2019 INSC 511

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3631 OF 2019
(Arising out of Special Leave Petition (Civil) No. 9213 of 2018)

GARWARE WALL ROPES LTD. … APPELLANT

VERSUS

COASTAL MARINE CONSTRUCTIONS & ENGINEERING LTD. … RESPONDENT

JUDGMENT

R.F. NARIMAN, J.

1. Leave granted.

2. This appeal arises out of a sub-contract given by the appellant to the respondent in respect of work to be done for installation of a geo-textile tubes embankment with toe mound at village Pentha in Odisha for protection against coastal erosion. The sub-contract agreement is dated 14.06.2013, Annexure III of which contains the following arbitration clause:

> "Any and all claims, disputes, questions or controversies involving the parties and arising in connection with the Agreement or execution, interpretation, validity, performance, termination hereof which cannot be finally

> resolved by such parties [*sic* through] negotiation shall be resolved by final and binding arbitration held in Pune. The disputes shall be referred to a sole arbitrator to be appointed by GWRL and COMACOE jointly in agreement."

3. Disputes arose between the parties, and on 02.01.2015, the appellant terminated the sub-contract. As a result, on 20.07.2016, the respondent wrote to the appellant stating that as disputes and differences had arisen between the parties, notice was given of appointment of Mr. Mihir Naniwadekar, Advocate, as sole arbitrator. The appellant replied on 17.08.2016, stating that the appointment of Mr. Naniwadekar as sole arbitrator was not acceptable as invocation of arbitration in pursuance of the agreement is premature. The respondent, therefore, filed a petition under Section 11 of the Arbitration and Conciliation Act, 1996 ["**1996 Act**"] on 10.02.2017 before the Bombay High Court. By the impugned judgment dated 09.03.2018, the Section 11 petition was allowed and Mr. Naniwadekar was appointed as sole arbitrator to adjudicate upon disputes and differences which have arisen between the appellant and the respondent in relation to the sub-contract dated 14.06.2013.

4. The question raised in this appeal is as to what is the effect of an arbitration clause contained in a contract which requires to be stamped. This Court, in **SMS Tea Estates (P) Ltd. v. Chandmari Tea**

Co. (P) Ltd., (2011) 14 SCC 66 [“**SMS Tea Estates**”], has held that where an arbitration clause is contained in an unstamped agreement, the provisions of the Indian Stamp Act, 1899 [“**Indian Stamp Act**”] require the Judge hearing the Section 11 application to impound the agreement and ensure that stamp duty and penalty (if any) are paid thereon before proceeding with the Section 11 application. The question is whether Section 11(6A), which has been introduced by way of the Arbitration and Conciliation (Amendment) Act, 2015 [“**Amendment Act, 2015**”], has removed the basis of this judgment, so that the stage at which the instrument is to be impounded is not by the Judge hearing the Section 11 application, but by an arbitrator who is appointed under Section 11, as has been held by the impugned judgment.

5. Mr. Dhruv Mehta, learned Senior Advocate appearing on behalf of the appellant, has taken us through the sub-contract as well as the arbitration clause contained therein. He relied strongly upon the Maharashtra Stamp Act, 1958 [“**Maharashtra Stamp Act**”], and Sections 33 and 34 thereof, in particular. According to him, these are provisions which are similar to the provisions contained in Sections 33 and 35 of the Indian Stamp Act, which, as held in **SMS Tea Estates** (supra), requires judicial authorities to impound such instruments,

which cannot be admitted in evidence or cannot be acted upon until duly stamped. According to him, the judgment in **SMS Tea Estates** (supra) continues to apply even after the introduction of Section 11(6A) to the 1996 Act, by which the Court is now to confine itself to the examination of the existence of an arbitration agreement. Relying upon the 246th Law Commission Report, which led to the amendment contained in Section 11(6A), together with the Statement of Objects and Reasons appended to the Arbitration and Conciliation (Amendment) Bill, 2015, Mr. Mehta argued that it was clear that the amendment was necessitated as a result of two Supreme Court judgments in particular, namely, **SBP & Co. v. Patel Engineering Ltd.**, (2005) 8 SCC 618 ["**SBP & Co.**"] and **National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.**, (2009) 1 SCC 267 ["**Boghara Polyfab**"], by which the door was opened too wide, so that many preliminary issues which do not relate to the existence of an arbitration agreement were to be decided by the Court hearing the Section 11 application instead of by the arbitrator. The focus being on these two judgments, it is clear that it is these two judgments whose basis has been removed, leaving **SMS Tea Estates** (supra) untouched. According to him, it is clear that if, as a result of operation of law, an instrument is to be impounded, upon which stamp duty and penalty (if any) are then to be paid, must

be followed as Section 11(6A) does not seek to interfere with the Indian Stamp Act at all. He relied upon certain judgments to buttress his submissions.

