

CASE UPDATE

VIDYA DROLIA & OTHERS V. DURGA TRADING CORPORATION
3-JUDGE BENCH, SUPREME COURT OF INDIA
DECIDED ON 14 DECEMBER 2020

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This descriptive case Update by NFRAL attempts to describe the court's conclusions in *Vidya Drolia and others v. Durga Trading Corporation (Vidya Drolia II)* and the line of reasoning that supports the decision. The judgment is a pastiche of several cases and academic writings and occupies 243 pages in double-spaced Arial font 14 (followed by the Supreme Court). The pages reduce to 90 (A4 size) on SCC OnLine. Given the length of this Update—which was difficult to avoid—we set out below a summary of the court's key conclusions. You can read the rest of the Update if you are interested in a detail description.

CASE INFO

Court: Supreme Court of India | **Case Number:** Civil Appeal No. 2402 of 2019 | **Citation:** 2020 SCC OnLine SC 1018 | **Bench:** NV Ramana, Sanjiv Khanna and Krishna Murari JJ | **Date of decision:** 14 December 2020 | **Judgment at:** https://main.sci.gov.in/supremecourt/2018/26779/26779_2018_32_1501_25180_Judgement_14-Dec-2020.pdf (all pages and paragraph numbers in this Update from this version)

A SUMMARY OF THE COURT'S CONCLUSIONS

- 1. On the connection between Section 8 (power to refer to arbitration) and Section 11 ACA (appointment of an arbitrator)**
 - Complementary. Both provisions should be read as laying similar standards.
 - Both are 'referral' or 'first look' stage.
- 2. On the meaning of the expression "existence of an arbitration agreement" in Section 11 ACA**
 - Includes validity and arbitrability.
 - Includes "valid arbitration agreement" as used in [Section 8 ACA](#).
- 3. What is a "valid arbitration agreement?" (the expression used in Section 8)**
 - An agreement that satisfies the requirements of [Section 7](#) ACA, [Section 10](#) of the Indian Contract Act, 1872, and other contract law requirements.
 - Includes an arbitrable matter (and thus the concept of validity includes arbitrability).
- 4. What is the overall scope of the court's power under Section 8 and Section 11 ACA, and who decides arbitrability: the court or the tribunal?**
 - The arbitral tribunal can rule on its jurisdiction (because of principle of separability and the *competence competence* doctrine in [Section 16](#) ACA). It is the preferred first authority to determine and decide all questions of non-arbitrability. The court has the "second look" power at the set-aside stage under [Section 34](#) ACA.
 - But, at the 'referral' or the 'first-look' stage also, the domestic courts retain some power to review *prima facie* the existence and validity of the arbitration agreement in legitimate cases (which includes some types of arbitrability).
 - So, rarely, 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. The power of the court in both proceedings is identical but extremely limited and restricted.
 - The court should apply the *prima facie* test to cut the deadwood.
 - Unless a party has established *prima facie* case of non-existence of a valid arbitration agreement, the matter should be referred [*per* Ramana J, *Cf.* point 10 below].
- 5. What matters, and types of arbitrability, are for the court and what are for the arbitral tribunal?**
 - These are what is stated in paragraph 22 of *National Insurance v. Boghara Polyfab* (2009) 1 SCC 267 [*note:* while para 22 of *Boghara* was for [Section 11](#), the discussion in *Vidya Drolia* is in the context also of Section 8; *Cf.* paras 86 to 89 of Khanna J's judgment].
 - Matters for the court are:

- Territorial jurisdiction [*per Boghara*, 1st category].
 - Whether the applicant is a party to the arbitration agreement [*per Boghara*, 1st category].
 - Subject-matter arbitrability (on which the court may for legitimate reasons conduct a *prima facie* review) [added by the court in this case, see description below].
- Matters for the tribunal (save in exceptional cases) are:
 - Whether the claim is dead (long-barred) or live [*per Boghara*, 2nd category].
 - Whether parties have concluded the contract/transaction by recording satisfaction of their rights and obligations [*per Boghara*, 2nd category].
 - Whether the claim falls within the scope of the arbitration clause [*per Boghara*, 3rd category].
 - Merits or any claim involved in the arbitration [*per Boghara*, 3rd category].
 - Issues relating to formation, existence, validity and (other) nonarbitrability matters would be connected with merits of the dispute and the facts. They are for the tribunal [added by the court in this case].

6. How is subject matter arbitrability determined?

- When the cause of action and subject matter relates to actions *in rem*.
- When the cause of action and the subject matter of the dispute affect third party rights, have *erga omnes* effect, requires collective or centralized adjudication before one court or forum.
- When the cause of action and the subject matter relates to the inalienable sovereign and public interest functions of the State.
- When there is implicit non-arbitrability, that is, when by mandatory law, the parties are barred from contracting out and waiving adjudication by a special public forum.

7. What is the *prima facie* test under Section 8 and Section 11 ACA?

- Not full review or long drawn review. In some cases, *prima facie* examination may require a deeper consideration. The court's challenge is to find the right balance between an obstructionist and a legitimate claim.
- The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable, when summary proceedings would be inconclusive, where facts are contested, where delaying tactics are adopted.
- When in doubt, refer [*per Ramana J*].

8. Examples of matters arbitrable and nonarbitrable

- These are arbitrable
 - Landlord-tenant disputes governed by the [Transfer of Property Act, 1882](#) are arbitrable [overruling *Himangni*].
 - Allegations of fraud when they relate to a civil dispute [note: the court also said that it concurred with *Avitel*]
- These cannot be arbitrated:
 - Insolvency
 - Intracompany disputes
 - Grant and issue of patents and registration of trademarks
 - Criminal cases
 - Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights etc.
 - Matters relating to probate, testamentary matter etc.
 - The debt recovery tribunal matters (covered under the Recovery of Debts and Bankruptcy Act, 1993)
 - Fraud, which vitiates and invalidate the arbitration clause

9. On the meaning of the non-obstante phrase in Section 11 (6A)— “notwithstanding any judgment ...confine to the examination of the existence of an arbitration agreement.”

- Intended to overrule the 7-judge bench *SBP case* legislatively.
- Not intended to side-line or over-ride the settled law on arbitrability.

