NTPC LTD.

v.

M/S SPML INFRA LTD.

(Civil Appeal No. 4778 of 2022)

APRIL 10, 2023

[DR. DHANANJAYA Y CHANDRACHUD, CJI AND PAMIDIGHANTAM SRI NARASIMHA*, J.]

Arbitration and Conciliation Act 1996 : s. 11(6) – Constitution of arbitral tribunal – Arbitiability of the dispute – Contract between the parties – Successful completion of work by SPML and issuance of completion certificate by NTPC – NTPC released the final payment – However, NTPC withheld SPML's Bank Guarantees with respect to other projects – In turn, SPML raised a claim against NTPC, and thereafter, filed writ petition seeking release the Bank Guarantees – During pendency, the parties arrived at a Settlement Agreement and in compliance thereof, NTPC released the Bank Guarantees and SPML withdrew the writ petition – After one month, SPML filed the arbitration petition u/s. 11(6) alleging coercion and economic duress in the execution of the Settlement Agreement – High Court allowed the same – On appeal held: No allegations of coercion or economic duress compelling SPML to withdraw any pending claims under the subject contract as a condition for the return of the Bank Guarantees – Only allegation by SPML was with respect to NTPC's illegal action of interlinking the release of the Bank Guarantees with some other contracts –Allegations of coercion and economic duress not bona fide, and that there were no pending claims between the parties for submission to arbitration – Claim of SPML was an attempt to initiate ex facie meritless, frivolous and dishonest litigation – High Court should have exercised the prima facie test to screen and strike down the ex-facie meritless and dishonest litigation – It should have exercised the restricted and limited review to check and protect parties from being forced to arbitrate – High Court erred in allowing the application u/s. 11(6), thus, the decision of the High Court set aside.

* Author

s. 11(6) – Pre-referral jurisdiction of the courts u/s. 11(6) – Scope of – Held: Is very narrow and inheres two inquiries – Primary inquiry is about the existence and the validity of an arbitration agreement and the secondary inquiry is with respect to the non-arbitrability of the dispute at the reference stage – Standard of scrutiny to examine the non-arbitrability of a claim is only prima facie – Limited scrutiny, through the eye of the needle, is necessary and compelling – If this duty within the limited extent is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court – Thus, this Court or a High Court, while exercising jurisdiction u/s. 11(6) not expected to act mechanically merely to refer a purported dispute raised by an applicant to the chosen arbitrator.

Allowing the appeal, the Court

HELD:

1.1 The pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non arbitrability of the dispute. [Para 25]

1.2 As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of

doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration. [Paras 26, 27]

1.3 The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia's case, if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator. [Para 28]

2.1 A simple narration of the bare fact leads to conclude that the allegations of coercion and economic duress are not bona fide, and that there were no pending claims between the parties for submission to arbitration. The respondent's claim fits in the description of an attempt to initiate "ex facie meritless, frivolous and dishonest litigation" [Para 44]

2.2 The whole dispute revolves around the solitary act of the Appellant, NTPC, in not returning the Bank Guarantees despite the successful completion of work. This continued even after SPML issued the No-Demand Certificate and NTPC released the final payment. These undisputed facts led to the institution of the Writ Petition before the Delhi High Court. There were no allegations of coercion or economic duress compelling SPML to withdraw any pending claims under the subject contract as a condition for the return of the Bank Guarantees. On the contrary, the only allegation by SPML was with respect to NTPC's "illegal" action of interlinking the release of the Bank Guarantees with some other contracts. This was precisely the argument before the High Court,

and, in fact, this submission is recorded by the High Court while issuing notice and injuncting NTPC. This fact clearly indicates that the plea of coercion and economic duress leading to the Settlement Agreement is an afterthought. [Para 45]

2.3. It was during the subsistence of the Writ Petition and the High Court's interim order, when SPML had complete protection of the Court, that the parties entered into the Settlement Agreement. This agreement was comprehensive. It inter alia provided for the release of Bank Guarantees by NTPC, the withdrawal of SPML's Writ Petition, restraining NTPC from filing contempt proceedings against SPML for letting the Bank Guarantees expire, and finally, restraining SPML from initiating any proceedings under the subject contract, including arbitration. The Settlement Agreement also recorded that there were no subsisting issues pending between the parties. [Para 46]