6. Ms. Ridhi Nyati, learned Advocate appearing on behalf of the respondent, referred us to Sections 8, 16, and 45 of the 1996 Act in particular, and made it clear that the object of the Amendment Act, 2015, in introducing Section 11(6A), was to confine the Court hearing the Section 11 application to examination of the existence of an arbitration agreement and nothing more. She made a distinction between “validity” and “existence” of an arbitration agreement, and argued that the provisions of the Indian Stamp Act are a fiscal measure intended merely to collect revenue and, if at all, will go to “validity” of an arbitration agreement and not to its “existence”. She relied strongly upon certain judgments which made it clear that an arbitration agreement is independent of the agreement in which it is contained. So long as it is in writing, and therefore, exists in fact, the Court hearing the Section 11 application is to appoint an arbitrator and thereafter leave all other preliminary issues to the arbitrator, as is mandated by Section 11 of the 1996 Act. The whole object of the amendment would be defeated as otherwise, a mini-trial would be conducted at the Section 11 stage, requiring impounding of the agreement containing

the arbitration clause. She also relied upon Section 11(13) of the 1996 Act, making it clear that the application under Section 11 ought to be disposed of within a period of 60 days from the date of service of notice, and that this would not be possible if questions relating to the Indian Stamp Act were to be decided at the Section 11 stage. Equally, according to her, no prejudice would be caused to any party if the arbitrator were to commence the arbitration and then impound the documents containing the arbitration clause by applying the Indian Stamp Act. She also argued that, in the present case, it is the appellant who is to pay stamp duty under the Indian Contract Act, 1872, and therefore, cannot take advantage of its own wrong in not doing so, as has been correctly held in the impugned judgment. She also relied upon several other judgments to buttress her submissions.

7. Having heard learned counsel for both sides, it is important to first set out the relevant provisions contained in the 1996 Act. Section 2(1)(b) defines "arbitration agreement" as follows:

> "**2. Definitions**.—(1) In this Part, unless the context otherwise requires,—
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> xxx xxx xxx
>
> (*b*) "arbitration agreement" means an agreement referred to in Section 7;
>
> xxx xxx xxx"

Section 7 is important and deals with what is meant by an arbitration agreement. Section 7 states:

> "**7. Arbitration agreement**.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in—
>
> (*a*) a document signed by the parties;
>
> (*b*) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or
>
> (*c*) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

Section 8, which speaks of the power to refer parties to arbitration where there is an arbitration agreement is also relevant, and states:

> "**8. Power to refer parties to arbitration where there is an arbitration agreement**.—(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, 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.

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."

Section 11(6A), 11(7), and 11(13) are important for decision in this case and are set out hereinbelow:

"**11. Appointment of arbitrators**.—

xxx xxx xxx

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

xxx xxx xxx

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such court is final and no appeal including Letters Patent Appeal shall lie against such decision.

xxx xxx xxx

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

xxx xxx xxx"

Section 16(1) reads as follows:

"**16. Competence of arbitral tribunal to rule on its jurisdiction**.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(*a*) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(*b*) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

xxx xxx xxx"

Section 45, which speaks of the power of a judicial authority to refer parties to arbitration, when it comes to agreements referred to by the New York Convention of 1958, states as follows:

"**45. Power of judicial authority to refer parties to arbitration**.—Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (V of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said

agreement is null and void, inoperative or incapable of being performed."

8. Sections 33 and 34 of the Maharashtra Stamp Act, with which we are directly concerned, read as follows:

> "**33. Examination and impounding of instruments**.— (1) Subject to the provisions of section 32-A, every person having by law or consent of parties authority to receive evidence and every person in charge of a public office, except an officer of police or any other officer, empowered by law to investigate offences under any law for the time being in force, before whom any instrument chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law.
>
> (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed:
>
> Provided that,—
>
> (a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do any instrument coming before him in the course of any proceeding other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973;
>
> (b) in the case of a judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court may appoint in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(a) the State Government may determine what offices shall be deemed to be public offices; and

(b) the State Government may determine who shall be deemed to be persons in charge of public offices.

34. Instruments not duly stamped inadmissible in evidence, etc.—No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument:

Provided that,—

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of,—

(i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and

(ii) a penalty at the rate of 2 per cent of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument:

Provided that, in no case, the amount of the penalty shall exceed double the deficient portion of the stamp duty.

(b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp; the contract or agreement shall be deemed to be duly stamped;

> (c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter IX or Part D of Chapter X of the Code of Criminal Procedure, 1973;
>
> (d) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act;
>
> (e) nothing herein contained shall prevent the admission of a copy of any instrument or of an oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clause (a) is paid."

9. The case law under Section 11(6) of the Arbitration Act, as it stood prior to the Amendment Act, 2015, has had a chequered history. In **Konkan Railway Corporation Ltd. v. Mehul Construction Co.**, (2000) 7 SCC 201 ["**Konkan Railway I**"], it was held that the powers of the Chief Justice under Section 11(6) of the 1996 Act are administrative in nature, and that the Chief Justice or his designate does not act as a judicial authority while appointing an arbitrator. The same view was reiterated in **Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd.**, (2002) 2 SCC 388 ["**Konkan Railway II**"].