10. On the negative language of Section 8 [*per Ramana J*]

- [Section 8](#) mandates referring a matter to arbitration unless the court *prima facies* finds that no valid arbitration agreement exists (rather than a finding *prima facie* that a valid arbitration agreement exists).
- The “respondent/defendant” (*sic* party opposing arbitration) has to establish a *prima facie* case of non-existence.
- [Section 8](#) lacks quality legislative drafting. A finding that there is no arbitration agreement means that there would not be a reference. This is a final finding subject only to appeal. Effectively, a *prima facie* standard is provided to reach a conclusive finding.

A. Introductory matters

1. Why did a 2-judge bench in *Drolia I* refer the case to a 3-judge court? What questions were referred?

*Drolia (I)*¹ involved a dispute about a tenancy agreement. The landlord had applied to the High Court for the appointment of an arbitrator. The tenant argued that the subject matter was not arbitrable. Still, the High Court rejected the objection and allowed the application. The arbitration proceedings began in 2016. In October 2017, a 2-judge bench of the SC decided *Himangni*² and ruled that a tenant-landlord dispute was not arbitrable even if the tenancy was not governed by a specific rent control legislation but the Transfer of Property Act, 1882 (“TPA”). Now, the tenant applied to the High Court for a review of the order of the appointment. That, too, was dismissed. *Drolia I* then reached the Supreme Court and was heard by a 2-judge bench of RF Nariman and Vineet Saran JJ. They were of the view that *Himangni*, a judgment of a co-ordinate bench, was wrongly decided. So, the case was referred to a 3-judge bench.

There was another aspect. [Section 11 \(6A\)](#) ACA³ provides that while deciding an application for the appointment of an arbitrator the court shall “notwithstanding any judgment, decree or order of any Court⁴, confine to the examination of the existence of an arbitration agreement”. Could the question of arbitrability be decided in such an application? As Nariman J put it, “whether the word “existence would include weeding-out arbitration clauses in agreements which indicate that the subject-matter is incapable of arbitration?” Referring to [Section 16](#) ACA, Nariman J contrasted the word “existence” used in [Section 11](#) ACA. He said, “it will be noticed that “validity” of an arbitration agreement is, therefore, apart from its “existence” [para 7, *Drolia I*].

2. How did the court interpret the questions referred to it? What matters were examined by it, and what not?

According to Khanna J “a deeper consideration” of *Vidya Drolia I* “reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected”:

- (a) “Meaning of non-arbitrability and when the subject-matter of the dispute is not capable of being resolved through arbitration.” [**considered in paragraphs 8 through 49**]
- (b) “The conundrum— “who decides”—whether the court at the reference stage⁵ or the arbitral tribunal in the arbitration proceedings?” [**paragraphs 50 through 98**]

He said that the second aspect “also relates to the scope and ambit of jurisdiction of the court ... when an objection of non-arbitrability is raised to an application under [Section 8](#) or [11](#) [ACA].”⁶

In the course of its discussion on the above-noted issues, the court considered and ruled on a large number of specific topics. The court clarified it was not considering: (i) Part II of ACA⁷; and (ii) the power under [Section 34](#) ACA.⁸

¹*Vidya Drolia and others v. Durga Trading Corporation* 2019 SCC OnLine SC 358 decided on 28 February 2019. See NFRAL’s Update on *Vidya Drolia (I)* in Yearbook 2019 at <https://www.nfral.in/wp-content/uploads/2020/03/NFRAL-Yearbook-2019.pdf>.

²*Himangni Enterprises v. Kamaljeet Singh Ahluwalia* (2017) 10 SCC 706, RK Agrawal and Abhay Manohar Sapre JJ.

³ As amended by the 2015 Amendments with effect from 23 October 2015. Sub-Section 6A has been proposed to be omitted by the 2019 Amendments, but all the amendments including this one have not come into force. However, as decided in *Mayavati* and *Drolia II*, the omission would not matter, and the principle would continue to apply; cf. Section C6 below.

⁴ The defined expression “Court” appears misplaced.

⁵ Thus, proceedings under both Sections [8](#) and [11](#) ACA have been considered as the “reference” stage or the “referral stage” or the “first look” stage.” See also para 51 at page 65.

⁶ Thus, the scope of [Section 8 ACA](#) also came to be considered expanding the question referred by *Vidya Drolia I*. Khanna J noted in paragraph 7 a caveat that “this judgment does not examine and interpret the transnational provisions of arbitration in Part II [ACA].”

⁷ At para 7 the court says, “at the outset we begin with the caveat that this judgment does not examine and interpret the transnational provisions of arbitration in Part II of the Arbitration Act”.

⁸ Paragraph 85, footnote 68 notes, “[T]he nature and extent of power of judicial review under Section 34 has not been examined and answered in this reference.”

B. The court's decision on "non-arbitrability" (meaning and applicable principles)

1. Introductory observations by the court on the meaning of nonarbitrability (paragraph 8)

The discussion on the first question begins at paragraph 8 under the heading "non-arbitrability". Speaking through Khanna J, the court says that nonarbitrability "relates to the very jurisdiction of the tribunal," and it has multiple meanings. It cites the "three facets" of nonarbitrability mentioned in *Booz*⁹. It refers to a paper by one John J Barcello III, then a Professor at Cornell University Law School¹⁰ to note that the author "has divided facets relating to non-arbitrability into seven categories."¹¹

2. General observations; What constitutes a valid arbitration agreement; Examination and analysis of judgments (paragraphs 9 to 28)

At para 9, the court says that it cannot decide the validity of the legal ratio of *Himangni* without examining when a subject matter or dispute is nonarbitrable. Also, understanding different facets of nonarbitrability are important in deciding whether it is the court or the tribunal that has jurisdiction.

Then, the court said that in *Drolia I* a distinction was made between nonarbitrability on account of existence and nonarbitrability on account of validity.¹²

Then (possibly keeping in view the concept of 'existence) the court then made some remarks on the contractual nature of arbitration and examined the definition of 'arbitration agreement' under [Section 2 \(d\) \(sic b\) ACA](#), the definition of 'agreement' under [Section 10](#) of the Indian Contract Act, 1872 ("ICA"). It concluded that to be legally valid "an arbitration agreement should satisfy the mandate" of [Section 10 ICA](#) in addition to [Section 7 ACA](#).¹³ Then, referring to various other provisions of ICA¹⁴ the court also said that the "arbitration agreement must satisfy the objective mandates of the law of contract to qualify as an agreement."¹⁵ [see paras 10-13].

