$-

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

BEFORE

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

\+ **CS (OS) 549/2021, I.A. 13976/2021, I.A. 15279/2021 and I.A.15281/2021**

Between: -

PORTO EMPORIOS SHIPPING INC.,
THROUGH ITS CONSTITUTED ATTORNEY
MR. ANIL SHAMRAO JADHAV
REGISTERED OFFICE: 80 BROAD STREET,
MONROVIA, LIBERIA ....PLAINTIFF

(Through: Mr. Sandeep Sethi, Sr. Advocate with Mr. Arvind Kumar Gupta, Mr.Aditya, Mr.Ajay, Mr. Omkar Pradhan and Mr. Arun Bhattacharya, Advocates.)

AND

1. INDIAN OIL CORPORATION LIMITED,
REGISTERED OFFICE: CORE-2, SCOPE COMPLEX 7,
INSTITUTIONAL AREA, PRAGATI VIHAR, LOODHI
ROAD, NEW DELHI, 110003

2. INDIAN COUNCIL OF ARBITRATION
REGISTERED OFFICE: FEDERATION HOUSE,
TANSEN MARG,
NEW DELHI, 110001

....DEFENDANTS

(Through: Mr. Ashish Dholakia, Sr. Advocate with Mr. Tarang Gupta, Mr. Shrikant Hathi, Mr. Kartikeya Sharma, Mr. Pavitra Kaur, Ms. Meghna Tandon, Mr. Shiven Asthana, Advocates for D-1.)

% Reserved on: 25.04.2025
Pronounced on: 09.05.2025

J U D G M E N T

I.A.15279/2021 (Under Section 8 of the Arbitration and Conciliation Act, 1996)

The instant application has been filed under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as *'1996 Act'*), seeking to refer the parties to the already instituted arbitration.

2. Before delving into the intricate legal disputes, it is imperative to encapsulate the salient events that underpin this multifaceted controversy. The following sequence of events provides the essential context required for a comprehensive understanding of the issues involved in the *lis*.

3. The parties involved in the dispute are Porto Emporios Shipping INC, (hereinafter referred to as *'plaintiff'*), which is registered in the Republic of Liberia and represented through its attorney. The defendants are Indian Oil Corporation Ltd (hereinafter referred to as *'defendant no.1'*) and the Indian Council of Arbitration (hereinafter referred to as *'defendant no.2'*).

4. The entire controversy revolves around the maritime voyage of a Charterparty for the transport of crude oil from Kuwait to India as agreed upon by the parties. On 05.08.2020, a Charterparty agreement was entered into between the plaintiff and defendant no.1 pursuant to which the plaintiff

agreed to charter carriage of 273,317 MT of crude oil from Mina Al-Ahmadi, Kuwait, to Paradip, India. *En route*, on 03.09.2020, an explosion occurred in the engine room, causing a fire on the charter vessel. On 14.10.2020, the plaintiff notified defendant no.1 that the Charterparty was frustrated due to the vessel being badly damaged. Consequently, on 29.12.2020, defendant no.1 filed a lawsuit in Panama seeking USD 78 million (hereinafter referred to as "*Panamanian money decree suit*"). During the pendency of the said suit, the defendant no. 1 also sought for an interim injunction from the First Maritime Court and on 30.12.2020, an interim injunction was granted restraining the sale, transfer, cancellation and encumbrances over the vessel.

5. Thereafter, on 12.02.2021, the plaintiff sent a notice to defendant no. 1 stating that by filing a lawsuit before the First Maritime Court, plaintiff had repudiated the arbitration clause in the Charterparty agreement and by virtue of the said notice, the plaintiff stated to have accepted the repudiatory breach of the Charterparty agreement.

6. On 26.02.2021, the plaintiff also instituted a lawsuit before the Panama Court seeking a declaration of non-liability and sought to cap/limit their liability under the appropriate provisions of the law in Panama relating to the Limitation of Liability for Maritime Claims (hereinafter referred to as "*limitation of liability suit*"). The Second Maritime Court in Panama admitted the suit on 09.03.2021 and directed service to defendant no.1 on 11.03.2021. Defendant no.1 replied on 12.03.2021 to the notice dated 12.02.2021, denying the repudiatory breach.

7. Thereafter, on 26.04.2021, the plaintiff filed an application before the

First Maritime Court in the Panamanian money decree suit seeking vacation of the interim injunction granted on 30.12.2020. Consequently, on 27.04.2021, the First Maritime Court in the Panamanian money decree suit admitted the vacation of the interim injunction application and appointed M/s. English White Shipping Limited as an assessor to provide an expert valuation on the then value of the Vessel.

8. On 27.04.2021, the plaintiff also filed an application before the Second Maritime Court in a limitation of liability suit for an anti-suit injunction. Various Court actions continued, including the constitution of a limitation fund on 03.05.2021 and the rejection of an anti-suit injunction on 05.05.2021 in the limitation of liability suit. The plaintiff filed an appeal against the said rejection on 06.05.2021. On 20.09.2021, the defendant no.2 issued an email to the plaintiff intimating that defendant no. 1 had registered arbitration proceedings. On 15.10.2021, the Second Maritime Court in Panama consolidated both the suits.

9. Thereafter, on 20.10.2021, the plaintiff replied to an email issued by the defendant no. 2, opposing the continuation of the arbitration proceedings, stating that the arbitration agreement was inoperative. Following this, the present suit for declaration and perpetual injunction was filed by the plaintiff. On 27.10.2021, summons were directed to be issued in the suit and an interim order was passed.

10. Thereafter, instant application under Section 8 of the 1996 Act was preferred by the defendant no. 1 to refer the parties to the arbitration and notice was directed to be issued on the said application on 24.11.2021.

11. *Mr. Ashish Dholakia*, learned senior counsel assisted by *Mr. Tarang*

Gupta, submits that the instant civil suit is barred by the provisions of Section 5 of the 1996 Act, which prohibits any intervention by the judicial authority with respect to the matters governed by Part I of the 1996 Act. According to him, the parties agreed to settle all their disputes in India in accordance with the provisions of the 1996 Act and therefore, the instant civil suit is a complete misuse of the remedy. Learned senior counsel also submits that Section 5 of the 1996 Act acts as an absolute bar in law against the exercise of powers by a judicial authority and imposes a blanket ban on judicial intervention of any type in the arbitral process, except in accordance with the provisions of Part I of the 1996 Act. He then contends that the instant civil suit does not fall under any of the exceptions envisaged in Part I of the 1996 Act.

12. According to him, the alleged cause in this suit does not exist within the Indian legal framework. The parties are strictly bound by a specific clause in the arbitration agreement unless a legal declaration explicitly overturns it. The arbitration clause, which was mutually agreed upon, cannot be waived by virtue of certain proceedings which have been undertaken in a foreign country. He gives a comprehensive demonstration of the proceedings and then contends that even in some of the proceedings, the plaintiff himself had conceded to the applicability of arbitration proceedings under the 1996 Act.

13. To substantiate his submission, strength is drawn from the decisions of the Supreme Court in the case of ***In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the***

Indian Stamp Act, 1899[1]***, SBI General Insurance Co. Ltd. v. Krish Spinning***[2]***, Sushma Shivkumar Daga v. Madhurkumar Ramkrishnaji Bajaj***[3]***, National Aluminium Company Limited v. Subhash Infra Engineers Private Limited***[4] and ***Kvaerner Cementation India Ltd. v. Bajranglal Agarwal***[5].

14. Learned senior counsel further submits that the Full Bench of the Bombay High Court in the case of ***JS Oceanliner v. MV Golden Progress***[6] has held that an application under Section 9 of the 1996 Act seeking the arrest of the vessel is not maintainable in law and the parties are required to file a substantive suit making a monetary claim and to seek interim measures of arrest of the vessel. He, therefore, explains that in the instant case, if certain proceedings had been instituted under the Panamanian law before the Maritime Court, the same would have been only for the limited purpose of securing the arrest of the vessel. In any case, learned senior counsel explains that if that is the only reason for the plaintiff to institute the civil suit, the same plea can very well be looked into by the Arbitral Tribunal once the substantive proceedings before the Arbitral Tribunal are commenced.

15. To support his contention, the learned senior counsel further places reliance on the decision of the Bombay High Court in the case of ***Siem Offshore v. Altus***[7] and ***Altus v. Siem Offshore***[8], wherein, the Bombay High Court has relied upon the decision in the case of ***JS Oceanliner***. The

[1] 2023 SCC Online SC 1666
[2] 2024 SCC Online SC 1754
[3] 2023 SCC Online SC 1683
[4] (2020) 15 SCC 557
[5] (2012) 5 SCC 214
[6] 2007 SCC OnLine Bom 69
[7] 2018 SCC Online Bom 2730

decision of the single judge in ***Siem Offshore*** is stated to have been confirmed by the Division Bench.

16. To further substantiate his plea, learned senior counsel explains that even the plea of waiver of the arbitration clause does not fall within the ambit of *prima facie* examination under Section 8 of the 1996 Act. He draws the strength to support the aforesaid contention while placing reliance on a decision of this Court in the case of ***Maruti Udyog Ltd. v Classic Motors Ltd. & Anr.***[9]***, K.V. Prateek Enterprises v. IL&FS Engineering & Engineering Construction Company Ltd.***[10]*, Hero Electric Vehicles Private Limited v. Lectro E-Mobility Private Limited & Anr.*[11] and ***World Sport Group v. MSM Satelite***[12]**.**

17. *Per contra, Mr. Sandeep Sethi,* learned senior counsel alongwith *Mr. Aditya Krishnamurthy,* appearing on behalf of the plaintiff, vehemently opposes the submissions made by the defendant. He argues that the instant application is not maintainable as the dispute is not arbitrable and, in any event, the arbitration agreement stands waived and terminated. He draws the Court's attention to the detailed chronology of events, highlighting that after the explosion aboard the vessel on 03.09.2020, which carried the cargo of defendant no. 1 and after the institution of the Panamanian money decree suit, the plaintiff issued a notice dated 14.10.2020 declaring the Charterparty agreement as frustrated. Subsequently, defendant no. 1 instituted the Panamanian money decree suit on 29.12.2020 and obtained interim relief by

---

[8] 2019 SCC Online Bom 1327
[9] 2016 SCC Online Del 5860
[10] 2017 SCC Online Del 8286
[11] 2021 SCC Online Del 1058.
[12] (2014) 11 SCC 639.

furnishing security. According to him, it amounted to a repudiatory breach, leading to the plaintiff's termination of the arbitration agreement on 12.02.2021.