10. However, in **SBP & Co.** (supra), a seven-Judge Bench overruled this view and held that the power to appoint an arbitrator under Section

11 is judicial and not administrative. The conclusions of the seven-Judge Bench were summarised in paragraph 47 of the aforesaid judgment. We are concerned directly with sub-paragraphs (i), (iv), and (xii), which read as follows:

> "(*i*) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.
>
> xxx xxx xxx
>
> (*iv*) The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.
>
> xxx xxx xxx
>
> (*xii*) The decision in *Konkan Rly. Corpn. Ltd.* v. *Rani Construction (P) Ltd.* [(2002) 2 SCC 388] is overruled."

This position was further clarified in **Boghara Polyfab** (supra) as follows:

> "**22.** Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in *SBP & Co.* [(2005) 8 SCC 618]. This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (*i*) issues which the

Chief Justice or his designate is bound to decide; (*ii*) issues which he can also decide, that is, issues which he may choose to decide; and (*iii*) issues which should be left to the Arbitral Tribunal to decide.

22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(*a*) Whether the party making the application has approached the appropriate High Court.

(*b*) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(*a*) Whether the claim is a dead (long-barred) claim or a live claim.

(*b*) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(*i*) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(*ii*) Merits or any claim involved in the arbitration."

11. As a result of these judgments, the door was wide open for the Chief Justice or his designate to decide a large number of preliminary aspects which could otherwise have been left to be decided by the arbitrator under Section 16 of the 1996 Act. As a result, the Law

Commission of India, by its Report No. 246 submitted in August 2014, suggested that various sweeping changes be made in the 1996 Act. Insofar as **SBP & Co.** (supra) and **Boghara Polyfab** (supra) are concerned, the Law Commission examined the matter and recommended the addition of a new sub-section, namely, sub-section (6A) in Section 11. In so doing, the Law Commission recommendations which are relevant and which led to the introduction of Section 11(6A) are as follows:

> "**28.** The Act recognizes situations where the intervention of the Court is envisaged at the pre-arbitral stage, i.e. prior to the constitution of the arbitral tribunal, which includes sections 8, 9, 11 in the case of Part I arbitrations and section 45 in the case of Part II arbitrations. Sections 8, 45 and also section 11 relating to "reference to arbitration" and "appointment of the tribunal", directly affect the constitution of the tribunal and functioning of the arbitral proceedings. Therefore, their operation has a direct and significant impact on the "conduct" of arbitrations. Section 9, being solely for the purpose of securing interim relief, although having the potential to affect the rights of parties, does not affect the "conduct" of the arbitration in the same way as these other provisions. It is in this context the Commission has examined and deliberated the working of these provisions and proposed certain amendments.
>
> **29.** The Supreme Court has had occasion to deliberate upon the scope and nature of permissible pre-arbitral judicial intervention, especially in the context of section 11 of the Act. Unfortunately, however, the question before the Supreme Court was framed in terms of whether such a power is a "judicial" or an "administrative" power – which obfuscates the real issue underlying such nomenclature/description as to –

- the scope of such powers – i.e. the scope of arguments which a Court (Chief Justice) will consider while deciding whether to appoint an arbitrator or not – i.e. whether the arbitration agreement exists, whether it is null and void, whether it is voidable etc.; and which of these it should leave for decision of the arbitral tribunal.
- the nature of such intervention – i.e. would the Court (Chief Justice) consider the issues upon a detailed trial and whether the same would be decided finally or be left for determination of the arbitral tribunal.

30. After a series of cases culminating in the decision in *SBP* v. *Patel Engineering*, (2005) 8 SCC 618, the Supreme Court held that the power to appoint an arbitrator under section 11 is a "judicial" power. The underlying issues in this judgment, relating to the scope of intervention, were subsequently clarified by RAVEENDRAN J in *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*, (2009) 1 SCC 267, where the Supreme Court laid down as follows –

> "1. The issues (first category) which Chief Justice/his designate will have to decide are:
>
> (a) Whether the party making the application has approached the appropriate High Court?
>
> (b) Whether there is an arbitration agreement and whether the party who has applied under section 11 of the Act, is a party to such an agreement?
>
> 2. The issues (second category) which the Chief Justice/his designate may choose to decide are:
>
> (a) Whether the claim is a dead (long barred) claim or a live claim?
>
> (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?
>
> 3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the arbitral tribunal are:

(a) Whether a claim falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(b) Merits of any claim involved in the arbitration."

31. The Commission is of the view that, in this context, the same test regarding scope and nature of judicial intervention, as applicable in the context of section 11, should also apply to sections 8 and 45 of the Act – since the scope and nature of judicial intervention should not change upon whether a party (intending to defeat the arbitration agreement) refuses to appoint an arbitrator in terms of the arbitration agreement, or moves a proceeding before a judicial authority in the face of such an arbitration agreement.

32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin Etsu Chemicals Co. Ltd.* v. *Aksh Optifibre*, (2005) 7 SCC 234, (in the context of section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.