In the course of this discussion further:

- (a) Referring to *Sukanya*¹⁶ the court said that *Booz* distinguished the scope of [Sections 8 and 11 ACA](#) relying on *Sukanya*. But the court was "bound by the dictum" of *SBP*,¹⁷ the 7-judge bench decision, which said that Sections

⁹ *Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and others* (2011) 5 SCC 532. RV Raveendran and JM Panchal JJ, decided on 15 April 2011. Paragraph 34 noted three facets of arbitrability relating to the jurisdiction of the arbitral tribunal, whether: (i) the disputes are capable of settlement by arbitration; (ii) the disputes are covered by the arbitration agreement; (iii) the parties have referred the dispute.

¹⁰ "Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective", 2003 Hein Online—36: Vanderbilt Journal of Transnational Law, Vol. 36, No. 4, October 2003.

¹¹ Barcello says that at the outset of a dispute when a matter goes to litigation, a party opposing arbitration may raise a series of legal issues. He then lists them in seven sub-heads. This is not a division by the author of facets of nonarbitrability.

¹² The court does not explain how this follows from *Drolia I*. Khanna J also noted the distinction between validity and arbitrability at para 15. So, did Ramana J in para 49 of his judgment. Ramana J also said that the distinction is required to be kept in mind. But their conclusions, in effect, makes no such distinction.

¹³ The meaning of the expression "legal relationship" [[Section 7\(1\) ACA](#)] is explained at footnote 12 of the judgment. The source is not acknowledged. The requirement of a legal relationship in some countries is a condition of substantive validity. (*per* Born, cited below).

¹⁴ Free consent, coercion, undue influence, fraud, misrepresentation, voidable contracts, and void contracts.

¹⁵ Most authorities acknowledge and distinguish between "formal validity" and the "substantive validity" of an arbitration agreement. Like any other type of contract an arbitration agreement is also subject to form requirements. The most significant among these is the "writing" or the "written form" requirement. But satisfaction of form requirements is a necessary, but not sufficient condition for contractual validity; requirements for the substantive validity must also be satisfied. (paraphrased from Prof. Born's International Commercial Arbitration, Wolters Kluwer, 2nd edition) What should be the form of an arbitration agreement (under Part I) is explained under [Section 7 ACA](#). As far as substantive invalidity is concerned, the courts rely on the general contract principles while addressing substantive invalidity. In the passages in question, Khanna J does not use "formal" or "substantive" invalidity, but validity as a whole.

¹⁶ *Sukanya Holdings Pvt. Ltd. v. Jayesh H Pandya* (2003) 5 SCC 531, SC, 2-judge bench (the entire subject-matter of the suit should be covered by the arbitration agreement. It cannot be bifurcated to some to arbitration).

¹⁷ *SBP & Co. v. Patel Engineering Ltd. and another* (2005) 8 SCC 618.

8 and 11 ACA were similar and complementary. In any case, the court noted that *Sukanya* had to be read along with *Chloro*,¹⁸ a 3-judge bench decision.¹⁹ [see paragraphs 16, 17]

- (b) The court referred back to *Booz* in detail for its discussion on arbitrability, specifically for [see paragraphs 19-23]:
- i. The distinction made between (nonarbitrable) *in rem* and (arbitrable) *in personam* action;
 - ii. The example of non-arbitrable disputes. [see *Booz*, para 31]
 - iii. Reference to Russel on Arbitration (22nd edition) where the author said that the matters in English law reserved for the court alone include cases where the type of remedy required is not one which the tribunal is empowered to give.
 - iv. Reference to Mustill and Boyd (certain remedies which the arbitrator can award are limited by consideration of public policy since he is appointed by the parties and not the State. For instance, he cannot impose fine, give imprisonment, commit a person for contempt or issue writ of *sub poena* binding on third parties and affecting public at large, such as a judgment in rem). [see *Booz*, para 41]
 - v. A further reference to Mustill and Boyd (2001 Companion Volume) for the point that rights which are valid as against the whole world cannot be the subject of private arbitration. For instance, an arbitrator has no jurisdiction to bind a third person by a decision on whether a patent is valid or not for no one has mandated him to make the decision.
 - vi. The reasoning as to why mortgage suits are not arbitrable.
- (c) Referred to *Ayyasamy*²⁰, *Vimal Kishor Shah*²¹, *Emaar MGF Land Limited*²², *Premier Automobiles*²³, *Olympus*²⁴, *VH Patel*.²⁵ [see paras 24-28]

3. Coalescing and crystallizing legal principles: The four principles to determine nonarbitrability

At paragraph 29, Khanna J says, “having examined and analyzed the judgments, we would coalesce and crystallize the legal principle for determining non-arbitrability.” This coalescing goes up to paragraph 49. In doing so, the court discussed a lot of things as we attempt to identify below.

¹⁸ *Chloro Controls India Private Limited v. Severn Rent Water Purification Inc. and others* (2013) 1 SCC 641.

¹⁹ This discussion is wholly confusing because, first, it is not apparent what point the court was trying to make. Second, *Booz* made no distinction about anything based on *Sukanya*. It merely followed it at para 51 and said that even if some issues in a mortgage suit are arbitrable, the issues could not be divided. Third, *per* para 32 of *Booz*, which Khanna J cited, the [Section 11](#) jurisdiction is “far narrower, and not including an examination of arbitrability.” The passage in *SBP* (para 16) that Khanna J felt bound by was in the context of nature of power under [Section 11](#) and not specifically on arbitrability. Fourth, *Chloro* had said that it was not necessary to examine the correctness of *Sukanya* because, among others, it did not apply to the facts. Fifth, Khanna J would later say that *SBP* no longer applies after the 2015 Amendments.

²⁰ *A Ayyasamy v. A Paramasivam and others* (2016) 10 SCC 386, Dr. AK Sikri and Dr. DY Chandrachud JJ. At para 24, Khanna J noted that Chandrachud J’s opinion “has made two important comments” (then he reproduced some part of para 35 and 38 of *Ayyasamy*). The excerpted para 35 of *Ayyasamy* refers to rights *in rem*, and para 37 notes that “if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration.”

²¹ *Vimal Kishor Shah v. Jayesh Dinesh Shah* (2016) 8 SCC 788. The court referred to *Vimal* to say that the disputes relating to private trusts were held nonarbitrable by necessary implication and “The Order of Reference”, i.e., *Drolia (I)* explains why. See para 25.

²² *Emaar MGF Land Ltd. v. Aftab Singh* (2019) 12 SCC 751, UU Lalit and Ashok Bhushan JJ. The effect of the 2015 Amendments on [Section 8](#)—“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” -- was considered. Held, not intended to side-line or override the settled law on non-arbitrability.