18. He further submits that the suit instituted in this Court, seeking declarations that the arbitration agreement stands waived, the proceedings are vexatious, and the subject matter is non-arbitrable, are issues distinct from the subject matter sought to be agitated in arbitration. It was contended that defendant no. 1 prosecuted the Panamanian suit for over a year before seeking to refer the matter to arbitration. He argues that the Panamanian Court's rejection of defendant no. 1's subsequent application to refer the matter to arbitration further supports the waiver of the arbitration agreement.

19. He further argues that the dispute is not arbitrable as it concerns limitation of liability under the Convention on Limitation of Liability for Maritime Claims, 1976 (LLMC), to which both India and Panama are parties. By placing reliance on Section 352C of the Merchant Shipping Act 1958, he submits that once a limitation fund is constituted under the Convention, the liability of the shipowner is statutorily capped, and all claims must be determined by the competent court overseeing the fund.

20. According to him, the power to grant anti-arbitration injunction is not within the realm of the Arbitrator as it is an inherent power of the Court and the Arbitrator does not have the power to interdict its own proceedings. He further submits that only this Court has the power to grant an anti-arbitration injunction. To support his contention, he places reliance on the decisions of ***Vidya Drolia v. Durga Trading Corporation*** [13], ***World Sport Group v.***

[13] (2021) 2 SCC 1

MSM Satellite[14] and ***Food Corporation of India v. Yadav Engineer and Contractor***[15].

21. In rejoinder submissions, *Mr. Dholakia* apart from reiterating his earlier submissions, argues that both parties are at *ad idem qua* the validity and existence of the arbitration clause. He further submits that the plea relating to waiver of the arbitration agreement and non-arbitrability of disputes pertains to the jurisdiction of the Arbitral Tribunal, which, under Section 16 of the 1996 Act, the Tribunal is exclusively empowered to rule on such issues. According to him, reliance on ***Bina Modi*** is misplaced, as that case pertained to a foreign-seated arbitration and involved a trust deed, whereas the present dispute arises from a Charterparty agreement governed by Part I of the 1996 Act, with no challenge to the arbitration agreement itself.

22. He further submits that under Section 8 of the 1996 Act, an application for reference to arbitration is maintainable when the subject matter is covered by an arbitration agreement, as is admittedly the case here. According to him, since the defendant no. 1 has already filed its Statement of Claim before the Arbitral Tribunal, therefore, the present suit is nothing but an attempt to obstruct the arbitration proceedings, which is impermissible. He further argues that it has been clarified in ***Re Interplay*** that the scope of judicial scrutiny under Section 8 is limited to a *prima facie* examination of the formal validity and existence of the arbitration agreement as per Section 7, and the earlier observations in ***Vidya Drolia*** permitting a deeper inquiry into non-arbitrability no longer hold the field.

[14] (2014) 11 SCC 639

23. Furthermore, he submits that Section 8 of the 1996 Act, by virtue of its non-obstante clause, mandates reference to arbitration notwithstanding any judgment, decree, or order, including foreign court decisions such as the Panamanian Court ruling cited by the plaintiff. Allowing suits such as the present one would open the floodgates for parties to evade arbitration through civil suits, thereby defeating the very purpose of the 1996 Act and the legislative intent behind the 2015 Amendments. Furthermore, *Mr. Dholakia* has also placed on record a tabular chart encapsulating his primary submissions alongwith his rejoinder submissions in contrast with the submissions of the plaintiff.

24. I have heard learned counsel for the parties appearing for the parties and have perused the record.

25. The solitary issue that arises for consideration is – "***Whether, under the limited periphery of the scope and extent of the enquiry envisaged under Section 8 of the 1996 Act, the plea of waiver of the arbitration clause can be meticulously examined by the referral Court in the present case?"***

26. In order to effectively answer this question, it is pertinent to first examine and peruse the underlying objective of the 1996 Act.

<u>Aim and objective of the 1996 Act</u>

27. The 1996 Act, which is at the helm of this controversy, is the complete code in itself, wherein, not only meticulous delineation of the arbitration proceedings is envisaged, but also the fetters on the Court's

[15] 1982 2 SCC 499.

interference as well as the mandate of the Arbitral Tribunal are aptly encapsulated. It has been enacted to consolidate and amend the law relating to domestic arbitration as well as international commercial arbitration in India after taking into account the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985.

28. Arbitration constitutes a consensual and private mode of dispute resolution, falling within the broader framework of Alternative Dispute Resolution (ADR) mechanisms, wherein the parties to a contractual relationship agree to refer their disputes for adjudication to a neutral third party or Arbitral Tribunal. The underlying rationale of this mechanism is to secure a binding resolution based on the material and evidence presented, thereby avoiding the procedural complexities and delays commonly associated with conventional litigation. The thrust of arbitration law is succinctly encapsulated in Redfern and Hunter: "*It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife*."[16]

29. The Supreme Court in ***Union of India v. Varindera Constructions Ltd.***[17], while discussing the object of arbitration, has held as under:

> *"12. The primary object of the arbitration is to reach a final disposition in a speedy, effective, inexpensive and expeditious manner. In order to regulate the law regarding arbitration, the legislature came up with legislation which is known as Arbitration and Conciliation Act, 1996. In order to make the arbitration process more effective, the legislature restricted the role of courts in case where matter is subject to the arbitration. Section 5 of the Act specifically restricted the interference*

[16] Redfern and Hunter on International Arbitration (7th edn, Oxford University Press, 2023) 3.
[17] (2018) 7 SCC 794

> *of the courts to some extent. In other words, it is only in exceptional circumstances, as provided by this Act, the court is entitled to intervene in the dispute which is the subject matter of arbitration. Such intervention may be before, at or after the arbitration proceeding, as the case may be. In short, court shall not intervene with the subject-matter of arbitration unless injustice is caused to either of the parties."*

30. The principal aim of the 1996 Act is twofold: firstly, to promote party autonomy and procedural flexibility by allowing disputing parties to determine the manner and forum of adjudication through arbitration; and secondly, to reduce the burden on the conventional judicial system by encouraging private resolution of commercial disputes. To ensure the fulfilment of these objectives, the 1996 Act mandates minimal judicial intervention at all stages of the arbitral process—be it pre-arbitral, during the conduct of arbitration, or post-award enforcement. The overarching objective is to render arbitration a credible and efficient alternative to litigation, thereby enhancing the ease of doing business and promoting faith in India's dispute resolution architecture. This legislative policy of non-intervention has also been reiterated and strengthened through consistent pronouncements of the Supreme Court, which have emphasised the imperative of preserving the autonomy and sanctity of the arbitral process.

31. Thus, the principal aim and objective underlying the enactment of the 1996 Act, is to liberate commercial disputes from the cumbersome and time-consuming shackles of the conventional litigation process. Recognising the exigencies of trade and commerce, where time is often of the essence, the legislature sought to create a specialised, expeditious, and efficacious framework for the resolution of disputes. The 1996 Act thus endeavours to promote a party-autonomous, flexible, and streamlined dispute resolution

mechanism through arbitration and conciliation, minimising judicial intervention and fostering finality in adjudication. It envisages providing a timely and effective alternative realm for dispute resolution, thereby reducing the burden on the conventional Courts system and enhancing the ease of doing business by ensuring that commercial disagreements are addressed with the swiftness and efficiency demanded by modern commercial realities, thereby, propelling the economy of the country.

32. After briefly traversing through the underlying objective of the 1996 Act, this Court shall examine the scheme of the 1996 Act.

Scheme of the 1996 Act

33. The 1996 Act delineates an exhaustive legal framework for arbitration in India, segmented into four parts- i) Part I, encompassing Sections 2 to 43, which pertains to domestic arbitration, meticulously outlines provisions on arbitration agreements, the constitution of the Arbitral Tribunal, procedural conduct, and the issuance and annulment of arbitral awards, Part I-A, including Sections 43A to 43M, introduces regulations for the establishment of arbitral institutions, ii) Part II, spanning across Sections 44 to 52, addresses the enforcement of specific foreign awards, facilitating their recognition and enforcement within India, iii) Part III, comprising of Sections 61 to 81, focuses on conciliation, elucidating processes for the amicable resolution of disputes extraneous to the traditional judicial system and iv) Part IV, encompassing Sections 82 to 87, consists of supplementary provisions, such as the High Court's authority to promulgate rules and the repeal of preceding arbitration statutes.

34. Within Part I, Section 5 is of utmost importance in the present *lis* and is particularly noteworthy for its non-obstante clause, which precludes judicial intervention in matters governed by Part I, unless expressly provided for therein, thereby preserving the autonomy and sanctity of the arbitral process. For the sake of convenience, Section 5 of the 1996 Act reads as under:-

> *"Section 5 of the 1996 Act*
> *5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*

35. A plain and simple reading of Section 5 provides *inter alia* overriding effect of the matters governed by Part I of the 1996 Act to have the supremacy to continue to govern without any intervention by any Judicial Authority unless the said 'Judicial Authority' is specifically vested with the power to do so under Part I itself.

36. Section 5 of the 1996 Act incorporates a non-obstante clause, thereby stipulating that in matters governed by Part I, 'Judicial Authority' shall not interfere, except as explicitly delineated within this section. The 1996 Act does not define the term 'Judicial Authority', which has been used in Sections 3,5,8, and 41(2) of Part I of the Act. In the case of ***Morgan Securities and Credit Pvt. ltd. and Modi Rubber Ltd. v. Parkinson***[18]**,** it is held that a 'Judicial Authority' need not necessarily be a Court. Under Section 2(1)(e) of the 1996 Act, the term 'Judicial Authority' has a much wider import than the term 'Court'. 'Judicial Authority' in its ordinary parlance would comprehend a Court defined under the 1996 Act, but also a

Court which would either be a Civil Court, or other authorities which perform judicial functions or quasi-judicial functions. The term 'Judicial Authority' has been used with the object of reducing intervention by all Courts and judicial bodies. In sum and substance, the object seems to restrict the power of any 'Judicial Authority', whether Courts or any other quasi-judicial bodies, to adopt a hands-off approach in intermingling with the powers of the Arbitral Tribunal.

37. In the case of ***Brahan Dutt v. Ashok Leyland finance***[19]**,** it has been held that the legislature intended to confer power on all judicial authorities to refer the parties to arbitration, where an arbitration agreement is in existence. Not only the Civil Court but all the judicial authorities are restrained from intervening in the matters governed by Part I of the 1996 Act except as provided in the Part.

38. The term 'Judicial Authority' has also been defined in the case of ***Cotton Corporation of India Pvt Ltd. v. Sharad Shekatri Soot Girni Niyamit***[20] to mean all authorities which can be described as judicial authorities, in the sense that they administer justice. The decision was affirmed by the Full Bench of the Bombay High Court in the case of ***Fountain Head Developers v. Maria Arcangela Sequeria***[21]**.**

39. The expression 'Judicial Authority' clearly denotes a Court or any 'Judicial Authority' other than a Court which enjoys the power to interpret and apply the law in resolving disputes and the administration of justice.