2.4. After reaping the benefits of the Settlement Agreement, the Writ Petition was withdrawn on 21.09.2020. It is thereafter that the present application under Section 11(6) of the Act was filed. The sequence of events leads to conclude that the letter of repudiation was issued only to wriggle out of the terms of the Settlement Agreement. Thus, it is clarified that the claims sought to be submitted to arbitration were raised as an afterthought. Further, SPML's allegations of coercion and economic duress in the execution of the Settlement Agreement lack bona fide. They are liable to be knocked down as ex facie frivolous and untenable. [Paras 47 and 48]

2.5. This is a case where the High Court should have exercised the prima facie test to screen and strike down the ex-facie meritless and dishonest litigation. These are the kinds of cases where the High Court should exercise the restricted and limited review to check and protect parties from being forced to arbitrate. Thus, the High Court erred in allowing the application under Section 11(6) of the Act. The High Court ought to have examined the issue of the final settlement of

disputes in the context of the principles laid down in Vidya Drolia's case. Thus, the decision of the High Court is set aside. [Paras 49-51]

Vidya Drolia and Ors. v. Durga Trading Corporation **(2021) 2 SCC 1 – relied on.**

Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman **(2019) 8 SCC 714 : [2019] 12 SCR 123;** *Duro Felguera, S.A. v. Gangavaram Port Ltd.* **(2017) 9 SCC 729 : [2017] 10 SCR 285;** *Sanjiv Prakash v. Seema Kukreja and Ors.* **(2021) 9 SCC 732;** *Oriental Insurance Co. Ltd. and Anr. v. Dicitex Furnishing Ltd.* **(2020) 4 SCC 621 : [2019] 14 SCR 389;** *Emaar India Ltd. v. Tarun Aggarwal Projects LLP & Anr* **2022 SCC OnLine SC 1328;** *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd* **(2009) 1 SCC 267 : [2008] 13 SCR 638;** *Union of India & Ors. v. Master Construction Co.* **(2011) 12 SCC 349 : [2011] 5 SCR 853;** *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.* **(2015) 2 SCC 424 : [2014] 12 SCR 360;** *United India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd.* **(2019) 5 SCC 362 : [2019] 5 SCR 521;** *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd.* **(2021) 5 SCC 671;** *Sanjiv Prakash v. Seema Kukreja and Ors.* **(2021) 9 SCC 732;** *Indian Oil Corporation Ltd. v. NCC Ltd.* **(2022) SCC OnLine SC 896;** *BSNL and Anr. v. Nortel Networks India (P) Ltd.* **(2021) 5 SCC 738;** *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons* **(2021) 5 SCC 705;** *DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd* **2021 SCC OnLine SC 781 – referred to.**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4778 of 2022.

From the Judgment and Order dated 08.04.2021 of the High Court of Delhi at New Delhi in ARBP No. 477 of 2020.

Adarsh Tripathi, Vikram S. Baid, Ajitesh Garg, Gaurav, Advs. for the Appellant.

Jaideep Gupta, Soumya Dutta, Advs. for the Respondent.

The Judgment of the Court was delivered by

PAMIDIGHANTAM SRI NARASIMHA, J.

1. The present appeal arises out of a decision of the High Court of Delhi[1], allowing the Respondent's application under Section 11(6) of the Arbitration and Conciliation Act, 1996[2] for the constitution of an Arbitral Tribunal. It is the case of Appellant NTPC that there were no subsisting disputes between the parties in view of the Settlement Agreement dated 27.05.2020 and that the application for arbitration is an afterthought and abuse of the process.

2. By an order dated 15.07.2022, this Court, while granting leave, stayed all further proceedings before the Arbitral Tribunal. Short facts giving rise to the filing of the petition under Section 11 of the Act and leading to the impugned decision of the High Court are as follows.

3. ***Facts:*** The Appellant and Respondent, hereinafter referred to as NTPC and SPML respectively, entered into a contract for "*Installation Services for Station Piping Package for Simhadri Super Thermal Power Project Stage II at NTPC at Simhadri, Vishakapatnam".* In terms of the contract agreement, SPML furnished Performance Bank Guarantees and Advanced Bank Guarantees[3] for Rs. 14,96,89,136/- to secure the Appellant.