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

> determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37 only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."

12. Pursuant to the Law Commission recommendations, Section 11(6A) was introduced first by Ordinance and then by the Amendment Act, 2015. The Statement of Objects and Reasons which were appended to the Arbitration and Conciliation (Amendment) Bill, 2015 which introduced the Amendment Act, 2015 read as follows:

> "**STATEMENT OF OBJECTS AND REASONS**
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> xxx xxx xxx
>
> 6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely: —
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> (i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;
>
> (ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;
>
> (iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

xxx xxx xxx"

13. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in **SBP & Co.** (supra) and **Boghara Polyfab** (supra) required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Section 11(4) to 11(6) is to

confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator. The question is as to whether the decision in **SMS Tea Estates** (supra) has also been done away with by the expression "notwithstanding any judgment, decree or order of any Court" contained in Section 11(6A).

14. In **SMS Tea Estates** (supra), this Court was confronted with an arbitration clause, namely, Clause 35 of a lease deed dated 21.12.2006 for a term of 30 years in regard to two tea estates. The lease deed was neither stamped nor registered. Paragraph 9 of the judgment set out the questions that arose for consideration as follows:

> "**9.** On the contentions urged the following questions arise for consideration:
>
> (*i*) Whether an arbitration agreement contained in an unregistered (but compulsorily registerable) instrument is valid and enforceable?
>
> (*ii*) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?
>
> (*iii*) Whether there is an arbitration agreement between the appellant and the respondent and whether an arbitrator should be appointed?"

When it came to the question of an arbitration clause contained in an unregistered lease deed, this Court held:

"**12.** When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the *transfer* or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer.

14. These principles have now found statutory recognition in sub-section (1) of Section 16 of the Arbitration and Conciliation Act, 1996 which is extracted below:

"**16. *Competence of Arbitral Tribunal to rule on its jurisdiction***.—(1) The Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose—

(*a*) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(*b*) a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

15. But where the contract or instrument is voidable at the option of a party (as for example under Section 19 of the Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement to sell his property under threat of physical harm or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding.

16. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to Section 49 of the Registration Act read with Section 16(1)(*a*) of the Act, an arbitration agreement in an unregistered but compulsorily registerable document can be acted upon and enforced for the purpose of dispute resolution by arbitration."

However, when it came to an unstamped lease deed which contained an arbitration clause, this Court, after setting out Sections 33 and 35 of the Indian Stamp Act held:

"**19.** Having regard to Section 35 of the Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of the Stamp Act is distinct and different from Section 49 of the Registration Act in regard to an unregistered document. Section 35 of the Stamp

Act, does not contain a proviso like Section 49 of the Registration Act enabling the instrument to be used to establish a collateral transaction.

20. The Scheme for Appointment of Arbitrators by the Chief Justice of Gauhati High Court, 1996 requires an application under Section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is, a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act.

21. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of the Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

22. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registerable) and which is not duly stamped:

22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and

whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Sections 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in Section 35 or 40 Section of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

xxx xxx xxx"

In conclusion, this Court held:

> *"***32.** In view of the above this appeal is allowed, the order of the High Court is set aside and the matter is remitted to the learned Chief Justice of the Gauhati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law."

15. It will be noticed from the aforesaid judgment that where an arbitration clause is contained in an agreement or conveyance, different consequences ensue depending on whether the agreement or conveyance is unregistered or unstamped. It is settled by **SBP & Co.** (supra) that Section 16 of the 1996 Act has full play only after the arbitral tribunal is constituted, without intervention of the Court under Section 11. This Court, in the aforesaid judgment, held:

"**12.** Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the

> conditions for the exercise of power to appoint an arbitrator are present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him."

In view of the law laid down by seven-Judge Bench, it is difficult to accede to the argument made by the learned counsel on behalf of the respondent that Section 16 makes it clear that an arbitration agreement has an independent existence of its own, and must be applied while deciding an application under Section 11 of the 1996 Act.

16. It will be seen that neither in the Statement of Objects and Reasons nor in the Law Commission Report is there any mention of **SMS Tea Estates** (supra). This is for the very good reason that the Supreme Court or the High Court, while deciding a Section 11 application, does not, in any manner, decide any preliminary question that arises between the parties. The Supreme Court or the High Court is only giving effect to the provisions of a mandatory enactment which, no doubt, is to protect revenue. **SMS Tea Estates** (supra) has taken account of the mandatory provisions contained in the Indian Stamp Act and held them applicable to judicial authorities, which would include the Supreme Court and the High Court acting under Section 11. A close look at Section 11(6A) would show that when the Supreme Court or the High Court considers an application under Section 11(4) to 11(6), and comes across an arbitration clause in an agreement or conveyance which is unstamped, it is enjoined by the provisions of the Indian Stamp Act to first impound the agreement or conveyance and see that stamp duty and penalty (if any) is paid before the agreement, as a whole, can be acted upon. It is important to remember that the Indian Stamp Act applies to the agreement or conveyance as a whole. Therefore, it is not possible to bifurcate the arbitration clause contained in such agreement or conveyance so as to give it an independent

existence, as has been contended for by the respondent. The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in **SMS Tea Estates** (supra) when it comes to an unregistered agreement or conveyance. However, the Indian Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. It is clear, therefore, that the introduction of Section 11(6A) does not, in any manner, deal with or get over the basis of the judgment in **SMS Tea Estates** (supra), which continues to apply even after the amendment of Section 11(6A).