²³ *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Others*¹⁹ in the context of rights and remedies under the Industrial Disputes Act, 1947 (Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration).

²⁴ An arbitrator can grant specific performance.

²⁵ *VH Patel & Company and others v. Hirubhai Himabhai Patel and others* (2000) 4 SCC 368 (there is no principle of law or provision that bars an arbitrator from deciding whether the dissolution of a partnership is just and equitable).

All in all, the court said, as it noted later in paragraph 45, it would like to propound a four-fold test for determining when the subject matter of a dispute is not arbitrable.

The first principle according to the court (after a discussion on rights *in rem* and *in personam*²⁶) is that arbitration by necessary implication excludes actions in rem. So, the dispute is not arbitrable when the cause of action and subject matter of the dispute related to actions *in rem* (not of subordinate rights *in personam* arising from rights *in rem*). [see paragraphs 30, 31, 45]

Second, arbitration is unsuitable when the cause of action and the subject matter of the dispute affect third party rights, have erga omnes effect, requires collective or centralized adjudication before one court or forum.²⁷ [see paragraphs 31, 45]

Third, the matter is not arbitrable when the cause of action and the subject matter relates to the inalienable sovereign and public interest functions of the State.²⁸ [see paragraphs 32, 45]

Fourth, implicit non-arbitrability, that is, when by mandatory law the parties are quintessentially barred from contracting out and waiving adjudication by a special public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum.²⁹ [see paragraphs 33-36 and 45]

4. Matters covered under the Recovery of Debts and Bankruptcy Act, 1993 (“RDB Act” or the “DRT Act”) are not arbitrable (but, Cf. fn. 33 for description and citations)

Immediately after stating the fourth principle (implicit nonarbitrability), in the same continuation, the judgment began a discussion on the doctrine of election.³⁰ The court referred to *Transcore*,³¹ and then said that where

²⁶ “The distinction between judgments *in rem* and judgments *in personam* turns on their power as *res judicata*, i.e. judgment *in rem* would operate as *res judicata* against the world, and judgment *in personam* would operate as *res judicata* only against the parties in dispute. Use of expressions “rights *in rem*” and “rights *in personam*” may not be correct for determining non-arbitrability because of the interplay between rights *in rem* and rights *in personam*. Many a times, a right *in rem* results in an enforceable right *in personam*”. [see para 30]

²⁷ “That is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement ... arbitration as a decentralized mode of dispute resolution is unsuitable when the subject matter or a dispute in the factual background, requires collective adjudication before one court or forum ...” See para 31.

²⁸ “Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon etc., as distinguished from commercial activities, economic adventures and welfare activities. Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.” See para 32.

²⁹ Khanna J referred to the “second condition” in *Dhulabhai v. State of Madhya Pradesh* AIR 1969 SC 78 that was in the context of a bar on the jurisdiction of a civil court by special enactment. The condition also stated that when there is no express exclusion of the jurisdiction, an examination of the remedies and the scheme of the enactment is necessary to find out the intention, and it is necessary to see if the statute creates special right or a liability, provides (a mechanism) for the determination, and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted. *Dhulabhai* was referred in *Vimal Kishor Shah*. Both were referred in *Drolia I*. Khanna J said *Dhulabhai* is not “directly applicable” but “apposite while examining” nonarbitrability. And then he reiterated the second condition and noted that “conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred”. And this is how he stated the “fourth principle” noted above (“when by mandatory law the parties are quintessentially barred from contracting out ...”)

³⁰ See, Aleka Mandaraka-Sheppard, *Demystifying the Right of Election in Contract Law*, (2006) 18 *SacLJ* 60. The author explains the concept of election in commercial contracts. An election is about a choice between two inconsistent rights. For example, in repudiation of the agreement, a party to a contract can choose to continue the contract or accept the other party's conduct as terminating the contract because the two rights are inconsistent neither may be enjoyed without extinction of the other. It is not clear how election fits in the discussion of Khanna J.

³¹ *Transcore v. Union* (2008) 1 SCC 125, Dr. Arijit Pasayat and SH Kapadia JJ, deciding that doctrine of election applies when two or more inconsistent remedies, and a choice to elect one exists, and thus concluding that the right of the lender bank under the DRT Act, 1993 and the securitization law of 2002 were, in effect, one, the latter additional. Thus, proceedings under both could go on.

there is a repugnancy between the provisions of mandatory law and arbitration, the right to elect arbitration is denied.

Then, the court referred to *MD Frozen Food* and *India Bulls* and said that “consistent with the above,³² observations in *Transcore* on the power of the DRT... and the principle enunciated in the present judgement” we must overrule the judgment of the Delhi High Court Court’s full bench in *HDFC* “which holds that matters covered under the DRT Act are arbitrable.”

Then the court noted that *HDFC* had been referred in *MD Frozen* but not examined in light of the legal principles of nonarbitrability. Also, *HDFC* had held that *DRT* matters are not *in rem* so are arbitrable, but, Khanna J said, nonarbitrability may arise in cases of implied prohibition in the statute conferring and creating special rights to be adjudicated by courts or public forum. In this case, the legislation has overwritten the contractual right to arbitration.³³

5. Myriad observations: public policy and arbitrability, arbitrator's duty to apply the public policy, party autonomy, the *Rashid Raza* test referred in *Avitel* on arbitrability of fraud etcetera

The discussion on DRT matters ended in paragraph 36. Then, from paragraph 37, a host of observations are made. Some among those are:

- (i) The public policy in case of non-arbitrability refers to implied non-arbitrability-- conferment of exclusive jurisdiction on the court or the special forum.
- (ii) The language of Sections 8 and 11 ACA is peremptory.
- (iii) Party autonomy is a fundamental principle. It goes “hand in hand with principle of limited court intervention, this being the fundamental principle underlying modern arbitration law.” Party autonomy is weaker in non-negotiated "take it or leave it" contracts and therefore, the legislature through statutes shield the weakest and vulnerable contracting parties like consumers." This is not so in negotiated agreements or even in adhesion contracts.
- (iv) *Avitel* “examined the law in invocation of fraud exception in great detail and holds that *Radhakrishnan*³⁴ as a precedent has no legs to stand on.” (see para 43). *Avitel* also quotes from *Rashid Raza*, which explained the *Ayyasamy* test. Khanna J said we respectfully concur with the view.³⁵

6. Summarizing the four principles

³² It is not clear what “above” referred to.

