-cum-Road Bridge over the river Brahmaputra near Dibrugarh, Assam in India*". In pursuance of the bids submitted by the petitioner, the respondent NF Railway awarded a contract on 28th of February, 2012 for "*construction of composite welded steel truss girders having a span of 34 x 125m + 2 x 32.6m for the superstructure of Bogibeel Rail-cum-Road Bridge over the river Brahmaputra near Dibrugarh, Assam in India*". Pursuant to the award of tender and agreement of works has executed by and between the petitioner and the NF Railways for execution of work at the total cost of Rs. 987,19,63, 637.85/- (Rupees Nine Hundred and Eighty Seven Crore, Nineteen Lakhs, Sixty-three Thousand, Six Hundred and Thirty-Seven and eighty-five paisa only) after depositing of Rs. 1 Crore towards earnest money

and Rs. 49,35,98,182 (Fourty-Nine Crore, Thirty-Five lakh, Ninety-eight thousand, one hundred and eighty-two) was also deposited as performance guarantee in respect of said contract agreement. The respondent authority also issued a letter of award to the petitioner instructing the petitioner to commence the work and accordingly the work was commenced with effect from 23.11.2011. As per the tender conditions, the allotted works should be completed within 48 months, and therefore, the date of completion stipulated for the contract work was 22.11.2015.

3. It is the case projected by the petitioner that since the inception, the execution of the work was delayed due to number of unavoidable events which will be on the control of the petitioner and which also cannot be attributable to the petitioner. Such delay had eventually led to the slippage and disruption in the planned progress of the work thereby causing delays in completion of the works. In view of the delay that had occurred for reasons beyond the control of the petitioner, the petitioner in terms of the special clauses of the contract as also the general clauses of the contract submitted interim applications seeking extension of time to enable the petitioner to complete the said works. The respondent NF Railways, upon due considerations of these application, granted extension of time for completion of the works as per the terms of the contract. Because of the delay which had occurred besides the actual entitlement of the petitioner in terms of the contract, the petitioner incurred additional costs amounting to Rs. 6988.76 lakhs pertaining to the period of 01.04.2019 to 31.07.2020 in respect of Claim No. 6 and further amount of Rs. 4998.08 Lakhs pertaining to the period of 01.08.2020 to 07.10.2021 in respect of the Claim No. 7. These additional claims were not honoured by the respondent authorities, and accordingly the same was construed to be disputed under Clause 64 of the

General Condition of Contract (hereinafter referred to as "GCC") and the same were liable to be referred to arbitration for resolution of the dispute. The petitioner Vide Communication dated 02.02.2024 raised these disputes and claimed the additional costs as mentioned therein as Claim No. 6 & 7.

4. It is the case projected by the petitioner that as per Clause 64 of the GCC, in the event of any disputes arising by and between the petitioner and the respondent and which requires resolution through arbitration, the provisions of Section 64 are required to be followed.

In terms of Clause 64 (3)(a)(i) where the total value of all the claims in question doesn't exceed Rs. 10 lakhs. The Arbitral Tribunal consists of a sole arbitrator, who shall be gazetted officer of the Railways not below the JA grade, nominated by the General Manager. Where the claim is not covered under 64 (3)(a)(i), then the provision prescribed under the Clause 64(3)(a)(ii) are to be invoked. In terms of the said provision, the Arbitral Tribunal shall consist of a panel of three gazette Railway officers, not below the JA grade. The Railway authority will send the names of these officers to the contractor within 60 days from the date of receipt of the written and valid demand. The Clause 63, therefore contains detailed procedure for appointment of Arbitrator.

5. According to the petitioner, pursuant to the amendment brought into the Arbitration & Conciliations Act 1996, the requirement of the mandate of Section 12 is to be profusely followed. It is submitted that in view of the provision of Section 12(5) of the Act of 1996 and the conditions laid therein, the provisions of Clause 64(3)(a)(i) and 64(3)(a)(ii) of the GCC, no longer be considered to be effective and binding. Therefore, the petitioner vide letter dated 29.02.2024 proceeded to nominate its arbitrator by nominating Mr. Justice E. Padmanabhan (Rtd.), Former Judge of the Madras High Court, as Arbitrator nominated by the

contractor and called upon the Railway authorities to nominate their Arbitrator. Once the Railways nominate their Arbitrator, the two Arbitrators will appoint the Presiding Arbitrator or Umpire.