17. Looked at from a slightly different angle, an arbitration agreement which is contained in an agreement or conveyance is dealt with in Section 7(2) of the 1996 Act. We are concerned with the first part of Section 7(2) on the facts of the present case, and therefore, the arbitration clause that is contained in the sub-contract in question is the subject matter of the present appeal. It is significant that an arbitration agreement may be in the form of an arbitration clause “in a contract”.

18. Sections 2(a), 2(b), 2(g) and 2(h) of the Indian Contract Act, 1872 ["**Contract Act**"] read as under:

> "**2. Interpretation clause**.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—
>
> (*a*) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
>
> (*b*) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
>
> xxx xxx xxx
>
> (*g*) An agreement not enforceable by law is said to be void;
>
> (*h*) An agreement enforceable by law is a contract;
>
> xxx xxx xxx"

19. When an arbitration clause is contained "in a contract", it is significant that the agreement only becomes a contract if it is enforceable by law. We have seen how, under the Indian Stamp Act, an agreement does not become a contract, namely, that it is not enforceable in law, unless it is duly stamped. Therefore, even a plain reading of Section 11(6A), when read with Section 7(2) of the 1996 Act and Section 2(h) of the Contract Act, would make it clear that an arbitration clause in an agreement would not exist when it is not enforceable by law. This is also an indicator that **SMS Tea Estates**

(supra) has, in no manner, been touched by the amendment of Section 11(6A).

20. We now come to some of the judgments cited by both the sides.

21. Learned counsel for the respondent relied heavily upon **Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr.**, (2014) 5 SCC 1 ["**Enercon**"], in particular, paragraph 83 thereof, which reads as follows:

> "**83.** The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the national courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties."

Paragraph 83 follows upon paragraph 79 of the judgment, which reads as follows:

> "**79.** In our opinion, all the issues raised by the appellants about the non-existence of a concluded contract pale into insignificance in the face of "Heads of Agreement on the proposed IPLA dated 23-5-2006". Clause 3 of the Heads of Agreement provides as under:
>
> "3. *Governing law and jurisdiction*
>
> 3.1 This paragraph is legally binding.
>
> 3.2 This Heads of Agreement is (and all negotiations and any legal agreements prepared in connection with the IPLA shall be) governed by and construed in accordance with the law of Germany.
>
> 3.3 The parties irrevocably agree that Clause 18 of the proposed draft IPLA shall apply to settle any dispute or claim that arises out of or in connection with this memorandum of understanding and negotiations relating to the proposed IPLA."
>
> A bare perusal of this clause makes it abundantly clear that the parties have irrevocably agreed that Clause 18 of the proposed IPLA shall apply to settle any dispute or claim that arises out of or in connection with this memorandum of understanding and negotiations relating to IPLA."

The focus in **Enercon** (supra) was as to whether an arbitration clause will apply even if there is no concluded contract entered into between the parties. Since the "Heads of Agreement" provided that disputes which arose out of the Memorandum of Understanding and negotiations relating to the Intellectual Property Licence Agreement (IPLA) were arbitrable, this Court held that the arbitration agreement in the facts of that case was separate from the main contract, making it a case which falls under the second part (and not under the first part) to

Section 7(2), namely, that an arbitration agreement may be in the form of a separate agreement. This judgment, therefore, does not take the respondent very much further. It may only be noted that the judgment in **Ashapura Mine-Chem Ltd. v. Gujarat Mineral Development Corporation**, (2015) 8 SCC 193 merely followed **Enercon** (supra) and would be inapplicable for the same reasons outlined by us above.

22. The other judgment strongly relied upon by the learned counsel for the respondent is **Duro Felguera, S.A. v. Gangavaram Port Ltd.**, (2017) 9 SCC 729 ["**Duro Felguera**"], and in particular, paragraph 59 of the judgment of Kurian Joseph, J. Paragraph 59 reads 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 and Co.* [*SBP and 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."

This judgment also makes it clear that the mischief that was sought to be remedied by the introduction of Section 11(6A) was contained in the judgments of **SBP & Co.** (supra) and **Boghara Polyfab** (supra). This

judgment does not, in any manner, answer the precise issue that is before us.