³³ In *HDFC Bank Limited v. Satpal Singh Bakshi*, 2013 (134) DRJ 566, AK Sikri, Acting CJ, Sanjay Kishan Kaul and Rajiv Shakdher JJ considered several arguments on arbitrability. They said that a financial institution's claim of money could not be treated as right *in rem* (para 13). But, they also said that “according to us, cases where a particular enactment creates special rights and obligations and gives special powers to the tribunals which are not with the civil courts, those disputes would be non-arbitrable.” (para 14). Thus, for example, they said that matters covered by rent control legislations (granting statutory protection to tenants), or workmen-employer disputes were not arbitrable. However, they found that the DRT Act did not create any special rights, but merely provided for a tribunal instead of civil court for deciding the disputes. *HDFC* was specifically referred and approved by a 2-judge bench Supreme Court in *MD Frozen Foods Exports Private Limited and Others v. Hero Fincorp Limited* (2017) 16 SCC 741. Nariman J, speaking for himself and his co-judge Sanjay Kishan Kaul J who was also on the *HDFC* bench, decided if arbitration and proceedings under the SARFAESI Act could go together. They noted that *Transcore* had already held that SARFAESI and DRT proceedings could go together, and “the only twist in the present case is that ... we are concerned with arbitration proceedings.” They said that it was “trite to say that arbitration is an alternative to the civil proceedings.” Then, at paragraph 30, referring to *HDFC* (which they footnoted) they said “in fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative”. They again referred to *HDFC* in paragraph 31 and noted it was rightly held that a financial institution's claim is not a right *in rem*. Another SC 2-judge bench decision in *Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd.* (2018) 14 SCC 783 (AK Sikri and Ashok Bhushan JJ) followed *MD Frozen* to say that arbitration and SARFAESI could go together. It is not apparent why the court identified *HDFC*, a judgment seemingly unconnected to the case, as problematic.

³⁴ *N Radhakrishnan v. Maestro Engineers and others* (2010) 1 SCC 72.

³⁵ In *Ayyasamy*, at para 25, Sikri J set out what the law on arbitrability of fraud was. Nariman J, who authored the 3-judge bench decision in *Rashid Raza* (2019) 8 SCC 710 explained what he termed were “two working tests” “laid down in para 25” of *Ayyasamy*. In *Avitel Post Studios Limited and others v. HSBC PI Holdings (Mauritius Limited)* 2020 SCC OnLine SC 656, which again was authored by Nariman J, the working tests were approved. Read NFRAL’s comprehensive Update of *Avitel* [here](#).

The four principles (already noted above in Section B3) were then set out at paragraph 45. Then, Khanna J cautioned that “these tests are not watertight compartments; they dovetail and overlap, *albeit* when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable”. He also said that the principles need to be applied with care and caution (reproducing *Olympus* para 35³⁶)

7. What are matters not arbitrable? [see para 46]

Then, “applying the above principles” to determine nonarbitrability, Khanna J said it was apparent that:

- i. Insolvency or intracompany disputes have to be addressed by a centralized forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions *in rem*.
- ii. Similarly, grant and issue of patents and registration of trademarks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable.
- iii. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim.
- iv. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect.
- v. Matters relating to probate, testamentary matter etc. are actions *in rem* and are a declaration to the world at large and hence are non-arbitrable.

8. Overruling *Radhakrishnan* and reiterating *HDFC's* overruling

Given the discussions above, Khanna J said, “we overrule the ratio in *Radhakrishnan inter alia* observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute”. He added a “caveat” that “fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability.” [see para 47, earlier discussion at paras 37-44]

He reiterated that the court has already set aside *HDFC*.

9. Overruling *Himangni*

Finally turning to the case which led to the ‘reference’, Khanna J said that landlord-tenant disputes governed by the TPA are arbitrable. He said those disputes are not actions *in rem* but pertain to subordinate rights *in personam* that arise from rights *in rem*; normally would not affect third-party rights or have *erga omnes* effect, or require centralized adjudication; do not relate to inalienable and sovereign functions of the State.

He added that the TPA has a public purpose (to regulate landlord-tenant relationships) and the arbitrator would be bound by it. [see para 49; see also para 22]

³⁶ *Olympus Superstructures Pvt. Ltd.* (1999) 5 SCC 651 (“35... certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce ... cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir v. Leeman*). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter...”)

However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations.

C. Who decides non-arbitrability [para 50 to 96]

The court then turned to the second question formulated by it. It began by noting that the issues of nonarbitrability can be raised before the court at three stages: [Section 8](#) stage; before the arbitral tribunal during the arbitration proceedings; or, at the stage of set-aside or enforcement.³⁷

1. Object of ACA

Khanna J also compared the ACA with the 1940 Act and said that the ACA based upon the UNCITRAL Model Law introduced a new regimen, and its primary objective was to minimize the supervisory role of courts. So, the tribunal's powers to deal with and decide "jurisdictional issues of non-arbitrability" were amplified, and the principles of separation and competence-competence were incorporated. Simultaneously, the courts retained some power to have a 'second look' in the post-award challenge proceeding. [see para 54]

2. "Legal position can be divided into four (sic three) phases"

He then divided the legal position into four (sic three) phases: the first phase, commencement of ACA to the 7-judge bench decision in *SBP* on 26 October 2005; second phase, from *SBP* till the 2015 Amendments (which he said was made to substantially reduce court interference and overrule the legal effect of *SBP*); and the third phase from 2015 Amendments till the 2019 Amendments.

The discussion of the first and the second phase is mainly a description of the cases before *SBP* which said that the power under [Section 11](#) ACA (as originally enacted) was an administrative power, *SBP* itself that held the power was judicial, *National Insurance* (where Raveendran J explained the *SBP* case), and a few cases which had discussed if *National Insurance* was decided contrary to *SBP*.³⁸

The court also referred to *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234 (a case on Section 45 ACA under the pre-2019 ACA) for its proposition on whether a determination that the arbitration agreement is null and void, inoperative or incapable of being performed is *prima facie*.

For the third phase, a reference was made to *Mayavati Trading*³⁹ which ruled on the effect of [Section 11 \(6A\)](#) ACA, Chandrachud, J's opinion in Ayyasamy, mainly on the principle of severability, *Garware Wall Ropes Limited v. Coastal Marine Constructions and Engineering Limited*, (2019) 9 SCC 209 and a few other cases. Referring also to *Narbheram*⁴⁰

³⁷ In *Avitel* the question was raised and considered in an application for interim relief under [Section 9](#) ACA.