4. Pursuant to the successful completion of the project, a Completion Certificate was issued by NTPC on 27.03.2019. By its letter dated 10.04.2019, NTPC informed SPML that the final payment under the contract would be released upon the receipt of a *No-Demand Certificate* from SPML. The *No-Demand Certificate* was issued by SPML on 12.04.2019 and NTPC also released the final payment amounting to Rs. 1,40,00,000/-in April 2019. The Bank Guarantees were however withheld.

1 In ARBP No. 477/2020, dated 08.04.2021.
2 hereinafter 'the Act'.
3 hereinafter referred to as 'Bank Guarantees'.

5. On 14.05.2019, NTPC informed SPML that the Bank Guarantees were withheld on account of pending liabilities and disputes between the parties with respect to other projects at Bongaigon, Barh, and Korba. SPML naturally protested. By its letter dated 15.05.2019, SPML informed NTPC that the retention of Bank Guarantees, despite issuance of the Completion Certificate and the *No-Demand Certificate,* by linking them to some other projects, was unjustified. Following the protest, SPML raised a demand of Rs. 72,01,53,899/- from NTPC as liabilities recoverable for actions attributable to NTPC under this very contract.

6. By its letter dated 12.06.2019, SPML called upon NTPC to appoint an Adjudicator for resolving pending disputes in terms of the General and Special Conditions of Contract. As no action was taken by NTPC, SPML moved the Delhi High Court by filing Writ Petition No. 7213 of 2019 under Article 226 of the Constitution, for the release of the Bank Guarantees. The prayer in the Writ Petition is to:

   "(a) Pass an appropriate Writ, Order or Direction quashing the e-mail dated 14.05.2019 issued by the Respondent insofar as it pertains to the release of the Bank Guarantees being (a) 0040ILG002609, (b) 0040ILG001109, (C) 0040ILG001209, (d) 0040ILG001309 and direct the Respondent to release the aforesaid Bank Guarantees forthwith, and

   (b) Pass any other order or such other orders as may be necessary in the interests of justice, equity and good conscience."

7. While issuing notice, the High Court, by its interim order dated 08.07.2019, directed NTPC not to encash the Bank Guarantees, and further directed SPML to keep the Bank Guarantees alive.

8. Pending the Writ Petition, negotiations between the parties culminated in a Settlement Agreement on 27.05.2020. Through the Settlement Agreement, NTPC agreed to release the withheld Bank Guarantees. SPML also agreed to withdraw its pending Writ Petition and undertook not to initiate any other proceedings, including arbitration, under the subject contract.

9. Following the Settlement Agreement, the Bank Guarantees were released by NTPC on 30.06.2020. SPML withdrew the Writ Petition, as recorded in the Order of the Delhi High Court dated 21.09.2020.

10. After the aforesaid settlement of the disputes, followed by its implementation, SPML repudiated the Settlement Agreement and filed the present application under Section 11(6) of the Act in the Delhi High Court on 10.10.2020[4]. In this Arbitration Petition, SPML alleged coercion and economic duress in the execution of the Settlement Agreement. The allegation was, that the retention of the Bank Guarantees compelled SPML to accept the terms of Settlement Agreement. SPML also averred that NTPC had failed to appoint an arbitrator in spite of repeated requests, and therefore the High Court must constitute an Arbitral Tribunal, in exercise of its jurisdiction under the Act.

11. In its reply to the Arbitration Petition, NTPC raised two-fold objections. *Firstly,* that SPML failed to follow the mandatory pre-arbitration procedure of first referring the disputes to an Adjudicator as per the terms of the Dispute Resolution Clause[5]. *Secondly*, that the disputes between the parties were settled by virtue of the Settlement Agreement dated 27.05.2020. Acting under the

4 Clause 6.2 of the General Conditions of Contract is as under:

"6.2 Arbitration

6.2.1 If either the Employer or the Contractor is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within twenty eight (28) days of a dispute being referred to it, then either the Employer or the Contractor may, within fifty six (56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given."

5 Dispute resolution was provided under clause 6.1 of the General Conditions of Contract and clause 3 of Special Conditions of Contract; hereinafter 'the Dispute Resolution Clause'; Clause 6.1 of the General Conditions of Contract is as under:

"6. Settlement of Disputes

6.1 Adjudicator

6.1.1 If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Facilities- whether during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract- the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute shall be referred in writing by either party to the Adjudicator, with a copy to the other party."