23. Indeed, in **United India Insurance Co. Ltd. and Ors. v. Hyundai Engineering and Construction Co. Ltd. and Ors.**, 2018 SCC OnLine SC 1045 ["**United India Insurance Co.**"], a three-Judge Bench of this Court, while dealing with an arbitration clause that arose under an insurance policy, distinguished **Duro Felguera** (supra) as follows:

> "**12.** The other decision heavily relied upon by the High Court and also by the respondents in *Duro Felguera* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729], will be of no avail. Firstly, because it is a two-Judge Bench decision and also because the Court was not called upon to consider the question which arises in the present case, in reference to clause 7 of the subject Insurance Policy. The exposition in this decision is a general observation about the effect of the amended provision and not specific to the issue under consideration. The issue under consideration has been directly dealt with by a three-Judge Bench of this Court in *Oriental Insurance Company Limited* [*Oriental Insurance Company Ltd.* v. *Narbheram Power and Steel (P) Ltd.*, (2018) 6 SCC 534], following the exposition in *Vulcan Insurance Co. Ltd.* v. *Maharaj Singh* [*Vulcan Insurance Co. Ltd.* v. *Maharaj Singh*, (1976) 1 SCC 943], which, again, is a three-Judge Bench decision having construed clause similar to the subject clause 7 of the Insurance Policy. In paragraphs 11 & 12 of *Vulcan Insurance Co. Ltd.* (supra), the Court answered the issue thus:
>
> > "11. Although the surveyors in their letter dated April 26, 1963 had raised a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1, the

appellant at no point of time raised any such dispute. *The appellant company in its letter dated July 5 and 29, 1963 repudiated the claim altogether. Under clause 13 the company was not required to mention any reason of rejection of the claim nor did it mention any. But the repudiation of the claim could not amount to the raising of a dispute as to the amount of any loss or damage alleged to have been suffered by Respondent 1. If the rejection of the claim made by the insured be on the ground that he had suffered no loss as a result of the fire or the amount of loss was not to the extent claimed by him, then and then only, a difference could have arisen as to the amount of any loss or damage within the meaning of clause 18*. In this case, however, the company repudiated its liability to pay any amount of loss or damage as claimed by Respondent 1. In other words, the dispute raised by the company appertained to its liability to pay any amount of damage whatsoever. In our opinion, therefore, the dispute raised by the appellant company was not covered by the arbitration clause.

12. *As per clause 13 on rejection of the claim by the company an action or suit, meaning thereby a legal proceeding which almost invariably in India will be in the nature of a suit, has got to be commenced within three months from the date of such rejection; otherwise, all benefits under the policy stand forfeited*. The rejection of the claim may be for the reasons indicated in the first part of clause 13, such as, false declaration, fraud or wilful neglect of the claimant or on any other ground disclosed or undisclosed. But as soon as there is a rejection of the claim and not the raising of a dispute as to the amount of any loss or damage, the only remedy open to the claimant is to commence a legal proceeding, namely, a suit, for establishment of the company's liability. It may well be that after the liability of the

> company is established in such a suit, for determination of the quantum of the loss or damage reference to arbitration will have to be resorted to in accordance with clause 18. *But the arbitration clause, restricted as it is by the use of the words 'if any difference arises as to the amount of any loss or damage', cannot take within its sweep a dispute as to the liability of the company when it refuses to pay any damage at all.*"

xxx xxx xxx

14. From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject clause 7 which is in *pari materia* to clause 13 of the policy considered by a three-Judge Bench in *Oriental Insurance Company Limited* (supra), is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the quantum to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the precondition and *sine qua non* for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the concerned policy. That has been expressly predicated in the opening part of clause 7 as well as the second paragraph of the same clause. In the opening part, it is stated that the "(liability being otherwise admitted)". This is reinforced and re-stated in the second paragraph in the following words:

> "It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as herein before provided, if the Company has disputed or not accepted liability under or in respect of this Policy."

15. Thus understood, there can be no arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the policy.

16. The core issue is whether the communication sent on 21st April, 2011 falls in the excepted category of repudiation and denial of liability in toto or has the effect

of acceptance of liability by the insurer under or in respect of the policy and limited to disputation of quantum. The High Court has made no effort to examine this aspect at all. It only reproduced clause 7 of the policy and in reference to the dictum in *Duro Felguera* (supra) held that no other enquiry can be made by the Court in that regard. This is misreading of the said decision and the amended provision and, in particular, mis-application of the three-Judge Bench decisions of this Court in *Vulcan Insurance Co. Ltd.* (supra) and in *Oriental Insurance Company Ltd.* (supra).

17. Reverting to the communication dated 21st April, 2011, we have no hesitation in taking the view that the appellants completely denied their liability and repudiated the claim of the JV (respondent Nos. 1 & 2) for the reasons mentioned in the communication. The reasons are specific. No plea was raised by the respondents that the policy or the said clause 7 was void. The appellants repudiated the claim of the JV and denied their liability in toto under or in respect of the subject policy. It was not a plea to dispute the quantum to be paid under the policy, which alone could be referred to arbitration in terms of clause 7. Thus, the plea taken by the appellants is of denial of its liability to indemnify the loss as claimed by the JV, which falls in the excepted category, thereby making the arbitration clause ineffective and incapable of being enforced, if not non-existent. It is not actuated so as to make a reference to arbitration. In other words, the plea of the appellants is about falling in an excepted category and non-arbitrable matter within the meaning of the opening part of clause 7 and as re-stated in the second paragraph of the same clause.