³⁸ *SBP* was on mainly the power of the Chief Justice/designate under the originally enacted [Section 11](#) ACA. In *National Insurance Company Limited v. Boghara Polyfab Private Limited* (2009) 1 SCC 267 (2-judge), RV Raveendran J explained the *SBP* decision by listing three categories (see para 22 of *National*). The third category set out matters exclusively for the tribunal, that is, if a claim was within the arbitration clause's scope or was an excepted matter, thus excluded from arbitration (non-arbitrable). In *Arasmeta v. Lafarge* (2013) 15 SCC 414 it was argued that specific passages of the *SBP* decision show that the 7-judge bench had also held that arbitrability should be decided in [Section 11](#) proceedings, and *Booz* had not considered the real ratio of *SBP*. This point was not accepted in *Arasmeta*. The 2-judge bench said that a 3-judge bench had considered the issue in *Chloro*. In this discussion, *Shree Ram Mills* (2007) 4 SCC 599, also figures because it made some observations on the nature of the finding under [Section 11](#), if *prima facie* or *final*, and it was suggested in *Arasmeta* that the finding was contrary to *Booz*. Khanna J does not state what the court meant to deduce from this discussion. Though, in the middle of the discussion he referred to paragraph 22 of *National Insurance* and said that if read carefully that para states the factors to be considered in a [Section 8](#) and [Section 11](#) application, which included the question whether the disputes that have arisen can be settled by arbitration. This may not be correct. Para 22 of *National Insurance* does not mention Section 8, and it talks about arbitrability in the sense whether the dispute is covered within the arbitration agreement.

³⁹ *Mayavati Trading Private Limited v. Pradyuat Deb Burman* (2019) 8 SCC 714

⁴⁰ (2018) 6 SCC 534, Dipak Misra CJ, AM Khanwilkar and DY Chandrachud JJ (considering in a Section 11 application if the dispute that arose was covered by the arbitration clause. The insurance policy had a term stated that arbitration could be invoked (on quantum) only if the liability was admitted)

and *United India*⁴¹, the court said it was clear that it was held twice (by the same 3-judge bench) that the question of nonarbitrability can be examined “at the reference stage.”

3. “At this stage ... views expressed by scholars ..”

The discussion moved on (from para 72) to the views of the scholars: Stavros Brekoulakis,⁴² Emmanuel Gaillard and Yas Banifatemi,⁴³ and again Khanna J’s favourite John J Barcelo III.⁴⁴ The court also referred to the French law and the German law, the decision of United States Supreme Court in *Buckeye Check Cashing Inc.*, 18 L Ed 2d 1270 (which relies on the famous *Prima Paint* decision⁴⁵), Prof. Alan Scott Rau,⁴⁶ and Prof. Stephen J. Ware.⁴⁷

4. “...Examine the principles of separability and competence-competence”; negative and positive effects of competence-competence⁴⁸

Discussing these issues, the court also referred to *Union of India v. Kishorilal Gupta & Bros.*⁴⁹ and another case and said that those decisions were under the 1940 Act and the ACA specifically incorporates principles of separation and competence-competence and empowers the arbitral tribunal to rule on its own jurisdiction.

The court described what the positive and negative effect of competence-competence was. It said that “as a positive implication, the arbitral tribunals are declared competent and authorized by law to rule as to their jurisdiction and decide non-arbitrability questions.” As per the negative effect, courts at the referral stage are not to decide on merits, except when permitted by the legislation either expressly or by necessary implication. The court then examined the position under Section 16 ACA. It said that the negative effect does not provide absolute authority, but only a priority to the arbitral tribunal to rule the jurisdiction on the three issues. The courts have a ‘second look’ under Section 34 ACA. [see paras 81-85]

5. The meaning of *prima facie* under Section 8 ACA (and also Section 11)⁵⁰. What issues must the court look at in the referral stage (under Section 8 and Section 11)? The *National Insurance* categories approved and restated

After discussing competence-competence, in the same continuity, the court began its discussion on the nature of a court’s functions at the referral stage (that is, Section 8 and 11 ACA) and an examination of the term ‘*prima facie*’. [para 86]

⁴¹ (2018) 17 SCC 607 (same bench considering a similar matter as in *Narbheram*).

⁴² Stavros L Brekoulakis, *On Arbitrability: Persisting Misconceptions and New Areas of Concern*, L Mistelis & S Brekoulakis (eds), *Arbitrability: International & Comparative Perspectives*, 19-45 (recognizing the prevailing view that inarbitrability of the subject matter of the arbitration agreement renders the arbitration agreement invalid. But, arguing that inarbitrability is an issue concerning the jurisdiction of arbitral tribunal rather than the validity of the arbitration agreement. However, Khanna J said that “referring to Articles II (1) and II (3) of the New York Convention the author did observe that it seems to include arbitrability of subject matter within the essential meaning of an arbitration agreement”).

⁴³ *Negative Effect of Competence-Competence: The Rule of Priority in Favour of the Arbitrators*, (discussing what should be the extent of the court’s review under Article II (3) of the NYC, see para 73 at page 104-106).

⁴⁴ See fn. 11. The article is referred here for, among others, the observation that that good legal order must decide what weight be given to these competing values—the possibility of obstructionism and a party genuinely resisting arbitration-- and how to structure the process to maximize overall value.

⁴⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* 1967 SCC OnLine US SC 160.

⁴⁶ Separability in the United States Supreme Court (citation not given), questioning the "abstract distinction between 'invalidity and non-existence' as 'nothing'".

⁴⁷ In *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc.*, about the American Law saying it "projects a different view" (than presumably Prof Rau).

⁴⁸ Before this, Khanna J also discussed to the 246th Law Commission Report to see the reasons given for the amendments in Sections 8 and 11 ACA.

⁴⁹ AIR 1959 SC 1362. In an oft-quoted passage Subba Rao J had said that an arbitration clause is a collateral term of a contract as distinguished from its substantive terms, but none the less it is an integral part of it; it perishes with the contract.

⁵⁰ The discussion begins at para 86 by referring both to Section 8 and 11. Later, somewhere a reference to Section 8 is made, and elsewhere Section 11.