6. In response to the communications of the writ petitioner, the respondent NF Railways replied vide its communication dated 13.05.2024, whereby they referred to Cause 55.2 of the GCC and claimed that where the total value of all the claims and dispute are more than 20% of the contract value, then the dispute cannot be resolved by arbitration and therefore the demand for appointment of an Arbitrator is in conflict with Cause 55.2 of the said contract agreement.

7. Learned Senior Counsel for the petitioner submits that this interpretation are to be made by the railway authority is incorrect inasmuch as the term "*all claims*" has been used in Clause 64(3)(n)(i), the contract agreement which will mean that each of the claims of the petitioner is an individual claim and has to be separately decided under the different heads by constituting different Arbitral tribunal. It is further submitted that Clause 64(1)(ii) of the agreement prescribes that the demand for arbitration shall specify the matters which are in question or subject of dispute or difference, as also the amount of claim item- wise. Clause 64 (1)(ii) envisages raising of claim item-wise and dispute has to be with reference to item-wise for which the claim has to be made separately and is also underscored by the subsequent provision of Clauses 64(1)(ii)(b). Being situated, the petitioner issued another communication dated 05.11.2024 calling upon the respondent to appoint its nominated arbitrator. Since the petitioner's communication did not evoke any response, the petitioner approached this Court by filing this petition under Section 11(6) of the Arbitration & Conciliations Act 1996, for appointment of an arbitrator.

8. The Respondent has filed their objections by way of an affidavit-in-opposition. According to the respondents, in respect of the concerned agreement executed by and between the respondent and the petitioner, there were seven claims raised by the petitioner.

In respect of Dispute No. 1, the issue was resolved and the stage of appointment of arbitrator was never reached.

In respect of Dispute No. 2, 3 & 4 are concerned, the arbitrator was appointed and award was declared by the sole arbitrator on 12.04.2025 and which has been challenged under Section 34.

In respect of Dispute No. 5, the matter is already under arbitration with the Arbitration tribunal consisting of three arbitrators namely, Justice Deepak Verma, (Former Judge of Supreme Court of India) as representing arbitrator, Justice E. Padmanavan, (Former Judge of Madras High Court – Nominee Arbitrator of the petitioner) and Mr. H. K. Jaggi, (Former General Manager Indian Railway- Nominee arbitrator of the Railways).

The present arbitration petition has been filed in view of the Dispute Nos. 6 and 7 arisen by and between the parties.

9. The learned counsel for the respondent submits that the reference to the arbitration sought for is barred under clause 55.2 and 55.3 of the contract agreement. Under the said Clauses where the amounts are more than 20 per cent of the contract value, arbitration is not to be invoked. The Standing Counsel for the Railways submits that since the disputes are more than 20 per cent of the value, the arbitration is not maintainable. It is submitted that the petitioner had preferred four other arbitration petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996 being Arb. Pet No. 7/2021, Arb. Pet No. 8/2021 and Arb. Pet. No. 4/2022 and Arb. Pet. No. 25 of 2022. These

petitions were contested by the Railways and by common order dated 28.11.2022 having regard on the pendency of the issue before larger bench of the Apex court regarding appointment of an arbitrator, the matter were deferred. This order was assailed by the petitioner by filing three separate Special Leave Petition (SLP) before the apex court. These petitions were subsequently converted into Civil Appeal being Civil Appeals No. 5305 of 2022, 5306 of 2023 and 5304 of 2023 and the same were disposed of by common order dated 21.08.2023 directing that the disputes between the parties be adjudicated by the Tribunal. Pursuant to the orders of the apex court, the Disputes 2, 3, 4 and 5 were referred to Arbitral tribunal to adjudicate the claims made by the petitioner and the order was passed. The learned counsel for the respondents in support of his contentions has referred to the following judgments:-

1. 2024 SCC Online SC 1754 – SBI General Insurance Company Limited. V/s Kris Spinning.
2. (2018) 6 SCC 534 – Oriental Insurance Company Limited V/s Narbheram Power and Steel Pvt. Ltd.
3. (2018) 17 SCC 607 – United Insurance Company Limited V/s Hyundai Engineering & Construction Company Ltd. & Ors.
4. Arb. P. No. 48/2023 – Beaver Infra Consultants Pvt. Ltd. V/s Union of India & Ors.