18. In view of the above, it must be held that the dispute in question is non-arbitrable and respondent Nos. 1 & 2 ought to have resorted to the remedy of a suit. The plea of respondent Nos. 1 & 2 about the final repudiation expressed by the appellants vide communication dated 17th April, 2017 will be of no avail. However, whether that factum can be taken as the cause of action for institution of the suit is a matter which can be debated in those

> proceedings. We may not be understood to have expressed any opinion either way in that regard.
>
> (emphasis in original)

24. This judgment is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the sub-contract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6A) deals with "existence", as opposed to Section 8, Section 16, and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in **United India Insurance Co.** (supra), as followed by us.

25. Other High Court judgments were relied upon in the context of stamp duty, being the judgments contained in **JMD Ltd. v. Celebrity Fitness India Pvt. Ltd.**, (2019) SCC OnLine Del 6483, **B.D. Sharma v. Swastik Infra Estate Pvt. Ltd. & Ors.**, (2018) SCC OnLine Del 13279,

Sandeep Soni v. Sanjay Roy, (2018) SCC OnLine Del 11169, and **N.D. Developers Pvt. Ltd. v. Bharathi & Ors.**, (2018) SCC OnLine Kar 2938. In view of our holding in this judgment, these judgments have not declared the law correctly, and are consequently, overruled. A recent Full Bench judgment of the Bombay High Court in **Gautam Landscapes Pvt. Ltd. v. Shailesh Shah and Ors.**, Arb. Pet. No. 466 of 2017 [decided on 04.04.2019] has also been brought to our notice. In paragraph 120 thereof, the Full Bench answered two questions framed by it as follows:

> "**120.** In view of the above deliberation, we answer the questions as framed by us as follows:
>
> (1) Whether a court, under the Arbitration and Conciliation Act, 1996, can entertain and grant any interim or ad-interim relief in an application under Section 9 of the said Act when a document containing arbitration clause is unstamped or insufficiently stamped?
>
> In the Affirmative
>
> (2) Whether, *inter alia*, in view of Section 11 (6A) of the Arbitration and Conciliation Act, 1996, inserted by Arbitration and Conciliation (Amendment) Act, 2016, it would be necessary for the Court before considering and passing final orders on an application under Section 11(6) of the Act to await the adjudication by the stamp authorities, in a case where the document objected to, is not adequately stamped?
>
> In the Negative"

Question (2), having been answered contrary to our judgment, is held to be incorrectly decided.

26. Learned counsel for the respondent relied strongly upon Section 11(13) of the 1996 Act to show that the 60-day period would be breached if a document were to be impounded at the stage of a Section 11(6) application. Stamp duty, when paid with penalty (if any), would require adjudication by the stamp authorities, which would take far more than the 60-day period that is laid down by Section 11(13). Undoubtedly, Section 11(13), which was also introduced by Amendment Act 3 of 2016, was enacted keeping one of the important objectives of the 1996 Act in mind, namely, speedy disposal of disputes by the arbitral tribunal, and appointment of an arbitrator having to be made as expeditiously as possible, therefore. Thus, a harmonious construction needs to be given to the provisions of the Maharashtra Stamp Act and Section 11(13) of the 1996 Act by which, if it is possible, both provisions ought to be subserved. We have already seen that under the Maharashtra Stamp Act, the object of impounding an instrument that is unstamped is to ensure that stamp duty and penalty (if any) must be paid on such instrument before it is acted upon by any authority. Likewise, under Section 11(13) of the 1996 Act, an application made under Section 11 for appointment of an arbitrator should be disposed of as expeditiously as possible, and, in any event, an endeavour shall be made to dispose of such application at least

within a period of 60 days from the date of service of notice on the opposite party.

27. The doctrine of harmonious construction of statutes is strongly imbedded in our interpretative canon. In **Sri Venkataramana Devaru v. State of Mysore**, [1958] SCR 895, Articles 25 and 26 of the Constitution of India were reconciled by applying the rule of harmonious construction thus:

> "The result then is that there are two provisions of equal authority, neither of them being subject to the other. The question is how the apparent conflict between them is to be resolved. The rule of construction is well settled that when there are in an enactment two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect could be given to both. This is what is known as the rule of harmonious construction. Applying this rule, if the contention of the appellants is to be accepted, then Article 25(2)(b) will become wholly nugatory in its application to denominational temples, though, as stated above, the language of that Article includes them. On the other hand, if the contention of the respondents is accepted, then full effect can be given to Article 26(b) in all matters of religion, subject only to this that as regards one aspect of them, entry into a temple for worship, the rights declared under Article 25(2)(b) will prevail. While, in the former case, Article 25(2)(b) will be put wholly out of operation, in the latter, effect can be given to both that provision and Article 26(b). We must accordingly hold that Article 26(b) must be read subject to Article 25(2)(b)."
>
> (at page 918)