Settlement Agreement, NTPC released the Bank Guarantees and SPML also proceeded to withdraw the Writ Petition, and therefore, there was discharge of the contract by accord and satisfaction. The allegations of coercion and economic duress were denied as false, as all events occurred during the subsistence of proceedings before the Delhi High Court, and the parties willingly complied with the terms of the Settlement Agreement. Further, the demand of Rs. 72,01,53,899/- was an afterthought, never raised during the subsistence of the contract. Under these circumstances, NTPC submitted that the application under Section 11(6) of the Act must be rejected.

12. ***High Court:*** The High Court examined the correspondence between the parties in detail. It rejected the first contention of NTPC that SPML should have first resorted to an alternative dispute resolution mechanism under the Dispute Resolution Clause. It noted that such a request was, in fact, made by SPML on an earlier occasion, but NTPC failed to respond to the same. On the request for arbitration and the allegation of economic duress that allegedly prevailed in signing the Settlement Agreement, the High Court observed that:

"66. SPML had invoked the arbitration clause and had sought reference of disputes to arbitration. It had also approached this Court. Thus, it would be difficult for SPML to establish that it was economically coerced to enter into the Settlement Agreement. However, this Court is unable to accept that the dispute whether the Contract Agreement stood discharged/novated in terms of the Settlement Agreement, is ex facie untenable, insubstantial or frivolous."

(emphasis supplied)

13. After referring to the decisions of this Court in *Mayavati Trading (P) Ltd. v. Pradyuat Deb Burman*[6], *Vidya Drolia and Ors. v. Durga Trading Corporation*[7], *Duro Felguera, S.A. v. Gangavaram Port*

6 (2019) 8 SCC 714.
7 (2021) 2 SCC 1. (hereinafter 'Vidya Drolia')

Ltd.[8]*, Sanjiv Prakash v. Seema Kukreja and Ors.*[9]*, and Oriental Insurance Co. Ltd. and Anr. v. Dicitex Furnishing Ltd.*[10]*,* the High Court allowed the Arbitration Petition. It appointed a former Judge of the Delhi High Court as the Arbitrator on behalf of NTPC, and directed the respective arbitrators to appoint the presiding Arbitrator.

14. ***Submissions by the Parties:*** Shri Adarsh Tripathi, Advocate appearing with and on behalf of the Solicitor General, for NTPC, submitted that the Settlement Agreement dated 27.05.2020 was arrived at during the pendency of the Writ Petition before the High Court. The allegations of coercion and economic duress were, therefore, false and unbelievable. He also submitted that SPML never raised claims during the subsistence of the contract, before the Completion Certificate was issued, or even before the final payment was made. Further, the conduct of SPML, in waiting for the release of the Bank Guarantees as per the Settlement Agreement before withdrawing the Writ Petition, and thereafter instituting the Arbitration Petition, clearly demonstrated that the allegation of coercion was not *bona fide.* Finally, he submitted that the High Court was under an obligation to undertake a limited scrutiny to examine whether a matter is *prima facie* arbitrable. For this purpose, he relied on a recent decision of this Court in *Emaar India Ltd. v. Tarun Aggarwal Projects LLP & Anr*[11]*.*

15. Shri Jaideep Gupta, Advocate appearing for the Respondent, SPML, has submitted that the legal principles governing an application under Section 11(6) of the Act are well-settled following the decisions of this Court in *Mayavati Trading* (supra) and *Vidya Drolia* (supra). At the pre-referral stage, the jurisdiction of the court is restricted to the examination of whether an arbitration agreement exists between the parties. He submitted that the decision of the High Court was unexceptionable, since the question as to whether the Settlement Agreement was executed under undue influence or coercion could be determined by an Arbitral Tribunal.

---

8 (2017) 9 SCC 729.
9 (2021) 9 SCC 732.
10 (2020) 4 SCC 621.
11 2022 SCC OnLine SC 1328.

16. ***Position of Law:*** In the present case, we are concerned with the pre-referral jurisdiction of the High Court under Section 11 of the Act and would like to underscore the limited scope within which an application under Section 11(6)[12] of the Act has to be considered.