---

[18] (2006) 12 SCC 642
[19] 2003 SCC OnLine MP 505
[20] 1999 SCC OnLine Bom 823
[21] 2007 SCC OnLine Bom 340

Section 5 is clearly crafted in furtherance of achieving a certainty of ensuring a minimum extent of judicial intervention and to create confidence in the minds of the parties qua the autonomy of the arbitral process. The supervisory role of Courts in arbitration proceedings is, thus, not completely obliterated, however, the same is restricted to the extent of specific power vested under Part I itself.

40. The 1996 Act itself is a special legislation which seeks to encourage institutionalised mechanisms having enforceability power to settle the disputes arising between contracting parties. The arbitration mechanism itself is with the consent of the parties, therefore, interference during the course of the proceedings has to be eschewed unless the same is inevitable. If the provisions of Section 5 are again looked into with the aforesaid context, it would manifest that before the proceedings culminate in passing of an award under Section 31 and termination of the proceedings in terms of Section 32 there seems to be hardly any scope for intervention except already envisaged under the 1996 Act.

41. At this juncture, reference can be made to Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred as "CPC") which reads as under:-

> *"**9. Courts to try all civil suits unless barred .-***
> *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.*
> *Explanation [I].-A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.*
> *[Explanation II .-For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular*

place.] [Inserted by the Code of Civil Procedure (Amendment) Act, 1976, Section 5 (w.e.f. 1.2.1977).]"

42. A bare perusal of Section 9 would indicate that the Civil Courts have the jurisdiction to try all civil suits except those which are expressly or impliedly barred. At this juncture, reference can be made to the seminal decision of the Constitutional Bench of the Supreme Court on this point titled as ***Dhulabhai v. State of Madhya Pradesh***[22], wherein, the Supreme Court delineated the conditions to be looked into while deciding the jurisdiction of the Civil Court. The relevant extracts of the said decision read as under:-

> *"(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*
>
> *(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.*
> *Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.*
> *(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.*
> *(4) When a provision is already declared unconstitutional or the*

[22] 1968 SCC OnLine SC 40

constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.
(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

43. Reference can be made to the decision of the Supreme Court in the case of ***S.Vanathan Muthuraja vs. Ramalingam @ Krishnamurthy Gurukkal & Ors.***[23], wherein, the Court while considering Section 9 of the CPC and the question of exclusion of Civil Court's jurisdiction, has observed and held that when a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the Civil Courts would take cognizance of it. It is further observed in the said decision that the normal rule of law is that Civil Courts have jurisdiction to try all suits of civil nature except those of which cognizance is either expressly or by necessary implication excluded. The rule of construction being that every presumption would be made in favour of the existence of a right and remedy in a democratic set up governed by the rule of law and jurisdiction of the Civil Courts is assumed. The exclusion would, therefore, normally be an exception. The relevant extracts of the said decision read as under:-

"Under Section 9, CPC, the courts shall, subject to the provisions contained therein, have jurisdiction to try all suits of civil nature

[23] (1997) 6 SCC 143

excepting suits cognizance of which is either expressly or impliedly barred. When a legal right is infringed, a suit would lie unless there is a bar against entertainment of such civil suit and the civil courts would tame cognizance of it. Therefore, the normal rule of law is that civil courts gave jurisdiction to try all suits of civil nature expect those of which cognizance is either expressly or by necessary implication excluded. The Rule of construction being that every presumption would be made in favour of the existence of a right and remedy in a democratic set up governed by rule of law and jurisdiction of the civil courts is assumed. The exclusion would, therefore, normally be an exception. Courts generally construe the provisions strictly when jurisdiction of the civil courts is claimed to be excluded. However, in the development of civil adjudication and abnormal delay at hierarchical stages, statutes intervene and provide alternative mode of resolution of civil disputes with less expensive but expeditious disposal. It is settled legal position that if a Tribunal with limited jurisdiction cannot assume exclusive jurisdiction and decide for itself the dispute conclusively, in such a situation, it is the court that is required to decide whether the Tribunal with limited jurisdiction has correctly assumed jurisdiction and decided the dispute within its limits. it is settled law that when jurisdiction has is conferred on a Tribunal, the court examine whether the essential principles of jurisdiction have been followed and decided by the Tribunals leaving the decision on merits to the Tribunal. It is also equally settled legal position that where a statute gives finality to the orders of the special Tribunal, the civil court's jurisdiction must be held to be excluded, if there is adequate remedy to do what the civil court would normally do in a suit. Such a provision, however does not exclude those cases where the provision, of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. Where there is an express bar of jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary that the statute creates a special right or liability and provides remedy for the determination of the right or liability and further lays down that all questions about the said right or liability shall be determined by the Tribunal so constituted and the question whether remedies are normally associated with the action in civil courts or prescribed by the statutes or not require examination. Therefore, each case requires examination whether the statute provides right and remedy and whether the scheme of the Act is that the

procedure provided will be conclusive and thereby excludes the jurisdiction of the civil court in respect thereof."

44. Thus, it is crystal clear that a strong presumption is made in favour of the jurisdiction of the Civil Courts and their jurisdiction is ousted unless it is expressly or impliedly provided in law as per the mandate of Section 9 of the CPC. In view of this position of law, Section 5 of the 1996 Act needs to be examined.

45. The debate around this question is fairly well settled by the Supreme Court in the case of ***Re: interplay***. The Supreme Court in the said case, while overruling the case of ***N.N. Global***, held that the non-obstante clause engraved in Section 5 indicates that the rule in Section 5 must take precedence over any other law for the time being in force. The relevant extracts of the said decision read as under:-

"185. In the above segments, we have dealt with the scope of Section 5 of the Arbitration Act. It restricts the extent of judicial intervention in various matters governed by Part I of the Arbitration Act. [CDC Financial Services (Mauritius) Ltd. v. BPL Communications Ltd., (2003) 12 SCC 140; Empire Jute Co. Ltd. v. Jute Corpn. of India Ltd., (2007) 14 SCC 680; Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204; Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd., (2022) 1 SCC 75 : (2022) 1 SCC (Civ) 374] ***The non obstante clause in this provision is of particular significance. It indicates that the rule in Section 5 (and consequently, the provisions of the Arbitration Act) must take precedence over any other law for the time being in force. Any intervention by the Courts (including impounding an agreement in which an arbitration clause is contained) is, therefore, permitted only if the Arbitration Act provides for such a step, which it does not. Sections 33 and 35 cannot be allowed to operate in proceedings under Section 11 (or Section 8, as the case may be), in view of the non obstante clause in Section 5.*** *This being the case, we are unable to agree with the decision in N.N. Global (2) [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 : (2023) 3 SCC (Civ) 564] , that the Court in a proceeding under Section 11 must give effect to Sections 33 and 35 of the Stamp Act despite the interdict in Section 5. The Court held : (SCC p. 87, para*

129)

> *"129. Section 5 no doubt provides for a non obstante clause. It provides against judicial interference except as provided in the Act. The non obstante clause purports to proclaim so despite the presence of any law which may provide for interference otherwise. However, this does not mean that the operation of the Stamp Act, in particular, Sections 33 and 35 would not have any play. We are of the clear view that the purport of Section 5 is not to take away the effect of Sections 33 and 35 of the Stamp Act. The Court under Section 11 purporting to give effect to Sections 33 and 35 cannot be accused of judicial interference contrary to Section 5 of the Act."*

186. Section 5 is effectively rendered otiose by the interpretation given to it in N.N. Global (2) [N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2023) 7 SCC 1 : (2023) 3 SCC (Civ) 564] . The Court failed to provide a reason for holding that Section 5 of the Arbitration Act does not have the effect of excluding the operation of Sections 33 and 35 of the Stamp Act in proceedings under Section 11 of the Arbitration Act. ***The non obstante clause in Section 5 does precisely this. In addition to the effect of the non obstante clause, the Arbitration Act is a special law. We must also be cognizant of the fact that one of objectives of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process.*** *[Statements of Objects and Reasons, Arbitration Act.]*

187. In Hameed Joharan v. Abdul Salam [Hameed Joharan v. Abdul Salam, (2001) 7 SCC 573] , this Court made the following observations on the interplay between the Stamp Act and the Limitation Act, 1963 : (SCC p. 594, para 38)

> *"38. ... The intent of the legislature in engrafting the Limitation Act shall have to be given its proper weightage. Absurdity cannot be the outcome of interpretation by a court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repel the same rather than encouraging it. The whole purport of the Stamp Act is to make available certain dues and to collect revenue but it does not mean and imply overriding the effect over another statute operating in a completely different sphere."*

***

197. ***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). The exercise of the jurisdiction of the Courts of the country over the substantive dispute between the parties is only possible at two stages:***
>
> ***(a) If an application for interim measures is filed under Section 9 of the Arbitration Act; or***
>
> ***(b) If the award is challenged under Section 34****.*
>
> *Issues which concern the payment of stamp duty fall within the remit of the Arbitral Tribunal. The discussion in the preceding segments also make it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9."*

46. Thus, the scheme of the 1996 Act and particularly Section 5 of the 1996 Act, which starts with the non-obstante clause, clearly reflects the intention of the legislature regarding the prominence of the party autonomy and principle of minimum judicial interference, couched in the language of the 1996 Act. The 1996 Act being the special law and CPC being the general law, the doctrine of ***generalia specialibus non derogant*** i.e., the general law would give way to special legislation would emphatically be applied in the present case and Section 5 of the 1996 Act would squarely be applicable in deciding the jurisdiction of any 'Judicial Authority', not just Civil Courts alone.[24]

47. After perusing the ambit of Section 5, it is imperative to have a look at Section 8 of the 1996 Act, which reads as follows:-

> *"8. Power to refer parties to arbitration where there is an arbitration agreement.—1 [(1)A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court,*

[24] LIC v. D.J. Bahadur, (1981) 1 SCC 315; Sundaram Finance Ltd. v. T. Thankam, (2015) 14 SCC 444

refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.]