In **J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of U.P.**, (1961) 3 SCR 185, this Court applied the rule of harmonious construction so that both provisions of a legislative instrument be given effect to thus:

> "To remove this incongruity, says the learned Attorney-General, apply the rule of harmonious construction and hold that clause 23 of the order has no application when an order is made on an application under clause 5(a). On the assumption that under clause 5(a) an employer can raise a dispute sought to be created by his own proposed order of dismissal of workmen there is clearly this disharmony as pointed out above between two provisions viz. clause 5(a) and clause 23; and undoubtedly we have to apply the rule of harmonious construction. In applying the rule, however, we have to remember that to harmonise is not to destroy. In the interpretation of statutes the court, always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. These presumptions will have to be made in the case of rule-making authority also. On the construction suggested by the learned Attorney-General it is obvious that by merely making an application under clause (5) on the allegation that a dispute has arisen about the proposed action to dismiss workmen the employer can in every case escape the requirements of clause 23 and if for one reason or other every employer when proposing a dismissal prefers to proceed under clause 5(a) instead of making an application under clause 23, clause 23 will be a dead letter. A construction like this which defeats the intention of the rule-making authority in clause 23 must, if possible, be avoided."
>
> (at page 193)

In **Chief Inspector of Mines v. Lala Karam Chand Thapar**, (1962) 1 SCR 9, the rule of harmonious construction was used to reconcile Section 31(4) of the Mines Act, 1952 and Section 24 of the General Clauses Act. This Court held:

> "If the words of Section 31(4) are construed to mean that the regulations became part of the Act to the extent that when the Act is repealed, the regulations also stand repealed, a conflict at once arises between Section 31(4) and the provisions of Section 24 of the General Clauses Act. In other words, the Mines Act, 1923, while saying in Section 31(4) that the repeal of the Act will result in the repeal of the regulations, will be saying, in the provisions of Section 24 of the General Clauses Act as read into it, that on the repeal of the Act, when the Act is repealed and re-enacted, the regulations will not stand repealed but will continue in force till superseded by regulations made under the re-enacted Act. To solve this conflict the courts must apply the rule of harmonious construction. According to Mr Pathak we have perfect harmony if it is held that the provisions of Section 24 of the General Clauses Act will have effect only if the regulations are such as survive the repeal of the parent Act and at the same time, construe Section 31(4) to mean that the regulations became for all purposes part and parcel of the Act. To harmonise is not however to destroy. The so-called harmony on the learned counsel's argument is achieved by making the provisions of Section 24 of the General Clauses Act nugatory and in effects destroying them in relation to the Mines Act, 1923. We have to seek therefore some other means of harmonising the two provisions. The reasonable way of harmonising that obviously suggests itself is to construe Section 31(4) to mean that the regulations on publication shall have for some purposes, say, for example, the purpose of deciding the validity of the regulations, the same effect as if they were part of the Act, but for the purpose of the continuity of existence, they will not be considered part of the Act, so that even though the Act is repealed, the

> regulations will continue to exist, in accordance with the provisions of Section 24 of the General Clauses Act. This construction will give reasonable effect to Section 31(4) of the Mines Act, 1923 and at the same time not frustrate the very salutary object of Section 24 of the General Clauses Act. ……"
>
> (at pp. 19-20)

In **Anwar Hasan Khan v. Mohd. Shafi**, (2001) 8 SCC 540, this Court succinctly laid down what is meant by the doctrine of harmonious construction, thus:

> "**8.** It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction. ……"

One reasonable way of harmonising the provisions contained in Sections 33 and 34 of the Maharashtra Stamp Act, which is a general statute insofar as it relates to safeguarding revenue, and Section 11(13) of the 1996 Act, which applies specifically to speedy resolution of disputes by appointment of an arbitrator expeditiously, is by

declaring that while proceeding with the Section 11 application, the High Court must impound the instrument which has not borne stamp duty and hand it over to the authority under the Maharashtra Stamp Act, who will then decide issues *qua* payment of stamp duty and penalty (if any) as expeditiously as possible, and preferably within a period of 45 days from the date on which the authority receives the instrument. As soon as stamp duty and penalty (if any) are paid on the instrument, any of the parties can bring the instrument to the notice of the High Court, which will then proceed to expeditiously hear and dispose of the Section 11 application. This will also ensure that once a Section 11 application is allowed and an arbitrator is appointed, the arbitrator can then proceed to decide the dispute within the time frame provided by Section 29A of the 1996 Act.

28. Arguments taken of prejudice, namely, that on the facts of this case, the appellant had to pay the stamp duty and cannot take advantage of his own wrong, are of no avail when it comes to the application of mandatory provisions of law. Even this argument, therefore, must be rejected.

29. We, therefore, allow the appeal and set aside the judgment of the Bombay High Court. The matter is remitted to the Bombay High Court to dispose of the same in the light of this judgment.

……..... J.
(R.F. NARIMAN)

……..... J.
(VINEET SARAN)

New Delhi;
April 10, 2019.