It referred to *Nirmala J Jhala*.⁵¹ It said that said that *prima facie* in the context of [Section 8](#) is restricted to the subject matter of the suit being *prima facie* arbitrable under a valid arbitration agreement. The court emphasized that it was “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 ... to cut the deadwood and trim off the side branches in straight forward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. [para 86, 87]

The court then discussed the test to be applied and said that observations of BN Srikrishna J in *Shin-Etsu* of “plainly arguable case” are important. The test was discussed referring to (English case) *Silver Dry Bulk*⁵², Delhi High Court’s *NCC Ltd.*⁵³ [para 87]

Continuing the discussion⁵⁴, the court said that the level and nature of scrutiny also depended on the facet of arbitrability. It restated the categories set out in *National Insurance*.⁵⁵ [para 88]

The first category in *National Insurance* included two questions (for the Chief Justice/Designate under the old law):

- (i) Has the party approached the appropriate High Court (territorial jurisdiction)? and
- (ii) Is the party applying a party to the arbitration agreement?

Khanna J added:

- (iii) whether the cause of action relates to action in personam or rem;
- (iv) Whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralized adjudication;
- (v) whether the subject matter relates to the inalienable sovereign and public interest functions of the State; and
- (vi) whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

On the other hand, Khanna J said, 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.⁵⁶

⁵¹ *Nirmala J Jhala v. State of Gujarat and Another* (2013) 4 SCC 301 (“...does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the case were [to be] believed ... the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence.”)

⁵² England and Wales High Court in *Silver Dry Bulk Company Limited v. Homer Hulbert Maritime Company Limited*, (2017) EWHC 44 (Comm.) (“It shall use the term “good arguable case” in that sense. It represents a relatively low threshold which retains flexibility for the Court to do what is just, while excluding those cases where the jurisdictional merits were so low that reluctant respondents ought not to be put to the expense and trouble of having to decide how to deal with arbitral proceedings where it was very likely that the tribunal had no jurisdiction”).

⁵³ *NCC Ltd. v. Indian Oil Corporation Ltd.*, Arbitration Petition No. 115 of 2018, decided on 08 February 2019 (“unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the concerned court hearing the [Section 11](#) petition should follow the more conservative course of allowing parties to have their say before the arbitral tribunal.”)

⁵⁴ Khanna J again referred to Prof. Brekoulakis and said he has differentiated between contractual aspects of an arbitration agreement which the court can examine at referral stage and jurisdictional aspects of arbitration agreement which he feels should be left to the arbitral tribunal. And yet again, John J Barcelo III, who Khanna J said had divided the issue of non-arbitrability into procedural and substantive objections.

⁵⁵ Explaining *SBP*, the *National Insurance* case identified and segregated into three categories the preliminary issues “that may arise for consideration in an application under Section 11.” See also *fn.* 39.

⁵⁶ This observation of the court can be understood when read with para 17 at page 21. Khanna J distinguishes between “a non-arbitrable claim and non-arbitrable subject matter.” He says that a non-arbitrable claim may arise “on account of scope of the arbitration agreement and also when the claim is not capable of being resolved through arbitration”. But, “generally non-arbitrability of the subject matter would relate to non-arbitrability in law.” Though this is conflating the concepts, the bottom line appears to be that the court should intervene only in extremely clear cases.

Undertaking a full detailed review or a long-drawn review at the referral stage would obstruct and cause delay Conversely, if the court becomes too reluctant to intervene, it may undermine the 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 or exercise 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.⁵⁷

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 Court would exercise discretion and refer the disputes to arbitration when it is satisfied that the context requires the arbitral tribunal should first decide the disputes and rule on non-arbitrability. Similarly, discretion should be exercised when the party opposing arbitration is adopting delaying tactics and impairing the referral proceedings.⁵⁸

6. [Section 11 \(6A\) ACA and the effect of the proposed omission](#)

The omitted [sub-section \(6-A\) to Section 11](#) of the Arbitration Act would continue to apply and guide the courts on its scope of jurisdiction at stage one, that is the pre-arbitration stage. The (proposed) omission would not make the ratio in *SBP* applicable.

7. ['Existence of an arbitration agreement' in Section 11 ACA includes validity and arbitrability](#)

The court now turned to the meaning of the word “existence” in [Section 11](#) ACA. It said that an agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the ACA and ICA when it is enforceable in law.

He then said there are additional reasons and set out 11 of those [[see para 92](#)]. Among those, he said that:

- (a) “It would be rather odd for the court to hold and say that the arbitration agreement exists, though *ex facie* and manifestly the arbitration agreement is invalid in law and the dispute in question is non-arbitrable.”
- (b) Sections 8 and 11 ACA are complementary. Both should be read as laying down similar standards. The “mandate of valid arbitration agreement in Section 8” can be read into the “mandate of Section 11, that is, existence of arbitration agreement.”
- (c) Reviewing existence as validity is justified because “absolute “hands off approach” would be counterproductive.”
- (d) The interpretation balances the allocation of decision-making: the primary jurisdiction with the tribunal, and the court as a forum for *prima facie* review to knockout *ex facie* frivolous and dishonest litigation.

At para 95, the court noted that the court at the referral stage would apply the *prima facie* test based on principles set out in this judgment. Further, in cases of debatable and disputable facts, and good reasonable arguable case, etc., the matter would be left for the arbitral tribunal.

8. [Principles applicable to interpretation of an arbitration clause](#)

⁵⁷ Citing Ozlem Susler – ‘The English Approach to Competence-Competence.’

⁵⁸ Citing Supreme Court of Canada in *Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin*, [2007] 2 SCR 801, 2007 SCC 34

Khanna J said that the court at the referral stage interferes only when it is manifest that the claims are *ex facie* time-barred. All other cases should be referred to the arbitrator. Then, he noted that we would also resolve the question of principles applicable to the interpretation of the arbitration clause since it directly relates to the scope of the arbitration agreement. He concluded that more appropriate interpretation would be the one of liberal construction as there is a presumption in favour of one-stop adjudication. [para 94]

9. Court's summary of its conclusions [para 96]

The conclusion of the discussion "Who Decides Arbitrability" was summarized:

- a. The scope of judicial review and jurisdiction of the court under [Section 8](#) and [11](#) ACA is identical but extremely limited and restricted. *SBP* no longer applies.
- b. 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 at the set-aside stage under Section 34(2)(a) (i), (ii) or (iv) or Section 34(2)(b) (i) ACA.
- c. Rarely, 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. 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.