17. The position of law with respect to the pre-referral jurisdiction, as it existed before the advent of Section 11(6A) in the Act, was based on a well-articulated principle formulated by this Court in *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd*[13]. In *Boghara Polyfab,* this Court held that the issue of non-arbitrability of a dispute *will* have to be examined by the court in cases where accord and discharge of the contract is alleged. Following the principle in *Boghara Polyfab,* this Court in *Union of India & Ors. v. Master Construction Co.*[14] observed that when the validity of a discharge voucher, no-claim certificate or a settlement agreement is in dispute, the court must *prima facie* examine the credibility of the allegations before referring the parties to arbitration. Yet again in *New India Assurance Co. Ltd. v. Genus Power Infrastructure Ltd.*[15], this Court observed that

---

12 Arbitration and Conciliation Act 1996 (Act 26 of 1996), Section 11(6):
"(6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request 1 [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court]to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

13 (2009) 1 SCC 267.

14 (2011) 12 SCC 349:
"**18.** In our opinion, there is no rule of the absolute kind. In a case where the claimant contends that a discharge voucher or no-claim certificate has been obtained by fraud, coercion, duress or undue influence and the other side contests the correctness thereof, the Chief Justice/his designate must look into this aspect to find out at least, prima facie, whether or not the dispute is bona fide and genuine. Where the dispute raised by the claimant with regard to validity of the discharge voucher or no-claim certificate or settlement agreement, prima facie, appears to be lacking in credibility, there may not be a necessity to refer the dispute for arbitration at all."

15 (2015) 2 SCC 424:
"**10.** In our considered view, the plea raised by the respondent is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the letter of subrogation was signed, that the notice dated 31-3-2011 itself was nearly after three weeks and that the financial condition of the respondent was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case and signing of letter of subrogation were not because of exercise of any undue influence. Such discharge and signing of letter of subrogation was voluntary and free from any coercion or undue influence. In the circumstances, we hold that upon execution of the letter of subrogation, there was full and final settlement of the claim. Since our answer to the question,

allegations of fraud, coercion, duress or undue influence must be *prima facie* substantiated through evidence by the party raising the allegations.

18. In a legislative response to these precedents, through the Arbitration and Conciliation (Amendment) Act 2015,[16] sub-section (6A) was added to Section 11 of the Act, which reads as follows:

"(6-A) 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."

(emphasis supplied)

19. Taking cognizance of the legislative change, this Court in *Duro Felguera* (supra), noted that post the 2015 Amendments, the jurisdiction of the court under Section 11(6) of the Act is limited to examining whether an arbitration agreement exists between the parties – "nothing more, nothing less"[17].

20. However, in the year 2019, in *United India Insurance Co. Ltd. v. Antique Art Exports Pvt. Ltd.*[18], this Court had nevertheless accepted an objection of 'accord and satisfaction' in opposition to an application for reference to arbitration.

---

whether there was really accord and satisfaction, is in the affirmative, in our view no arbitrable dispute existed so as to exercise power under Section 11 of the Act. The High Court was not therefore justified in exercising power under Section 11 of the Act."

16 Arbitration and Conciliation (Amendment) Act 2015 (Act 3 of 2016); hereinafter referred to as 'the 2015 Amendments'.

17 *Duro Felguera* supra note 7, para 59 (concurring opinion of Kurian Joseph, J).

18 (2019) 5 SCC 362:

"**21.** In the instant case, prima facie no dispute subsisted after the discharge voucher being signed by the respondent without any demur or protest and claim being finally settled with accord and satisfaction and after 11 weeks of the settlement of claim a letter was sent on 27-7-2016 for the first time raising a voice in the form of protest that the discharge voucher was signed under undue influence and coercion with no supportive prima facie evidence being placed on record in absence thereof, it must follow that the claim had been settled with accord and satisfaction leaving no arbitral dispute subsisting under the agreement to be referred to the arbitrator for adjudication.

22. In our considered view, the High Court has committed a manifest error in passing the impugned order and adopting a mechanical process in appointing the arbitrator without any supportive evidence on record to prima facie substantiate that an arbitral dispute subsisted under the agreement which needed to be referred to the arbitrator for adjudication."

21. It did not take much time for this Court to reverse the approach in *Antique Art Exports (supra).* A three-judge bench in *Mayavati Trading* (supra) expressly overruled the above-referred decision in *Antique Art Exports*, observing that:

"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment, as Section 11(6-A) is confined to the examination of the existence of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in Duro Felguera, SA."