10. The core issue required to be decided by the Court is whether the applicability of Clause 55 of the Contract Agreement is to be applied on the totality of all the claims or it is to be applied to the individual claims.

In the present proceedings, the Court is concerned with two of the claims out of

the total seven claims raised by the respondent authorities. From the pleadings, it is seen that appointment mentioned in this Court in a similar matter between the same parties arising out of the same contract had referred the matter and allowed the petition for appointment of arbitrator by the Arbitration Petition Case No. 25 of 2022, and the arbitrators nominated by each of the parties were accepted by the court and direction was issued that both these Arbitrators thereafter proceed to appoint the Presiding Arbitrator, and the matter was disposed of. Against this order passed, the Railways filed the Civil Appeal approached the apex court by filing an SLP being SLP (Civil Diary No. 26835 of 2020). This SLP came to be disposed of on 12.07.2024 by the following order:

“Delay condoned.

We are not inclined to interfere with the impugned judgment. However, if claims filed are beyond the stipulation in clause 55.2 of the Contract Agreement, it will be open to the petitioners to raise the contention of non-arbitrability before the arbitral tribunal.

We clarify that we have not made any comment on the merits of the aforesaid submission.

Recording the aforesaid, the special leave petition is dismissed.

Pending application(s), if any, shall stand disposed of.”

11. Under such circumstances, therefore the question for non-arbitrability of the claim which is raised by the Railways, was directed to be urged before the Arbitral Tribunal and the SLP was dismissed without making any comment on the merits of the said submission and therefore, the appointment of an arbitrator by a Co-ordinate Bench Vide Order dated 29.01.2024 was not interfered with. The order of the Apex Court, however, was not brought on record by the Railways rather the same was brought to the notice of the Court by the petitioner. The relevant clauses governing arbitration in the contracts are extracted below:

“55.0 Settlement of Disputes –Indian Railway Arbitration Rules.

55.1 Arbitration and settlement of disputes shall be governed vide clause 63.64 of General

Conditions of Contract, N.F. Railway, 1998 edition which are reproduced below subject to any correction made prior to the opening of this tender.

Clause-63. Matters finally determined by the Railway – All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall within 120 days after receipt of the contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2), 62(1) to (xiii) (B) of General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause.

Clause-64 (1) (i) Demand for Arbitration:

In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the 'excepted matters' referred to in clause 63 of these conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

Clause-64(1)(ii) The demand for arbitration shall specify the matters which are in question or subject of the dispute or difference as also the amount of claim item wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railways, shall be referred to arbitration and other matters shall not be included in the reference.

Clause-64(1)(ii)(a) – The arbitration proceedings shall be assured to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(a) The claimant shall submit his claim stating the facts supporting the claims along with all relevant documents and the relief or remedy sought against

each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(b) The railway shall submit its defence statement and counter claim(s), if any, within a period of 60 days of receipt of copy of claims from Tribunal thereafter, unless otherwise extension has been granted by Tribunal.

(c) Place of arbitration:- The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

Railway or any other place with the written consent of both the parties.

Clause- 64(1)(iii) – No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

Clause – 64(3)(a)(i) – In cases where the total value of all claims in question added together does not exceed Rs. 10,00,000/- (Rupees ten lakhs) only, the Arbitral Tribunal shall consist of a sole arbitrator who shall be a gazette officer of Railway not below JA grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

Clause- 64(3)(a)(ii) – In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade or two Railway Gazetted officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitrations is received by the General Manager. Contractor will be asked to suggest to General Manager, at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from

outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. General Manager shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominee. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An Officer of Selection grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railways for the purpose of appointment of Arbitrators..

Clause- 64(3)(a)(iii) – If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacate his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/ arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)..