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: 2 [Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

48. Section 8 again reinforces and strengthens the object of Section 5 to empower even a 'Judicial Authority' before whom an action is brought in a matter to refer the parties to arbitration, which is the subject or the arbitration agreement. If a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, than notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to the arbitration unless it finds that *prima facie* no valid arbitration agreement exist. It is, therefore, evident that Section 5 of the 1996 Act significantly curtails judicial intervention in matters governed by Part I, while Section 8 mandates that the 'Judicial Authority', upon being satisfied of the existence of a valid arbitration agreement, is not only empowered but also obligated to refer the parties to arbitration, unless it finds that no such valid agreement exists. At the same time, in order to

prevent the misuse of arbitration clauses for reviving stale claims, the legislature has deliberately imposed a strict temporal threshold under Section 8 of the 1996 Act, prescribing the filing of the first statement on the substance of the dispute as the outer limit for invoking the right to seek reference to arbitration.

49. Section 8 of the 1996 Act is couched in the form of a legislative command to a 'Judicial Authority' to refer parties to arbitration if the dispute is covered by a valid arbitration agreement and a timely application is made. In the case of ***Hindustan Petroleum corporation Ltd. v. Pinkcity Midway Petroleum***[25]**,** the Court held as under:-

> *"This Court in the case of P. Anand Gajapathi Raju & Ors. v. P. V. G. Raju (Dead) & Ors. [2000 (4) SCC 539] has held that the language of Section 8 is peremptory in nature.* ***Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator.*** *Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below.* ***Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."***

50. It becomes all the more significant to take note of the precedent of this Court in the case of ***BPL Communication Ltd. v. Punj Lloyd Ltd.***[26]**,** wherein the Court had set out certain requirements for the exercise of

[25] (2003) 6 SCC 503

jurisdiction under Section 8 as follows:-

> *"1.The provision of Section 8 is pre-emptory in nature and is mandatory.*
>
> *2.The mandate of Section 8 can be invoked by a party to an action before a judicial authority by filing an application.*
>
> *3. The application invoking Section 8 may be filed in any action, not necessarily the civil suits, which is brought before "a judicial authority", which does not necessarily imply a Civil Court established under Civil Procedure Code and a Court as defined by clause (e) of Section 2 of the Act*
>
> *4.The application for referring the disputes to an Arbitrator may be made by a party "not later than when submitting his first statement on the substance of the dispute". Before invoking the powers of the judicial authority under Section 8, the party applying, must not have submitted the statement on the substance of the dispute, in the proceeding in which application is filed, or in a proceeding between the parties to the arbitration agreement before a Court or judicial authority prior to the present action.*
>
> *5.Reference to an Arbitrator under this provision can be made if the action before the judicial authority is a matter, which is "the subject matter of an arbitration agreement". The subject matter before a judicial authority must completely identify with the subject of the arbitration agreement. Reference of part of the subject matter of an action before the judicial authority to arbitration to which arbitration agreement applies, is not contemplated. If requirements of the ingredients of sub-section (1) of Section 8 are satisfied, the Court has no option or discretion, but it is mandatory for it to make reference of the subject matter of the action before it to arbitration in accordance with the arbitration agreement.*
>
> *6.Parties to the action before judicial authority and the arbitration agreement should be the same.*
>
> *7.The application shall be accompanied by the original arbitration agreement or a duly certified copy thereon.*
>
> *8. The judicial authority will not refuse making a reference under Section 8, merely on the ground that a dispute about existence and validity of the arbitration agreement or jurisdiction of the Arbitrator has been raised since the Arbitrator would have jurisdiction to decide these objections under Section 16 of the Act. The judicial authority before making reference would have to be satisfied that the subject matter of the action before it and the subject of the arbitration agreement are identical and may examine the arbitration agreement and the subject matter of the action*

[26] 2003 SCC OnLine Del 1032

before it for giving a finding in this regard.

9.Unless the judicial authority before whom the application under Section 8 has been filed is a Court, as defined within the meaning of Section 42 read with clause (e) of Section 2 of the Act, the judicial authority shall not entertain subsequent proceedings arising under the arbitration agreement by virtue of Section 42 of the Act.

10.After a reference of the subject of arbitration made by the judicial authority to an arbitration under Section 8, nothing remains to be decided in the action."

51. In sum and substance, once the pre-requisite conditions of Section 8 are satisfied, the 'Judicial Authority' is obligated to refer the parties to arbitration. The 'Judicial Authority' has to only ascertain whether the subject matter of both the disputes is the same, and the jurisdiction of the Civil Court has been ousted in terms of the special Statute. A conjoint reading of Section 5 and Section 8 would, thus, clearly uplift the arbitral proceedings and their uninterrupted continuation notwithstanding any judgment, decree, or order of the Supreme Court or any Court.

52. At this juncture, reference can again be made to the seminal decision of the Supreme Court in the case of ***Vidya Drolia,*** wherein, it has been unequivocally stated that the Courts, by default would refer the matter when contentions relating to non-arbitrability are plainly arguable. The Supreme Court has further held that when consideration of the aforesaid aspects in summary proceedings would be insufficient and inconclusive and wherein, the facts are contested, the Court by default would refer the matter to an Arbitrator. It has been further emphasised that the Court by default would refer the matter to an Arbitrator when the party opposing the arbitration, adopts delaying tactics or impairs the conduct of the arbitration proceedings. At the stage of Section 8 or 11, it is not meant for the referral 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 the integrity and efficacy of arbitration as an alternative dispute resolution mechanism.

53. The Supreme Court in the said decision has re-emphasised that even aspect of validity of an arbitration agreement itself is required to be examined keeping in mind whether the same can be decided without much delay or dispute and when debatable and disputable facts and reasonable arguable case is presented, the Court would force the parties to abide by the arbitration agreement as the Arbitration Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. The relevant extracts of the said decision 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."*

54. It is equally relevant to point out that the *prima facie* case in the context of Section 8 is not to be confused with the merits of the case put up by the parties, which has to be established before the Arbitral Tribunal. *Prima facie* case is restricted to the subject matter of the suit being *prima facie* arbitrable under a valid arbitration agreement. *Prima facie* case means the assertions on these aspects are *bona fide*. *Prima facie* examination is not a full review but a primary first review and to read out manifestly and *ex facie* non-existent an invalid arbitration agreement and a non-arbitration dispute.

55. The aim and objective of the *prima facie* review at the reference stage is to *cut the deadwood and trim off the side branches* in straightforward cases where dismissal is barefaced and pellucid and when, on the facts and law, the litigation must stop at the first stage. It is only when the Court is certain that no valid arbitration agreement exists or the disputes/ subject matters are non-arbitrable, the application under Section 8 would be rejected. At this stage, the Court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and

summary, and not a mini-trial, etc.

56. Following the general rules and the principle laid down by ***Vidya Drolia***, the Supreme Court has consistently taken a position that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. Reference can be made to the decisions in the case of ***Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd.***[27]***, Sanjiv Prakash v. Seema Kukreja***[28] and ***Indian Oil Corpn. Ltd. v. NCC Ltd.***[29]**.**

57. The Supreme Court in the case ***BSNL v. Nortel Networks (India) (P) Ltd.***[30] and ***Secunderabad Cantonment Board v. B. Ramachandraiah & Sons***[31], while affirming the fundamental principle of minimum judicial intervention, held that when cases are manifestly *ex facie* time barred, then reference should not be made.

58. In the case of ***BSNL v. Nortel Networks (India)(P) Ltd.*** the Supreme Court has again extensively considered the aforesaid aspects and under the facts of the said case, while reaffirming the settled legal position of arbitration being preferred remedy and non-arbitration should be an exception, under the facts of the said case has held that the claimant in that case attempted to initiate *ex-facie* meritless, frivolous and dishonest litigation and, therefore, the order under Section 11(6) passed by the High Court for appointment of an Arbitrator was set aside as the dispute earlier attained final settlement. The Supreme Court held that only in the very limited category of cases, where there is not even a vestige of doubt that the

[27] (2021) 5 SCC 671.
[28] (2021) 9 SCC 732.
[29] (2023) 2 SCC 539.
[30] (2021) 5 SCC 738.
[31] (2021) 5 SCC 705.

claim is *ex-facie* time-barred, or that the dispute is non-arbitrable, that the Court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise, it would encroach upon what is essentially a matter to be determined by the tribunal. A similar position has also been affirmed in the case of the ***Secunderabad Cantonment Board.***

59. Furthermore, there is also no cloud of uncertainty over the proposition of law that the application for stay of the arbitration proceedings pending before the Arbitral Tribunal can also be brought before the same Tribunal. Reference can be made to the decision of the Bombay High Court in the case of ***Maharashtra State Electricity Board v. Datar Switchgear Ltd.***[32] in this regard. The relevant extracts of the same read as under:-

> ***"50.*** *A reading of the provisions contained in Part-I of the Arbitration and Conciliation Act, 1996 would, therefore, in my view, leave no manner of doubt that the Arbitral Tribunal does not have the power to suspend the arbitral proceedings before it as a step in aid of the execution of an interim order passed by the Arbitral Tribunal. While consolidating and amending the law relating to domestic and international commercial arbitration, the legislature has made specific provisions for the termination or, as the case may be, for suspension of arbitral proceedings. The Arbitral Tribunal is empowered to rule on its jurisdiction and to determine a challenge to the existence or the validity of an arbitration agreement. In such a situation, the recent decision of three learned Judges of the Supreme Court in (Bhatia International v. Bulk Trading S.A.)[2], (2002) 4 SCC 105 holds that applications for stay of arbitral proceedings or to challenge the existence or validity of the arbitration agreement or involving the jurisdiction of the Arbitral Tribunal have to be made to the Arbitral Tribunal under the Act. Such applications cannot be made to the Court under section 9.* ***Where there is a challenge to the jurisdiction of the Arbitral Tribunal or the existence or validity of the arbitration agreement is questioned, an application can only lie before the Arbitral Tribunal to have these issues adjudicated. As an incident of***

[32] 2002 SCC OnLine Bom 983

> ***its power to adjudicate on its jurisdiction, the Arbitral Tribunal may entertain an application for stay or as a consequence of its determination upholding a challenge to its jurisdiction or to the existence or validity of the agreement on arbitration, terminate proceedings. In so far as defaults are concerned, the legislature has made specific provisions which envisage specific instances of default and provide clear cut consequences of those defaults. Among these circumstances, as already noted, are those envisaged in sections 25, 27(5) and 38 of the Act. Provisions have been made in section 32 for termination of proceedings.*** *That being the position, it would be impermissible to read into sub-section (3) of section 19 a power to suspend arbitral proceedings or to terminate arbitral proceedings as an incident of the enforcement of an interim order.*

60. At this juncture, it is equally significant to refer to the decision of the Supreme Court in the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.***[33], wherein, the Supreme Court, while emphasising the legislative command couched in Section 8 of the 1996 Act held that generally if the dispute pertains to the adjudication of rights *in rem* and not *in personam* then a private forum like the Arbitration Tribunal cannot decide such a dispute. The relevant extract of the said decision reads as under:-

> ***"34.*** *The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:*
> *(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).*
> *(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.*
> *(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the*

[33] (2011) 5 SCC 532.

Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.

35. *The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.*

36. *The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.*

***

38. *Generally* ***and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration****. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."*

61. The nature of the power under Section 11 came to be referred to a Constitutional Bench of the Supreme Court in the case of ***Shree Ram mills v. Utility premises***[34] wherein, it was articulated that the crux of this role was to appoint an Arbitrator in instances where a party defaulted, eschewing involvement in any contentious matters between the disputing parties. This demarcation accentuated the procedural mandate assigned to the judge, ensuring the facilitation of arbitration proceedings without encroaching upon the adjudication of disputes.

62. The case of ***Indian Oil corp. Ltd. v. SPS Engineering Ltd.***[35] becomes noteworthy, wherein, it was observed that in an application under Section 11 of the 1996 Act, it is imperative to elucidate the existence of a dispute and an arbitration agreement for its resolution. The applicant need not substantiate their claim, furnish exhaustive details concerning the statute of limitations, or produce documentary evidence demonstrating the claim's timeliness. This adjudicatory responsibility is predominantly vested in the Arbitral Tribunal. Should the Chief Justice or their designate deem it requisite to scrutinize issues beyond the mere existence of an arbitration agreement, such as determining if the claim is antiquated (time-barred) or if there has been an acquiescence of mutual rights and obligations under the contract, they must explicitly document this intention and provide the parties with an opportunity to submit pertinent materials. Absent such notification, parties would operate under the presumption that only jurisdictional matters and the existence of an arbitration agreement will be addressed in these proceedings.

---

[34] (2007) 4 SCC 599.
[35] (2011) 3 SCC 507

63. Subsequently, a seven-judge Bench in the case of ***S.B.P. and Co. v. Patel Engineering***[36] made pivotal observations that altered the understanding of the Chief Justice's role under Section 11 of the 1996 Act. The Court overruled earlier decisions, establishing that the Chief Justice or their designate's function is judicial rather than administrative. This means they must act in a judicial capacity when appointing arbitrators. Furthermore, the Supreme Court clarified that the Chief Justice or their designate has the authority to resolve contentious issues, such as the existence and validity of an arbitration agreement and whether claims are time-barred. The Supreme Court also emphasized that orders made under Section 11 are subject to judicial review under Article 136 of the Constitution of India, thereby allowing such decisions to be challenged before the Supreme Court. This landmark judgment highlighted the judicial nature of the Chief Justice's role, underscoring the need for a more nuanced and legally rigorous approach to the appointment of arbitrators.

64. Following this, 2015 amendment was brought into force, which *inter alia*, further narrowed the contours of the judicial interference at the stage of reference in arbitration proceedings. The Supreme Court in the case of ***Duro Felguera, S.A. v. Gangavaram Port Ltd.,*** [37] clarified the effect and impact of the 2015 amendment. The Court held that the scope of the referral Court's jurisdiction is limited to only one aspect i.e., 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

[36] (2005) 8 SCC 618.
[37] (2017) 9 SCC 729

arisen between the parties to the agreement. The relevant paragraphs of the said decision read as follows:-

> *"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. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . 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."*

65. Recently, this Court as well in Arb. P. 145/2025 titled as ***Pradhan Air Express Pvt. Ltd v. Air Works Engineering Pvt. Ltd,*** while relying on the decisions of ***SBI General Insurance Co. Ltd. v. Krish Spinning,***[38] ***Interplay between Arbitration Agreements*** and ***Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd.,***[39] has held that jurisdictional contours of the referral Court, as meticulously delineated under the 1996 Act and further crystallised through a consistent line of authoritative pronouncements by the Supreme Court, are unequivocally confined to a *prima facie* examination of the existence of an arbitration agreement. The adjudication of aspects relating to frivolous, non-existent and *malafide* claims at the referral stage are deferred till the arbitration proceedings eventually come to an end. The relevant extracts of the said decision reads as under:-

> *"9. The law with respect to the scope and standard of judicial scrutiny under Section 11(6) of the 1996 Act has been fairly well settled. The Supreme Court in the case of* ***SBI General Insurance Co. Ltd. v. Krish***

[38] 2024 SCC OnLine SC 1754.
[39] (2025) 2 SCC 192.

Spinning,[40] *while considering all earlier pronouncements including the Constitutional Bench decision of seven judges in the case of* ***Interplay between Arbitration Agreements under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899***, ***In re*** [41] *has held that scope of inquiry at the stage of appointment of an Arbitrator is limited to the extent of prima facie existence of the arbitration agreement and nothing else.*

10. It has unequivocally been held in paragraph no.114 in the case of ***SBI General Insurance Co. Ltd*** *that observations made in* ***Vidya Drolia v. Durga Trading Corpn.,***[42] *and adopted in* ***NTPC Ltd. v. SPML Infra Ltd.,***[43] *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 apply after the decision of* ***Re: Interplay****. The abovenoted paragraph no.114 in the case of* ***SBI General Insurance Co. Ltd*** *reads as under:-*

> *"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)."*

11. Ex-facie frivolity and dishonesty are the issues, which have been held to be within the scope of the Arbitral Tribunal which is equally capable of deciding upon the appreciation of evidence adduced by the parties. While considering the aforesaid pronouncements of the Supreme Court, the Supreme Court in the case of ***Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd.,***[44] *however, has held that the referral Courts under Section 11 must not be misused by one party in order to force other parties to the arbitration agreement to participate in a time-consuming and costly arbitration process. Few instances have been delineated such as, the adjudication of a non-existent and*

---

[40] 2024 SCC OnLine SC 1754.
[41] 2023 SCC OnLine SC 1666.
[42] (2021) 2 SCC 1.
[43] (2023) 9 SCC 385.
[44] (2025) 2 SCC 192.

malafide claim through arbitration. The Court, however, in order to balance the limited scope of judicial interference of the referral Court with the interest of the parties who might be constrained to participate in the arbitration proceedings, has held that the Arbitral Tribunal eventually may direct that the costs of the arbitration shall be borne by the party which the Arbitral Tribunal finds to have abused the process of law and caused unnecessary harassment to the other parties to the arbitration.

12. It is thus seen that the Supreme Court has deferred the adjudication of aspects relating to frivolous, non-existent and malafide claims at the referral stage till the arbitration proceedings eventually come to an end. The relevant extracts of ***Goqii Technologies (P) Ltd.*** *reads as under:-*

> ***"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."*

13. In view of the aforesaid, the scope at the stage of Section 11 proceedings is akin to the eye of the needle test and is limited to the extent of finding a prima facie existence of the arbitration agreement and nothing beyond it. The jurisdictional contours of the referral Court,

as meticulously delineated under the 1996 Act and further crystallised through a consistent line of authoritative pronouncements by the Supreme Court, are unequivocally confined to a prima facie examination of the existence of an arbitration agreement. These boundaries are not merely procedural safeguards but fundamental to upholding the autonomy of the arbitral process. Any transgression beyond this limited judicial threshold would not only contravene the legislative intent enshrined in Section 8 and Section 11 of the 1996 Act but also risk undermining the sanctity and efficiency of arbitration as a preferred mode of dispute resolution. The referral Court must, therefore, exercise restraint and refrain from venturing into the merits of the dispute or adjudicating issues that fall squarely within the jurisdictional domain of the arbitral tribunal. It is thus seen that the scope of enquiry at the referral stage is conservative in nature."

66. At this juncture, reference can be made to the decision of ***SBI General Insurance Co. Ltd. v. Krish Spinning,*** wherein the Court considered the difference between Sections 8 and 11 of the 1996 Act and held as under:-

"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."

67. Therefore, although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral Courts under the said provisions is intended to be different. The legislative intent to distinguish the two provisions is further underscored by the appellate remedy provided under Section 37 — which permits an appeal against the refusal to refer parties under Section 8 — a remedy conspicuously absent in the context of a refusal under Section 11. While a Court acting under Section 8 is required to undertake a *prima facie* examination of the validity of the arbitration agreement, the jurisdiction under Section 11 is limited to a mere existence of such an agreement. Significantly, the pendency of an application under Section 8 does not obstruct the commencement or continuation of arbitration, nor the rendering of an award. In stark contrast, once an application is filed under Section 11 owing to a failure in the agreed procedure for appointment, arbitral proceedings are effectively stalled pending judicial determination.

68. Thus, the tenet articulated in Section 11 of the 1996 Act emphatically underscores the limited scope of judicial intervention. The resolution of matters such as the existence of a valid arbitration agreement, the distinction between a live claim and a dead one, or whether accord and satisfaction have been mutually achieved, if adjudicated at the pre-reference stage, would effectively nullify the authority of the arbitrator or Arbitral Tribunal as delineated in Section 16. This would further contravene the doctrine of *kompetenz-kompetenz,* which bestows upon the arbitrator the capacity to adjudicate on its own jurisdiction, including any objections pertaining to the existence or validity of the arbitration agreement. The statute does not

envisage the scrutiny of preliminary issues by the Court at the pre-reference stage as per Section 11. A referral Court at the Section 8 or 11 stage can only enter into a *prima facie* determination. The legislative mandate of *prima facie* determination ensures that the referral Courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction.

69. Therefore, at the heart of Sections 8 and 11 lies a shared compass i.e., an unwavering commitment to uphold party autonomy. Much like voyagers, unlike the ones in the present case, who, after careful navigation and the setting of sails, agree upon a route to weather future storms together, commercial parties, through negotiation and foresight, often choose alternate dispute resolution mechanism like arbitration as a safe harbour for the resolution of potential disputes. This choice is not born of haste but emerges from a deliberate desire to preserve the commercial camaraderie that underpins their transaction.

70. Therefore, if one party strays from this charted course, thereby abandoning the agreed harbour of dispute resolution mechanism, it eventually threatens to jeopardise the spirit of mutual understanding and consent. It is at this juncture, Section 8 intervenes as a compass in the hands of the aggrieved party, enabling them to steer the vessel back to the mutually chosen forum. However, this right is not boundless; it must be invoked within the limited timeframe of before filing the written statement, and only if the quarrel at hand falls within the ambit of the arbitration agreement. In essence, the legislature, through these provisions, seeks to honour the sanctity of promises made by the contracting parties, wherein the dispute resolution is not just about justice, but also about keeping intact the sanctity

of party autonomy, thereby preserving the thread of trust that binds commercial relationships.