22. The entire case law on the subject was considered by a three-judge bench of this Court in *Vidya Drolia* (supra), and an overarching principle with respect to the pre-referral jurisdiction under Section 11(6) of the Act was laid down. The relevant portion of the judgment is as follows:

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments

by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(emphasis supplied)

23. The limited scope of judicial scrutiny at the pre-referral stageis navigated through the test of a *'prima facie review'.* This is explained as under:

> *"133. 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. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and Section 34 of the Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.*
>
> *134. Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. 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. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not 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…*
>
> *…*
>
> *138… On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.*
>
> *139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent wastage of public and private resources, can exercise judicial discretion to conduct*

an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case orexercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable.

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes."

(emphasis supplied)

24. Following the *general rule and the principle* laid down in *Vidya Drolia* (supra), this Court has consistently been holding that the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engg. Pvt. Ltd.*[19], *Sanjiv Prakash*

19 (2021) 5 SCC 671, paras 29, 30.

v. Seema Kukreja and Ors.[20], and *Indian Oil Corporation Ltd. v. NCC Ltd.,*[21] the parties were referred to arbitration, as the *prima facie* review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the *exception to the general principle* that the court may not refer parties to arbitration when it is clear that the case is manifestly and *exfacie* non-arbitrable, in *BSNL and Anr. v. Nortel Networks India (P) Ltd.*[22] and *Secunderabad Cantonment Board v. B. Ramachandraiah & Sons*[23], arbitration was refused as the claims of the parties were demonstrably time-barred.

25. ***Eye of the Needle:*** The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the *parties to the agreement* and the *applicant's privity* to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and *rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable*[24]*.* Explaining this position, flowing from the principles laid down in *Vidya Drolia* (supra), this Court in a subsequent decision in *Nortel Networks* (supra) held[25]:

"45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court

20 (2021) 9 SCC 732.
21 (2022) SCC OnLine SC 896.
22 (2021) 5 SCC 738. (hereinafter *'Nortel Networks'*)
23 (2021) 5 SCC 705.
24 *Vidya Drolia* supra note 7, para 154.4.
25 *Nortel Networks* supra note 22, para 45.1.

can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute..."

27. The standard of scrutiny to examine the non-arbitrability of a claim is only *prima facie*. Referral courts must not undertake a full review of the contested facts; they must only be confined to a *primary first review*[26] and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is *bona fide* or not.[27] The *prima facie* scrutiny of the facts must lead to a clear conclusion that there is *not even a vestige of doubt that the claim is non-arbitrable*.[28] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration[29].

28. The limited scrutiny, through the *eye of the needle,* is necessary and compelling. It is intertwined with the duty of the referral court to *protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable*[30].It has been termed as a *legitimate* interference by courts to refuse reference in order *to prevent wastage of public and private resources*[31]*.* Further, as noted in *Vidya Drolia* (supra), if this duty within the limited compass is not exercised, *and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court*[32]*.* Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to *act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator*[33]*,* as explained in *DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.*

29. ***Analysis:*** We will now proceed to apply these principles to the present case and examine the arbitrability of the dispute by undertaking a *prima facie* review of the basic facts.

---

26 *Vidya Drolia* supra note 7, para 134.
27 bid.
28 *Nortel Networks* supra note 22, para 47.
29 *Vidya Drolia* supra note 7, para 154.4.
30 ibid para 154.4.
31 ibid para 139.
32 ibid.
33 DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd 2021 SCC OnLine SC 781, paras 18, 20.

30. SPML duly completed the stipulated work under the subject contract, and a Completion Certificate was issued by NTPC on 27.03.2019. SPML sought the release of the final payment, and NTPC, by its letter dated 10.04.2019, agreed to release the same.

31. A No-Demand Certificate was issued by SPML on 12.04.2019, and the final payment was released by April 2019. There is nothing on record about any pending claims of SPML during the subsistence of the contract or till the release of the final payment. This is evident from the Writ Petition as well as the Arbitration Petition under Section 11 of the Act.

32. While NTPC released the final payment, on 14.05.2019, it justified the withholding of SPML's Bank Guarantees on the ground that there are certain disputes between the parties with respect to other projects.