Clause – 64 (3)(a)(v) – While appointing arbitrator(s) under sub-clause (i), (ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more Arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

Clause – 64(3)(b)(i) – The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be interfered there from.

Clause-64(3)(b)(ii) – A may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of tribunal within 60 days of receipt of the award.

Clause- 64(3)(b)(iii) – A party may apply to tribunal within 60 days of the receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from

the arbitral award.

Clause-64.4 – In case of the Tribunal, comprising of three Members, any ruling or award shall be made by a majority of Members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

Clause-64.5 – where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

Clause 64.6 – The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s) as per the rates fixed by the Railway Board from time to time and the fee shall be borne equally by both the parties. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway board from time to time irrespective of the fact whether the arbitrator(s) is/ are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

Clause 64.7 – Subject to the provisions of the aforesaid Arbitration and Conciliation Act – 1996 and the rules there under and any statutory modification thereof shall apply to the arbitration proceedings under this clause.

55.2 The provision of Clause 63 and 64 to the General Conditions of the Contract will be applicable only for settlement of claims or disputes between the parties for values less than or equal to 20 % of the value of the contract and when claims or disputes are of value more than 20% of the value of the contract, provisions of Clauses -63 & 64 and other relevant clauses of the General Conditions of Contract will not be applicable and arbitration will not be a remedy for settlement of such disputes.

12. A careful perusal of these clauses, reveal that the Clause 55.1 is provided arbitration and settlement of dispute shall be governed by Clause 63 and 64. Clause 55.2 provides that the provision of Section Clauses 63 and 64 will be applicable only for settlement of claims or disputes between the parties for values less than or equal to 20 per cent of the values of the contract and when the claim of disputes are of a value of more than 20 per cent provision of

Section 63, 64 and other relevant clauses of the GCC will not be applicable.

13. It is not in dispute before the parties that there exists a valid arbitration agreement. What has been disputed before this court is that arbitration is barred under Clauses 55.2 as the total claims raised by the petitioner which exceeds 20 per cent of the contract value and which is a prescription under the Clauses of the agreement appending contract executed by and between the parties. Therefore, the only dispute is whether the same is to be done by taking the claim individually or the total value of all the claims raised.

14. In this context, it is necessary to determine *prima facie* whether the claims exceed 20 per cent individually.

Claim No. 6 pertains to Rs. 72.13 Crore and the total value of the contract is Rs. 1427.05 Crores, secondly, the Claim No. 7 pertains to Rs. 50.36 Cr. and the total value of the contract being Rs. 1427.05 Cr.

15. Having noticed these claims, it is now necessary to refer to the judgments pressed into service at the bar.

16. In *M/S GSR ventures Private Limited & Ors. –vs- Union of India & Ors*, reported in 2023(2) GLT 759, a Coordinate bench of this court while deciding the question of appointment of an Arbitrator in another similarly situated contract between the Railways and the Contractor had held that the scope of role of the court especially at this stage of the consideration of an application under Section 11 of the Arbitrations and Conciliations Act 1996 has to be minimal. There has to be minimal interference or intervention by the court at the referral stage and accordingly the court proceeded to appoint the sole arbitrator in respect of the said petition.

17. In *Office for Alternative Architecture –vs- Ircon Infrastructure and Service Limited* [Civil Appeal No. 6620 of 2025 (Arising out of SLP(C) No. 28104/2023)],

the apex court held that the correct course of the High court under 11(6) jurisdiction was to leave it open to the parties to raise the issue of non-arbitrability of certain claims only before the Arbitral tribunal. High Court cannot bisect the claim on the appellant in two parts- one arbitrable and other non-arbitrable.