71. Section 16 further delineates the competency of the Arbitral Tribunal to adjudicate any objections pertaining to its jurisdiction over disputes submitted for arbitration. The jurisdiction of the tribunal under Section 16 is anchored on two principal pillars *firstly*, the principle of *kompetenz-kompetenz*, whereby the Arbitral Tribunal possesses the authority to determine its own jurisdiction, and *secondly*, the doctrine of separability (or severability), which posits that the arbitration agreement is a distinct and autonomous contract, separate from the underlying substantive contract that encapsulates the commercial terms agreed upon by the parties. (See. ***Olympus Superstructures pvt. ltd. v. Meena Vijay Khetan***[45]).

72. The doctrine of *kompetenz-kompetenz*, also known as *Competence-Competence* or *Competence de la recognized*, is a legal principle originating from German jurisprudence. It endows an Arbitral Tribunal with the authority to determine its own jurisdiction, encompassing any objections related to the existence or validity of the arbitration agreement. This doctrine, however, is subject to a crucial exception, when the arbitration agreement itself is contested as non-existent or rendered null and *void* due to fraud or deception. The underlying intent of this doctrine is to prevent the arbitration process from being derailed at the outset by preliminary objections raised by one of the parties challenging the competence of the tribunal. It empowers the tribunal to make an initial determination on the validity of the arbitration agreement and its jurisdiction over the arbitral

[45] (1999) 5 SCC 651.

proceedings.

73. The doctrine of *kompetenz-kompetenz* is widely acknowledged across various jurisdictions. The primary point of divergence lies in the timing of judicial intervention. This timing is significant, as it impacts both public and private interests. Under Indian law, the statute does not provide for an immediate challenge before the Court against a preliminary award on jurisdiction. Instead, the aggrieved party must await the final award and then challenge it under Section 34 of the 1996 Act. Permitting judicial review at an intermediate stage of the proceedings would enable parties to employ delay tactics, thereby squandering both public and private resources.

74. The doctrine of competence-competence within its fold encompasses both the positive and negative facets. The positive facet includes the recognition of the mutual intention of the contracting parties to resolve their disputes amicably through arbitration and prevents them from instituting parallel proceedings before the Courts thereby, delaying the arbitral process.

75. On the contrary, the negative side of competence-competence focuses on the Courts thereby, limiting their power of interference at the referral stage. Thus, the negative aspect of the doctrine of competence-competence suggests that the Courts should refrain from entertaining a challenge to the jurisdiction of the Arbitral Tribunal before the arbitrators themselves have had an opportunity to do so.[46] Therefore, juxtaposing both negative and positive facets, the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their

[46] George A. Bermann, "The "Gateway" Problem in International Commercial Arbitration", (2012) 37 Yale Journal of International Law 1, 16

jurisdiction, which is subject to subsequent review by Courts.[47]

76. The positive and negative aspects of the doctrine of competence-competence were also recognised by the Supreme Court in the case of ***Vidya Drolia***. The relevant extracts of the said decision read as under:-

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

77. The doctrine of severability posits that an arbitration agreement is legally and existentially distinct from the underlying substantive contract within which it is embedded. It is regarded as autonomous and juridically independent from the substantive contract. This doctrine ensures that the arbitration agreement remains generally valid and binding, even in instances where the underlying contract is deemed invalid, illegal, terminated, or repudiated. The substantive contract encompasses the commercial terms agreed upon by the parties, delineating their rights and obligations, whereas the arbitration clause constitutes the parties' agreement regarding the method of dispute resolution. The party alleging invalidity of the main

[47] Fouchard, Gaillard, Goldman on International Commercial Arbitration, Emmanuel Gaillard and John

contract must establish that the alleged invalidity has a direct bearing upon the arbitration clause to avoid arbitration. The grounds for contesting the validity of the arbitration agreement are similar to the grounds provided under the contract law, including fraudulent inducement, fraud, illegality, duress, or waiver.

78. In the case of ***Indian Farmers Fertilizer Cooperative Ltd. v. Bhadra products***[48]**,** the Court held that substantive jurisdiction would comprehend *firstly,* the existence or validity of the arbitration agreement; *secondly,* the constitution of the tribunal; *thirdly,* the issues submitted to arbitration should be arbitrable and emanate from the arbitration agreement. Further, in the case of ***Dresser Rand SA v. Bindal Agro-Chem Ltd.***[49] the Court determined that the issue of the existence of the arbitration agreement is to be determined from the terms of the agreement. If the terms of the agreement indicate the unequivocal intention of the parties to refer their disputes to a private tribunal for adjudication, it would be a valid arbitration agreement. The intention to arbitrate must be clearly spelt out from the arbitration agreement.

79. Moving on to Section 17 of the 1996 Act, which gives the power to the Arbitral Tribunal regarding interim measures. The Law Commission of India, in its 246th Report on the 1996 Act, recommended that the powers of a Tribunal under Section 17 must be brought in line with the powers of a Court under Section 9. The rationale for doing so was spelt out by the Commission in the following words "*This is to provide the arbitral tribunal*

Savage (Eds.), (1999) 401
[48] (2018) 2 SCC 534.
[49] (2006) 1 SCC 2671.

the same powers as a civil court in relation to grant of interim measures." , It is clear that the object of amending Section 17 of the 1996 Act was to vest with the Tribunal, the same powers as a Civil Court in relation to the grant of interim measures. In other words, the power to pass interim measures imposes a discretion vested in the Tribunal that would have to be exercised in consonance with the well-settled principles governing the grant of such reliefs by the Civil Court.

80. Section 34 then provides for the power of the Court against an arbitral award and the grounds on which it can be set aside. The underlying philosophy of Section 34 of the 1996 Act strives to bring a balance between party autonomy and minimum judicial interference in arbitral proceedings. Thus, the section envisages a position whereby an award can be challenged for the purpose of setting aside the same at the first instance without much delay. The parties have more hands-on involvement in an arbitration process and play an active role in the adjudication process. Due to the party autonomy and efficacious dispute resolution process envisaged under the 1996 Act, there is a limited canvas where the Courts can interfere with the mandate of the Arbitral Tribunal and supplant its reasoning. The legislative mandate and spirit of Section 34 of the 1996 Act clearly elucidate that there is a limited scope of interference by the Courts inside the field of the Arbitrator.

81. In ***Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.***[50], the Supreme Court held that the Court hearing a Section 34 petition does not sit in an appeal (See also ***Associate***

[50] (2018) 3 SCC 170

Builders v. DDA[51] and ***S. Munishamappa v. B. Venkatarayappa***[52]***)***. Considering the embargo imposed on the Constitutional Courts under the ambit of Section 34 of the 1996 Act, the decision of the Supreme Court in ***Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd.***[53], is of utmost relevance. The Supreme Court held that power vested under Section 34(4) of the 1996 Act is to cure defects can be utilised in cases where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the 1996 Act.

82. The discussion revolving around the fetters imposed on the Courts under Section 34 would not be complete without the reference to the recent decision of the Supreme Court in the case of ***Gayatri Balaswamy v. M/s. ISG Novasoft Technologies Limited***[54] wherein the Constitutional Bench ruled that nature and scope of powers under Sections 34 and 37 of the 1996 Act include also the power of modification of an Award to some extent. The Court ruled that limited power can be exercised in certain contingencies namely, i) when the Award is severable by severing the "invalid" portion from the "valid" portion of the Award, ii) for correcting any clerical, computational or typographical errors, iii) post-Award interest iv) Article 142 of the Constitution of India would squarely be applicable in the modification of the Award as well *albeit* that power must be exercised with great care and caution.

---

[51] (2015) 3 SCC 49
[52] (1981) 3 SCC 260
[53] (2019) 20 SCC 1
[54] 2025 SCC OnLine SC 986

83. Thus, the legislative mandate behind the advent of the 1996 Act, the spirit and scope of Section 34 and the categorical judicial pronouncements on the ambit of Section 34, clearly elucidate that the Constitutional Courts do not possess the unbridled power to interfere unnecessarily with the Award. The embargo imposed on Constitutional Courts under Section 34 is in tune with the legislative intent of the 1996 Act.

84. Section 37 of the 1996 Act further strengthens the legislative command of minimum judicial interference in the arbitration matters. Upon examining Section 37, it becomes evident that the scope of such an appeal is narrowly tailored and largely mirrors the limited jurisdiction available under Section 34 of the 1996 Act. The Supreme Court, in ***C & C Constructions Ltd. v. IRCON International Ltd.***[55], while relying on a series of precedents including ***Larsen Air Conditioning and Refrigeration Company v. Union of India***[56], underscored that the jurisdiction conferred by Section 34 is strictly confined. Judicial interference with an arbitral award is permissible *inter alia* in cases of patent illegality, and such illegality must be fundamental and not of a trivial or technical nature. The Court clarified that although the Tribunal must act in accordance with the contract terms, a reasonably plausible interpretation of those terms by the arbitrator cannot be a ground for setting aside the award. Another valid basis for interference is the breach of principles of natural justice.

85. In contrast, an appeal under Section 37—which is directed against an "interim measure"—is even more limited in scope than under Section 34. In ***Konkan Railway Corporation Limited v. Chenab Bridge Project***

[55] 2025 SCC OnLine SC 218

Undertaking[57], the Supreme Court reiterated that the Appellate Court, while hearing a Section 37 appeal, is not empowered to re-evaluate the merits of the arbitral award. Instead, its inquiry must be confined to determining whether the Arbitral Tribunal had acted beyond its jurisdiction. The restricted ambit of Section 37 appeals, as emphasized in various judicial pronouncements, reflects a legislative policy aimed at minimal judicial intervention, preserving the finality of arbitral proceedings, and avoiding duplication of litigation. Furthermore, where two interpretations are reasonably possible, the Court cannot supplant the Arbitral Tribunal's view with its own. The Supreme Court also cautioned that merely framing an error as a form of illegality does not suffice unless it meets the high threshold of 'patent illegality'. While judicial intervention is not entirely precluded, it must be exercised sparingly to avoid undue delay and protraction of proceedings. Reference can be made to the recent decision of this Court in the case of ***Godrej Properties Limited v. Frontier Home Developers Private Ltd. & Anr.***[58] in this regard.

86. Thus, it can be safely concluded that the legislative scheme couched in Sections 5, 8, 11, 16, 34 and 37 of the 1996 Act read with Section 9 of the CPC would emphatically underscore that the interjection to arbitral proceedings at the inception is an exception to the general rule. Even though Section 9 of CPC encompasses within its scope broader power to file a civil suit, yet the suits are barred, which are expressly or impliedly barred under

[56] (2023) 15 SCC 472
[57] (2023) 9 SCC 85
[58] 2025 SCC OnLine Del 2148

any law. It is in this context that Section 5 of the 1996 Act will have to be re-examined, which starts with the non-obstante clause.