33. Objecting to the stand of NTPC by its letter dated 15.05.2019, SPML stated that linking the Bank Guarantees with claims under other projects was unjustified. In turn, SPML raised a claim of Rs. 72,01,53,899/- against NTPC. At the same time, SPML also sought the appointment of an "Adjudicator" to settle these claims.

34. It is in the above-referred context that SPML filed the Writ Petition before the High Court on 03.07.2019. The prayer in the Writ Petition, particularly in the context of the huge claim raised on 15.05.2019, assumes importance. The prayer is reproduced herein below for ready reference:

"*(a) Pass an appropriate Writ, Order or Direction quashing the e-mail dated 14.05.2019 issued by the Respondent insofar as it pertains to the release of the Bank Guarantees being (a) 0040ILG002609, (b) 0040ILG001109, (c) 0040ILG001209, (d) 0040ILG001309 and direct the Respondent to release the aforesaid Bank Guarantees forthwith, ...*"

35. There is no reference to the claim of Rs.72,01,53,899/- in the body or the Prayer of the Writ Petition. Conspicuously, the Writ Petition is confined to seeking a direction to return the Bank Guarantees.

36. Pending disposal of the Writ Petition, the High Court, by an interim order dated 08.07.2019,directed NPTC not to invoke the Bank Guarantees. The interim order was subject to SPML keeping the Bank Guarantees alive. The relevant portions of the order are:

"…

2. Issue notice. The learned counsel appearing for the respondent accepts notice.

3. Admittedly, the contract pursuant to which the bank guarantees in question had been furnished has been completed and there is no dispute that the petitioner's performance of the contract was satisfactory. The petitioner also claims that it has received the entire consideration for the same. The petitioner's claims that the release of the bank guarantees is being withheld contrary to the terms of the contract between the parties, in order to pressurize the petitioner in respect of certain disputes in relation to other contracts, which are pending adjudication before the Arbitral Tribunal.

…

6. In the meanwhile, the respondents are restrained from invoking the bank guarantees, subject to the petitioner keeping the same alive."

37. On 23.07.2019, SPML sent a Notice to NTPC, intimating its intention to invoke Arbitration under the Dispute Resolution Clause.

38. During the pendency of the Writ Petition, the parties engaged themselves in multiple discussions about their claims and counter-claims. All that culminated in the Settlement Agreement dated 27.05.2020. The Terms of the Settlement Agreement are as follows:

"NOW THEREFORE, in consideration of the premises and mutual promises contained herein, the parties agree as follows:

1. That the Agency undertakes to withdraw WP No. 7213/2019 filed in the Hon'ble High Court upon execution of the present agreement immediately upon receipt of original Bank Guarantees stated herein below lying with NTPC as mentioned herein below at Para 4.

2. That the Agency has agreed not to initiate any further proceedings in relation with the present contract agreement and work executed by the Agency, of any nature whatsoever. Further, the Agency has undertaken not to raise any claim of any nature whatsoever against the NTPC Ltd. in relation with the present contract agreement and work executed by the Agency, be it Arbitration proceedings, civil suit, writ petition, or any other proceedings before any judicial or quasi-judicial forum.

3. That the Agency has confirmed it has received entire payments arising out of the present contract and the same stands closed, and no further sum/money is payable to the Agency in any manner whatsoever by NTPC Ltd. under the subject contract.

…

5. That NTPC Ltd. has further agreed not to raise any contempt proceedings against the Agency for not keeping alive the BGs as directed by the Hon'ble High Court of Delhi in pending Writ Petition."

39. In compliance with the Settlement Agreement, NTPC released the Bank Guarantees on 30.06.2020, which were the subject matter of the pending Writ Petition.

40. It is noteworthy that the Bank Guarantees expired on 19.11.2019 and 16.12.2019, despite the specific direction by the High Court to SPML to keep its Bank Guarantees alive. However, in compliance with its express undertaking in the Settlement Agreement, NTPC did not file any contempt proceedings against SPML.

41. Following the release of the Bank Guarantees as per the Settlement Agreement, SPML withdrew the Writ Petition, as recorded by the High Court in its Order dated 21.09.2020.

42. One month later, on 10.10.2020, SPML filed the Arbitration Petition under Section 11(6) of the Act alleging coercion and economic duress in the execution of the Settlement Agreement. It was also alleged that the Settlement Agreement was repudiated on 22.07.2020 through SPML's letter to NTPC, disputing the Settlement Agreement.