18. In *Managing Director of Bihar State Food and Civil Supply Corporation Limited –vs- Sanjay Kumar* reported in *2025 SCC Online Sc 1604* and another bunch of petitions, the apex court held that Section 11 of the Act is perhaps that the only provision which has been interpreted and re-interpreted by the Supreme Court for the longest period of time. It was held that after introduction of Sub-Section 6A the matter came to be finally decided by a seven Judge's bench of the Apex court in the case of *interplay between arbitration agreement under Arbitration and Conciliations Act 1996 and the Indian Stamp Act 1899, in RE*. Referring to the said seven Judge's Bench judgment and the findings thereof, the apex court held that court exercising its jurisdiction under 11(6) and Section 8 must follow the mandate Sub-Section 6A as interpreted and mandated by the decision of the court and their scrutiny must be confined the existence of the arbitration agreement. The apex court held and where the arbitration agreement exists the matter must end there. The relevant Paragraphs of the said judgment are extracted below:

“23. *Section 11 of the Act has perhaps been the only provision which would have been interpreted and re-interpreted by the Supreme Court for the longest time ever. After two decades of its interpretation commencing from 1996, Parliament intervened and supplied sub-section (6A) to Section 11 of the Act as per which the consideration by a referral court shall be confine(d) to the examination of the existence of an arbitration agreement.*

24. *Even after the introduction of sub-section (6A), it took almost a decade for us to have*

clarity and certainty till the seven judges bench decision of this Court in the case of *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899*, In *Re*²⁹ was delivered.

25. In the seven judges bench decision, this Court considered in detail the separability of the arbitration agreement from the contract, the empowerment of the arbitral tribunal to examine its own competence and finally the limits of referral courts scrutiny. The relevant portions are as under:

“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 [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764]*, 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 [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549]* 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.

167. *Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, The Law Lexicon (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234]."*

26. *The above referred decision is followed in subsequent decisions of this Court in SBI General Insurance Co. Ltd. v. Krish Spinning³⁰, Aslam Ismail Khan Deshmukh v. ASAP Fluids Private Ltd.³¹ and Office for Alternative Architecture v. Ircon Infrastructure and Services Ltd.³²*

27. *The curtains have fallen. Courts exercising jurisdictions under Section 11(6) and Section 8 must follow the mandate of sub-section (6A), as interpreted and mandated by the decisions of this Court and their scrutiny must be "confine(d) to the examination of the existence of the arbitration agreement".*

28. *We have examined the matter in detail. There is an arbitration agreement. The matter must end here. While we agree with Mr. Ranjit Kumar submissions that his client has much to say, let all that be said before the arbitral tribunal. It is, as we have said elsewhere, just as*

necessary to follow a precedent as it is to make one."

19. Again, in *Aslam Ismail Khan Deshmukh –vs- ASAP Fluids Private Limited & Anr.*, reported in 2025, 1 SCC 502, the apex court has held that if the referral court dealt into the domain of the arbitration tribunal at Section 11 stage and rejects the application on the claimant, there is a serious risk of leaving claim remediless for the adjudication of their claims. The apex court held that it must restrict itself to examining whether Section 11 petitions are within limitation.

20. Again in *GOQII Technologies Private Limited –vs-Sokrati Technologies Private Limited*, reported in (2025) 2 SCC 192 the apex court held that the scope of enquiry under Section 11 of 1996 Act is limited to ascertaining the prima facie existence of arbitration agreement. Referring to the judgment of the apex court in *SBI General Insurance Co. Ltd. Vs. Krish Spinning*, reported in 2024 SCC Online SC 1754 that frivolity in litigation too is also an aspect which the referral court should not decide at the stage of Section 11, as the arbitrator is equally if not more , competent to adjudicate the same. The relevant paragraphs of the Judgment are extracted below:-

“19. The scope of inquiry under Section 11 of the 1996 Act is limited to ascertaining the prima facie existence of an arbitration agreement. In the present case, the High Court exceeded this limited scope by undertaking a detailed examination of the factual matrix. The High Court erroneously proceeded to assess the auditor's report in detail and dismissed [Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd., 2024 SCC OnLine Bom 3530] the arbitration application. In our view, such an approach does not give effect to the legislative intent behind the 2015 Amendment to the 1996 Act which limited the judicial scrutiny at the stage of Section 11 solely to the prima facie determination of the existence of an arbitration agreement.

20. *As observed in Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754 : 2024 INSC 532] , frivolity in litigation too is an aspect which the referral court should not decide at the stage of Section 11 as the arbitrator is equally, if*

not more, competent to adjudicate the same.