87. After perusing the scheme of the 1996 Act and legislative command of minimum judicial interference couched in sections of the 1996 Act as delineated above, this Court shall now test the contentions of the parties on the touchstone of principles as carved out above.

Present Suit

88. In the instant civil suit, the plaintiff has prayed for the following reliefs:

> *"a) pass a decree for declaration that the Arbitration Agreement contained in clause 29 of the Charterparty Agreement dated 5th August 2020 between the Plaintiff/ Porto Emporios Shipping Inc. and Defendant No. 1/ Indian Oil Corporation Limited has been waived and/or has stood terminated and therefore is inoperable;*
>
> *b) pass a decree for declaration that the arbitration proceedings commenced by the Defendant No. 1/ Indian Oil Corporation Limited on 3rd September 2021 under clause 29 of the Charterparty Agreement dated 5th August 2020 is oppressive and vexatious in light of Defendant No. 1/ Indian Oil Corporation Limited on 6th July 2021 having lodged a claim against the limitation fund constituted by the Plaintiff/ Porto Emporios Shipping Inc. before the Second Maritime Court in Panama on the basis of the claim in the Panamanian Money Decree Suit filed by Defendant No. 1/ Indian Oil Corporation Limited in the First Maritime Court of Panama;*
>
> *c) pass a decree for declaration that the claim sought to be made by the Defendant No. 1/ Indian Oil Corporation Limited against the Plaintiff/ Porto Emporios Shipping Inc. by notice dated 3rd September 2021, under the Arbitration Agreement contained in clause 29 of the Charterparty Agreement dated 5th August 2020 is non-arbitrable and cannot be proceeded with in arbitration;*
>
> *d) pass a decree of perpetual injunction restraining Defendant No. 1/ Indian Oil Corporation Limited and Defendant No. 2/ Indian Council of Arbitration from prosecuting, conducting and taking any steps or further steps in the arbitration proceedings sought to be commenced*

by the notice dated 3rd September 2021 under the Charterparty dated 5th August 2020, between the Plaintiff/ Porto Emporios Shipping Inc. and Defendant No. 1/ Indian Oil Corporation Limited which is currently being administered by Defendant No. 2/ Indian Council of Arbitration as Case No. ACM- 210;

e) pass a decree of perpetual injunction restraining the Defendants from taking any steps or further steps on the basis of the email dated 20th September 2021 issued by Defendant No. 2/ Indian Council of Arbitration and from appointing any arbitrator/s under clause 29 of the Charterparty dated 5th August 2020 and Rule 10 (3)(b) of the Maritime Arbitration Rules of the Indian Council of Arbitration;"

89. In order to examine the contentions of the plaintiff that the reliefs sought in the instant civil suit are not capable of being granted in arbitration proceedings, the Court would be required to examine the scope and extent of the relief prayed in the instant civil suit. For the sake of clarity, Clause 29 of the Charterparty agreement is reproduced as under:-

> *"All disputes arising under this charter party shall be settled in India in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (No.26 of 1996) or any further amendments thereof, and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The arbitrators shall be commercial men."*

90. A bare perusal of the entire relief clause would reveal that it centres around Clause 29 of the Charterparty agreement. The first and fundamental relief is to declare the said clause as inoperable on account of its being waived and or having stood terminated. The remaining reliefs B, C, D and E though couched differently, however, are the same and fundamentally relates to the existence of Clause 29 of the Charterparty agreement which is sought to be made inoperable and, therefore, there is no difficulty in concluding that the fundamental relief prayed in the instant civil suit is non-

operability of Clause 29 of the Charterparty agreement.

91. In sum and substance, the plaintiff's case rests on the fulcrum of the inoperability of the arbitration clause under the Charterparty agreement, rendering the same clause as redundant and consequent declaration of the same inoperable in the instant civil suit. To put it simply, a plea of an arbitration agreement being non-existent is taken, and in the absence of an existing clause, it is contended that the disputes are non-arbitrable.

92. Therefore, if the waiver of the Clause 29 of the Charterparty Agreement is tested on the anvil of the judicial dictum laid down in ***Booz Allen and Hamilton Inc.***, it is crystal clear that it is not covered under the well recognised examples of non-arbitrable disputes *inter-alia* such as: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate) etc.

93. Furthermore, a *right in rem* is a right exercisable against the world at large, as contrasted with a *right in personam*, which is an interest protected solely against specific individuals. Actions *in personam* refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions *in rem* refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

94. At this point in time, it is pertinent to note the concept of "waiver" which has been consistently defined across leading legal dictionaries.

Black's Law Dictionary (11th ed.) defines waiver as "*the voluntary relinquishment or abandonment — express or implied — of a legal right or advantage*." Similarly, Ballentine's Law Dictionary (3rd ed.) describes it as "*an intentional relinquishment of a known right, claim, or privilege.*" According to the Oxford Dictionary of Law (7th ed.), waiver is "*the voluntary giving up or abandoning of a right, either by an express statement or by conduct that is inconsistent with the enforcement of that right.*" Garner's Dictionary of Legal Usage defines waiver as "*the intentional or voluntary abandonment of a known legal right, claim, or privilege, which may be expressed in writing or implied by conduct.*" In the Indian context, P Ramanathan Aiyar's Advanced Law Lexicon (5th ed.) explains waiver as "*the intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed.*" Thus, the common thread running through these definitions is that waiver requires the voluntary, intentional, and conscious abandonment of a known legal right, either through express words or conduct indicating an intention inconsistent with the assertion of such right.

95. Therefore, when the plea of waiver of the arbitration agreement is examined in light of the guiding principles that distinguish *rights in rem* from *rights in personam*, it becomes evident that such a waiver does not operate against the world at large but is confined to the rights and obligations *inter se* the parties involved in the *lis*. The doctrine of waiver, in this context, is inherently personal and pertains solely to the contractual relationship between the disputing parties. Therefore, applying the principles enunciated by the Supreme Court in ***Booz Allen and Hamilton Inc.,*** it is

manifestly evident that the plaintiff's fundamental grievance in the present case i.e., the alleged waiver of the arbitration clause, concerns a right *in personam*. Consequently, the determination of such a plea properly falls within the jurisdictional domain of the Arbitral Tribunal itself.

96. Furthermore, if the gamut of the objections of the plaintiff to arbitration proceedings is seen, it rests on the fundamental principle of non-arbitrability and consequently renders the proceedings without jurisdiction. Section 16(2) of the 1996 Act itself provides a remedy for the non-applicant to raise an objection before the Arbitral Tribunal, *inter alia* that the Arbitral Tribunal does not have the jurisdiction. The remedy does not lapse here as held in the case of ***Vidya Drolia*** by the Supreme Court, the Court has been conferred power of 'second look' on aspect of non-arbitrability post the award in terms of Sub-clause (i), (ii) or (iv) of Sub-section 34(2)(a) or Sub-clause(i) of Section 34(2)(b) of the 1996 Act.

97. There is no doubt that the 1996 Act is a self-contained code *inter alia* with respect to matters dealing with the appointment of arbitrators, commencement of arbitration, making of an award and challenges to the arbitral award, as well as execution of such awards.[59] When a self-contained code sets out a procedure, the applicability of a general legal procedure would be impliedly excluded.[60] In ***Re: interplay*** as well the Supreme Court has emphasized that the 1996 Act, being a self-contained and exhaustive code on arbitration law, carries the imperative that what is permissible under the law ought to be performed only in the manner indicated, and not

[59] Pasl Wind Solutions (P) Ltd v. GE Power Conversion (India) (P) Ltd., (2021) 7 SCC 1; Kandla Export Corporation v. OCI Corporation, (2018) 14 SCC 715.
[60] Subal Paul v. Malina Paul, (2003) 10 SCC 361.

otherwise. Accordingly, matters governed by the 1996 Act, such as the arbitration agreement, appointment of arbitrators and competence of the Arbitral Tribunal to rule on its jurisdiction, have to be assessed in the manner specified under the law. The corollary is that it is not permissible to do what is not mentioned under the 1996 Act. Therefore, provisions of other statutes cannot interfere with the working of the 1996 Act, unless specified otherwise.

98. Coming to the facts of the present case, on 12.02.2021, notice was issued by the plaintiff to the defendant, attributing the intention of the defendant to abandon, renounce and disable them from performing their obligations under the Charterparty agreement contended in Clause 29. The aforesaid notice reads as under:-

> *"Subject: MT New Diamond - Charterparty dated 5 August 2020*
>
> *1. As you are aware, we are instructed by Porto Emporios Shipping Inc of Liberia ("Our Clients"), the owners of the ship MT New Diamond ("Vessel"). We refer to our earlier exchange of correspondence in relation to our Clients claim for compensation under Section 65 of the Indian Contract Act, 1872 in light of the Charterparty dated 5 August 2020 between our respective Clients ("Charterparty") being rendered void on account of frustration.*
>
> *2. Clause 29 of the Charterparty contains an arbitration agreement which provides as follows:*
>
> *"All disputes arising under this charter party shall be settled in India in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (No.26 of 1996) or any further amendments thereof, and under the Maritime Arbitration Rules of the Indian Council of Arbitration. The arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The arbitrators shall be commercial men."*
>
> *3. In flagrant breach of the aforesaid arbitration agreement contained in the Charterparty ("Arbitration Agreement"), your Clients have instituted substantial legal proceedings on the underlying merits of*

their alleged claim under the Charterparty, before the Maritime Court of the Republic of Panama in which they have sought inter-alia, a money decree of USD 78 Million against Our Clients ("Panamanian Suit"). Our Clients also note that whilst your Clients in the Panamanian Suit have referred to the fact that the charterparty is governed by Indian law, there is no reference whatsoever to the Arbitration Agreement contained in clause 29 of the Charterparty, which clearly evidences the fact that your Clients do not wish to perform their obligation to arbitrate under the Arbitration Agreement.

4. Your Clients having given a go by to the Arbitration Agreement contained in the Charterparty by unilaterally instituting the Panamanian Suit have thereby through their actions, manifested their intentions of abandoning, renouncing and disabling themselves from performing their obligations under the Arbitration Agreement contained in clause 29 of the Charterparty.

5. Your Clients' action of giving a go by to the Arbitration Agreement by filing the substantive action before the Maritime Court of the Republic of Panama i.e. the Panamanian Suit, is a repudiatory breach of the Arbitration Agreement on the part of your Clients. Accordingly, and on instructions of our Clients, please be advised that our Clients hereby accept your Clients' repudiatory breach, thus bringing the Arbitration Agreement contained in the Charterparty to an end. Please advise your Clients accordingly, who are, for the avoidance of any miscommunication, also copied into this letter.
Our Clients' rights remain reserved to the fullest extent."