D. The operative decision

The court did not state how it applied to the facts the principles set out. In two cases where arbitration proceedings were pending, the issue of arbitrability was left for the arbitrator. In the third where the tribunal had rejected the objection, the petitioner was at liberty to pursue the remedy at the set-aside stage.

E. The judgment of Ramana J

1. Why separate opinion?

"The present matters deal with a very important aspect in the arbitration jurisprudence in this country, which necessitate a separate opinion.

2. The two questions in view of Ramana J [para6]

As per Ramana J, the two questions were: -

- (a) To what extent does the Court decide the question of non-arbitrability under [Section 11](#) ACA?
- (b) Whether tenancy disputes are capable of being resolved through arbitration?

3. The structure of ACA and precedent on [Section 11](#) [para 17 onwards]

Ramana J first described the structure of the ACA and noted that "the present structure of arbitration is such that Courts are to assist and support arbitration and leave the substantive part of adjudication to the arbitral tribunal." (para 27, Ramana J)

He then discussed precedent and said that from their study it was clear that earlier there was a wide discretion for judicial interference at the stage of reference under [Section 11](#) ACA, and the 2015 Amendments was brought into force to limit the power of judicial interference under [Section 11](#) ACA. [see para 43]

4. Why is the test under [Section 8](#) *prima facie*?

He discussed why the test under [Section 8](#) ACA is on a *prima facie* basis? The primary reason, he noted, is the negative effect of *Kompetenz Kompetenz* under Section 16, which mandates that the arbitral tribunal is required to first look into any objections as to the jurisdiction of the tribunal itself. But, the legislature has found a balance to avoid protracted litigation, and the court is required to examine the validity of an arbitration agreement on a *prima facie* basis. [see para 44 onwards]

5. Meaning of validity under [Section 8](#)

As to the meaning of validity under [Section 8](#) ACA, he said there is no doubt that ‘validity’ to be examined under [Section 8\(2\)](#) of the Act, could be interpreted to mean formal validity as expressed under Section 7 ACA. However, the burden of the precedents stops us from accepting such a narrow interpretation.⁵⁹ [see para 46 onwards]

6. Can arbitrability be examined under [Section 8](#) ACA? Yes, but more suited for the tribunal which can examine public policy?

On the question if arbitrability can be analyzed by the court under [Section 8](#) or [Section 11](#) ACA, he noted that no doubt, “arbitrability finds a close nexus with the validity of the arbitration agreement” (the term referred in [Section 8](#)), even if a valid arbitration agreement exists, it does not mean that certain subject matters are arbitrable per se”. This distinction is required to be kept in mind.⁶⁰

He then said though Section 34 (2)(b) provides that an award which may not be capable of being settled by arbitration, or is against the public policy of India can be set aside. It does not mean that the tribunal cannot first adjudicate a claim based on the public policy argument.

Thus, in his view, whether a subject matter can or cannot be arbitrated should necessarily be dealt on a case to case basis, rather than a having a bold exposition that certain subject matters are incapable of arbitration.

Further, the plea of public policy is required to be specifically identified, pleaded and shown concerning how the award is contrary to the public policy. This, as per Ramana J, is more suited to be first dealt by the tribunal.

7. A word of caution for arbitrators

He also added a word of caution for the arbitrators: they have been given jurisdiction to decide on the subject matter arbitrability. They are required to identify the specific public policy in order to determine the subject matter arbitrability. Merely because a matter verges on a prohibited territory, should not by in itself stop the arbitrator from deciding the matter. He/she should be careful in considering the question of non-arbitrability. [see para 61]

8. The effect of the negative language of [Section 8](#); what *prima facie* means?

He also commented on the negative language of [Section 8](#) (“unless it finds that *prima facie* no valid arbitration agreement exists”). He noted that in a case of finding that there is no agreement, there could be no further reference and that will stand at odds with the established precedents on *prima facie* standards. In this context, he said, we can only stress the requirement of quality legislative drafting protocols to eliminate such complications.

He concluded that the “respondent/defendant has to establish⁶¹ a *prima facie* case of non-existence of valid arbitration agreement, wherein it is to be summarily portrayed that a party is entitled to such a finding. If a party cannot satisfy the Court of the same on the basis of documents produced, and rather requires extensive examination of oral and documentary production, then the matter has to be necessarily referred to the tribunal for full trial”.

⁵⁹ Ramana J did not elaborate. Presumably, he meant that the substantive validity is also included.

⁶⁰ *Cf. fn. 12.*

⁶¹ In a Section 8 application, the respondent/defendant would usually be the party who wants to get the matter referred to arbitration. It cannot be for him to establish that no agreement exists.

He then referred to a test of a good arguable case which was “extensively argued before us”. However, he said that the statutory language under [Sections 8](#) and [11](#) emphasizes the threshold requirement for a party for establishing the opposite. He said, therefore, that if the ‘good arguable case standard’ is interpreted for a party requiring to show non-existence, then the same would amount to judicial activism.

9. The meaning of the word existence in [Section 11](#)

As to “existence” and the effect of *Duro Felguera* he noted that as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid.

10. The difference in the language of [Section 8](#) and [11](#): not material

He said that though the statutory language of [Section 8](#) and [11](#) are different, materially they do not vary, and both provide for limited judicial interference at reference stage, as enunciated above.

11. Is tenancy dispute arbitrable?

In line with our holding on question no. 1, generally it would not have been appropriate for us to delve into the second question. However, considering that a question of law has been referred to us, we agree with the conclusions reached by our learned brother. [para 74]

12. Conclusions of Ramana J [see para 69,75]

Ramana J’s conclusions were: -

- a. Sections [8](#) and [11](#) of the Act have the same ambit concerning judicial interference.
- b. Usually, subject matter arbitrability cannot be decided at the stage of Sections [8](#) or [11](#) ACA, unless it is a clear case of deadwood.
- c. The court, under Sections [8](#) and [11](#), has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established *prima facie* case of non-existence of a valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
- d. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a *prima facie* basis, as laid down above, i.e., ‘when in doubt, do refer.’
- e. The scope of the court to examine the *prima facie* validity of an arbitration agreement includes only:
 - i. Whether the arbitration agreement was in writing? or, whether the arbitration agreement was contained in an exchange of letters, telecommunication etc.?
 - ii. Whether the core contractual ingredients qua the arbitration agreement were fulfilled?
 - iii. On rare occasions, whether the subject matter of the dispute is arbitrable?

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