21. *Before we conclude, we must clarify that the limited jurisdiction of the referral courts under Section 11 must not be misused by parties in order to force other parties to the arbitration agreement to participate in a time consuming and costly arbitration process. This is possible in instances, including but not limited to, where the claimant canvasses the adjudication of non-existent and mala fide claims through arbitration.*

22. *With a view to balance the limited scope of judicial interference of the referral courts with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. Having said that, it is clarified that the aforesaid is not to be construed as a determination of the merits of the matter before us, which the Arbitral Tribunal will rightfully be equipped to determine.*

23. *The existence of the arbitration agreement in Clause 18.12 of the MSA has not been disputed by the respondent. The question whether there exists a valid dispute to be referred to arbitration can be addressed by the Arbitral Tribunal as a preliminary issue.”*

21. In *M/s Andhra Pradesh Power Generation Cooperation Limited (APGENCO) Vs. M/S Tecro Systems Limited & Ors*, reported in *2025 INSC 1447*, it was held that legislative policy under the Act of 1996 strongly favors minimal judicial intervention at the pre- arbitral stage. The Referral Court is required to undertake only a prima facie determination of the existence of the arbitration agreement and refrain from entering into contentious factual or legal issues related to the authority, capacity, arbitrability, maintainability or merits of claims.

22. In *SBI General Insurance Co. Ltd. –vs- Kris Spinning*, reported in *2024 SCC Online SC 1754*, the apex court pressed on the necessity of the referral Court for minimal intervention at the pre-arbitral stage. The referral Court is prima facie examined the existence of arbitration agreement. The Apex court held that whether the disputes raised before the referral Court is one of

quantum and not the liability, prima facie falls within the scope of arbitration. The dispute regarding within the court in accordance to the satisfactions of court does not pertain to the existence of the arbitration agreement and can be adjudicated upon by the arbitratral tribunal as a preliminary issue.

23. The other judgments referred to by the respondent have not been discussed in view of the later judgments referred and discussed hereinabove.

24. The apex court has consistently held that at the pre-arbitral stage, the Referral Court under Section 11(6) is only to examine the existence of the arbitration agreement. Coming to the facts of the present case, there is not dispute that there is an arbitration agreement in existence. There is also no dispute that out of seven claims raised by the petitioner, one has already been settled without reference to arbitration and four other claims have been referred to arbitration in respect of the same agreement containing the same clauses which had been sought to be interpreted in the present proceedings by the respondents. In all these four claims, the arbitral tribunal has passed award and against some of them, if not, of all the railways, have already appealed under Section 34.

25. Upon a careful perusal of the provision of the contract as also the judgment pressed into service, it appears to the court that the disputes sought to be raised by the railways is not with regard to the existence from an arbitral tribunal, but is in respect of the arbitrability of the claim raised according to the respondents, the amount is 20% of the total value of the contract, and therefore outside the scope of arbitration in terms of Clause 55 of the said agreement. This is the understanding of the court pertains in accordance with satisfaction within court, and therefore the same can be suitably decided by the arbitral tribunal upon being constituted. The tribunal can decide these issues as

a preliminary issue, and thereafter proceed to examine the other claims if so required.

26. In view of the above discussion, arbitration petition is therefore allowed. Hon'ble Mr. Justice E. Padmanabhan (Rtd.), Former Judge of the Madras High Court, appointed as "Nominee" of the claimants, while Mr. H. K. Jaggi, Former General Manager of Indian Railway, appointed as the Nominee Arbitrator of the Railways, Justice Amitava Roy, Former Judge of the Supreme Court is appointed as the Presiding Arbitrator. Parties will therefore appear before their respective Prospective Arbitrators on 23.02.2026, and thereafter the Prospective Arbitrators appointed after Confirmation of their appointment will takes steps to initiate the Arbitration with Hon'ble Mr. Justice Amitava Roy as the "Presiding Arbitrator".

27. Copies of the orders be communicated to the prospective arbitrators appointed by the Court. The appointments made shall be confirmed, subject to written declarations received from the nominee arbitrators as is required under Section 12(5) of the Arbitrations and Conciliation Act, 1996.

28. Matter, therefore be listed again on 27.02.2026.

JUDGE

Comparing Assistant