99. The aforesaid notice was specifically replied by the defendant no. 1 on 12.03.2021, duly rejecting the claim of the repudiatory breach of the Contract in the following words:-

*"**Re: MT New Diamond- Charterparty dated 5 August 2020.***
We are in receipt of your letter bearing reference number 2280 dated February 12, 2021 which we passed on to our clients for instructions.

At the outset our clients deny all allegations and contentions as contained in the said letter under reply and nothing herein is deemed to be admitted unless specifically admitted herein.

Our clients also deny and reject your statement that the proceedings in Panama are a breach of the Charterparty. The nature of the claim filed in Panama is only a "flag arrest" which is a pure precautionary proceeding where the court decrees via injunction to keep the

registration of the vessel as it is and no possible deletion or cancellation of the title is possible nor any transfer of the title. The action also seeks security as required by Panama law and includes the P&I as defendant via a direct action permitted by Panama Laws.

The nature of the Panama proceedings and the procedural law do not require Plaintiffs (our client) to mention the existence of an arbitration clause in the charterparty. Panama Laws consider the allegations of the existence of an arbitration clause an affirmative defense which Defendants are the proper party to raise it via a petition to stay the case. Our client's regret that your clients are unaware of this practice in Panama and have not been advised properly, which fully recognizes arbitration clauses and stay cases pending the resolution of the arbitration. Any security lodged in Panama is either kept at the orders of the arbitration panel or sent, once the case is stayed, to the arbitration panel.

As can be deduced from the aforementioned our clients have not given a go-by to the arbitration agreement contained in the charter party and have not by their action manifested their intentions of abandoning, renouncing and disabling themselves from performing their obligation under the arbitration agreement contained in the charterparty. As such there has never been a repudiatory breach of arbitration agreement on the part of our clients and since there is no repudiatory breach on the part of our client the question of your client accepting the alleged repudiatory breach on part of our client and bringing arbitration agreement contained in the charter party to an end does not arise at all.

Our clients reserve all their rights as contained in the said charter party read with the bill of lading and all their other rights to the fullest extent."

100. Needless to state that the plaintiff's request for the grant of an anti-suit injunction was also rejected by the Second Maritime Court on 05.05.2021. The extract of the order 05.05.2021 reads as under:

"Also with reference to this request, we must clarify that the Claimant with its original brief of limitation claim, had requested that this type of general precautionary or protection measure be ordered and executed, a request that was resolved by this Court through Writ No. 47 of Match 3, 2021, and given that the claimants have corrected their claim brief, in compliance with

what was ordered by Writ No. 89 of April 22, 2021, and in said corrected brief they have accompanied in the same way the request that this general precautionary or protection measure be ordered, forces this Court to declare again its opinion regarding this request, by virtue of the retroactive effect that said correction of the claim has on the proceedings.

In this sense, and in relation to this request, this court considers that the opinion on which it must stand is not to admit it, since even when our maritime procedure law establishes the application of general precautionary or protection measures as part of the precautionary measures, it cannot be ignored, in the foreground, that said prohibition or restriction that the claimants seek conflicts with the right of action enshrined and protected by constitutional and legal norms, as well as procedural norms.

It is opportune to highlight what the trial lawyer Jorge Fábrega Ponce has told us about this aspect, who in his work Institutions of Civil Procedural Law, pages 93 and 94, explains that the right of action or the action itself constitutes a public right, abstract and autonomous that any natural or legal person has, to demand the jurisdictional activity of the state, through a claim and achieve through proceedings, which are decided prior to compliance with the legal formalities, the claim or petition that is formulated, a right to which the consecrated right for the defendant is also linked to the contradiction, which generates for the State the obligation to agree on the effective jurisdictional protection of the subjects, procedural and of those who have a legitimate interest in its development and decision in broad custody due proceedings and constitutional structure.

Hence, without undermining that precautionary function that the law grants to judges to order precautionary measures, unnamed in such cases, it should be noted that we are not only talking about the imposition of a precautionary measure based on a conservation or protection measure, directed to natural or legal persons, whether they are still not part of proceedings, or already being so in the case of the known creditor who already participates therein, it would be necessary to go beyond the legal restrictions that are imposed with a measure of this nature, since a limitation or prohibition would be imposed on the inherent right of action that would correspond to each person to enforce a particular right on which, as we have been reiterating, the courts of justice are called to guarantee and protect in a general way the access to justice and therefore said right of action.

In that direction it is also pertinent to reiterate that the "antisuit injunction" a concept identified by the petitioners in order for this court to issue it, is typical of the Common law system, which as has been highlighted, consists of a resolution or judicial order by which the judge orders a party to abstain from initiating or continuing judicial or arbitration proceedings before the forum of another State, or to abstain from initiating it, considering said proceedings to be legally incompatible with those before the Court that ordered said measure.

It must be understood then that antisuit injunctions are intimately related to conflicts over international jurisdiction, either due to the existence of a submission agreement to a specific forum, judicial or in arbitration, or as we have indicated because the foreign proceedings are degrading or oppressive to any of the parties, for example if being harmed abusively depriving it of its natural forum.

Notwithstanding the use made of this concept by the judges under the system of law offered by the Common law, it does not find support in the additional provisions of the maritime procedural law, and much less as part of a jurisprudential analysis or development to that effect, which outright makes it impossible for the Court to subsume it analogously to the maritime procedural law, given that our rules in any case are derived from the system of continental or written law which in its essence requires the existence of the legal rule and its eventual jurisprudential interpretation as concurrent sources of law.

At another point to consider, we would have that, a measure such as the one requested by the petitioners would not find support within the legal nature of the limitation proceedings themselves, being the latter comprised within the so-called universal proceedings, developed in relation to the legal universality or the totality of the assets and rights of a natural or legal person, and that gravitate around the jurisdiction of attraction, on existing claims a1nd lawsuits, or that may affect the patrimony of said person who seeks to limit his liability, and where any actions and rights that his creditors may have shall be satisfied by means of the creation of the limitation fund, since it is from said fund that any credits that are filed against it are payable, as understood from the provisions of articles 517 to 529 and 588 to 607 of our maritime procedural law, rules that regulate this type of special shipowner limitation of liability proceedings.

In this line, it should also be noted that within the regulations established to regulate the limitation of liability, we do not find the right to limit the filing of claims, due to the fact that there are ongoing limitation of liability proceedings, because in their context, these speak in such a case only of suspending enforcements against assets of the shipowner provided that they originate in the provisions of the limitation of liability, an aspect that is interpreted from the provisions of article 524, to which the provisions of article 529 are added, from which one can construe the possibility of accumulating, not only pending proceedings, but any that are filed in other jurisdictions as a result of the voyage, aspects that would devalue the viability of a precautionary measure such as the one requested by the claimants within proceedings for the limitation of liability.

Consequently, the guarantee of effective judicial protection, access to justice and protection of the right of action, as well as the other highlighted aspects, correspond to evaluative elements that lead this judge to determine that a request of this nature, and using a concept that is not enshrined in our maritime procedural regulations cannot be viable in these proceedings of limitation of liability. Therefore, said request for general precautionary or protection measure requested by PORTO EMPORIOS SHIPPING INC, NEW SHIPPING LIMITED and THE WEST OF ENGLAND SHIP OWNERS MUTUAL INSURANCE ASSOCIATION within these proceedings of limitation of the Shipowner's liability must be denied."

101. In the present case, there exists no dispute as to the existence of a valid and binding arbitration agreement between the parties. In such a scenario, the mandate under Section 8 of the 1996 Act is unequivocal. It obliges the judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement, to refer the parties to arbitration, provided the party applying does so before submitting its first statement on the substance of the dispute. The legislative intent underpinning Section 8 is to ensure that where parties have consciously

agreed to resolve their disputes through arbitration, such agreement must be honoured and enforced by the Courts with minimal intervention.

102. Only when the dispute is manifestly and demonstrably non-arbitrable can a Court decline referral to arbitration. To that extent, a detailed judicial examination of arbitrability at the Section 8 stage would not only transgress the legislative scheme but also frustrate the underlying objective of the 1996 Act, which is to reduce judicial interference and uphold party autonomy. These boundaries are not merely procedural safeguards but fundamental to upholding the autonomy of the arbitral process. Any transgression beyond this limited judicial threshold would not only contravene the legislative intent enshrined in Section 8 of the 1996 Act but also risk undermining the sanctity and efficiency of arbitration as a preferred mode of dispute resolution. The referral Court must, therefore, exercise restraint and refrain from venturing into the merits of the dispute or adjudicating issues that fall squarely within the jurisdictional domain of the arbitral tribunal. The referral mechanism under Section 8 is designed to exclude judicial determination of issues which fall within the jurisdiction of the Arbitral Tribunal, except where there is a clear finding that the claims are *ex-facie* non-arbitrable.

103. At the Section 8 stage, wherein the underlying intention was to only cut deadwood, it falls flat if the same arena in which the Arbitral Tribunal has the power to look into was vociferously argued and meticulously analysed by the Courts, rendering the principle of minimum judicial intervention otiose. The principle of minimum judicial intervention, which is almost cast in stone in so many words in the legislative scheme of the 1996 Act, would ultimately be defeated if the Arbitral Tribunal's power to look

into the non-arbitrability aspect is curtailed when the claims are not *ex-facie* non-arbitrable.

104. No doubt, the precautionary measure petition filed before the First Maritime Court by defendant no.1 and the exoneration from limitation of liability petition filed by the plaintiff both are pending adjudication before the Court at Panama. However, in none of those proceedings, Clause 29 of the Charterparty agreement has been held to be redundant. An inference is drawn on the basis of certain positions and the averments made by the defendant before the First Maritime Court and the Second Maritime Court.

105. It is also required to be noted that the aspect of inoperability of Clause 29 of the Charterparty agreement encompasses in itself an aspect of non-arbitrability. Needless to state that the implication of those averments and positions can still be looked into by the Arbitral Tribunal to be appointed under clause 29 of the Charterparty agreement.

106. Taking into consideration the overall conspectus of the facts and legal position revolving around the principle of minimum judicial interference, couched in the legislative mandate of Section 8 of the 1996 Act and upholding the sanctity of the party autonomy, the application stands allowed.

107. Needless to state, the observations made herein are limited to the question posed before the Court under Section 8 of the 1996 Act and shall not be construed as an expression on the merits of the case.

108. In view of the aforesaid, the parties herein are referred to the Arbitral Tribunal as the Court does not find that no valid arbitration exists between the parties.

109. All rights and contentions are open.

110. The suit stands disposed of alongwith pending applications.

(PURUSHAINDRA KUMAR KAURAV)
JUDGE

MAY 09, 2025
Nc/DPA/p/@m