43. In its reply to the Arbitration Petition, NTPC specifically pointed out that SPML never raised any claims with respect to the dues amounting to Rs. 72,01,53,899/- during the pendency of the contract, and that the allegations of coercion and economic duress are completely false. NTPC alleged that the Arbitration Petition lacked *bona fide.*

44. A simple narration of the bare facts, as indicated above, leads us to conclude that the allegations of coercion and economic duress are not *bona fide,* and that there were no pending claims between the parties for submission to arbitration. The Respondent's claim fits in the description of an attempt to initiate *"ex facie meritless, frivolous and dishonest litigation"*[34]. We will endeavor to give reasons for our conclusion.

45. The whole dispute revolves around the solitary act of the Appellant, NTPC, in not returning the Bank Guarantees despite the successful completion of work. This continued even after SPML issued the No-Demand Certificate and NTPC released the final payment. These undisputed facts led to the institution of the Writ Petition before the Delhi High Court. There were no allegations of coercion or economic duress compelling SPML to withdraw any pending claims under the subject contract as a condition for the return of the Bank Guarantees. On the contrary, the only allegation by SPML was with respect to NTPC's "illegal" action of interlinking the release of the Bank Guarantees with some other contracts. This was precisely the argument before the High Court, and, in fact, this submission is recorded by the High Court while issuing notice and injuncting NTPC. This fact clearly indicates that the plea of coercion and economic duress leading to the Settlement Agreement is an afterthought.

46. We will now examine whether the allegations of coercion and economic duress in the execution of the Settlement Agreement are *bona fide* or not. This inquiry has a direct bearing on the arbitrability of the dispute. It was during the subsistence of the Writ Petition and the High Court's interim order, when SPML had complete protection of the Court, that the parties entered into

34 *Vidya Drolia* supra note 7, para147.11.

the Settlement Agreement. This agreement was comprehensive. It *inter alia* provided for (i) the release of Bank Guarantees by NTPC, (ii) the withdrawal of SPML's Writ Petition, (iii) restraining NTPC from filing contempt proceedings against SPML for letting the Bank Guarantees expire, and finally, (iv) restraining SPML from initiating any proceedings under the subject contract, including arbitration. The Settlement Agreement also recorded that there were no subsisting issues pending between the parties.

47. The plea of coercion and economic duress must be seen in the context of the execution of the Settlement Agreement not being disputed, and its implementation leading to the release of the Bank Guarantees on 30.06.2020 also not being disputed. Almost three weeks after the release of the Bank Guarantees, a letter of repudiation was issued by SPML on 22.07.2020. This letter was issued about two months *after* the Settlement Agreement was executed and in fact *during* the subsistence of the Writ Petition. After reaping the benefits of the Settlement Agreement, the Writ Petition was withdrawn on 21.09.2020. It is there after that the present application under Section 11(6) of the Act was filed. The sequence of events leads us to conclude that the letter of repudiation was issued only to wriggle out of the terms of the Settlement Agreement.

48. The foregoing clarifies beyond doubt that the claims sought to be submitted to arbitration were raised as an afterthought. Further, SPML's allegations of coercion and economic duress in the execution of the Settlement Agreement lack *bona fide.* They are liable to be knocked down as *exfacie* frivolous and untenable.

49. In view of the above-referred facts, which speak for themselves, we are of the opinion that this is a case where the High Court should have exercised the *prima facie* test to screen and strike down the *ex-facie* meritless and dishonest litigation. These are the kinds of cases where the High Court should exercise the restricted and limited review to check and protect parties from being forced to arbitrate.

50. Accordingly, we have no hesitation in holding that the High Court has committed an error in allowing the application under Section 11(6) of the Act. High Court ought to have examined the issue of the final settlement of disputes in the context of the principles laid down in *Vidya Drolia* (supra).

51. For the reasons stated above, the decision of the High Court of Delhi in Arbitration Petition No.477 of 2020, dated 08.04.2021, is set aside, and Civil Appeal No.4778 of 2022 stands allowed.

52. The parties shall bear their own costs.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeal allowed.
(*Assisted by:* Surbhi Soni and Rakhi, LCRAs).