IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
AC No. 55 of 2025

(M/S AMAR INDIA PVT. LTD., THROUGH ITS DIRECTOR SHRI KULDEEP SINGH KUSHWAHA Vs *UNION OF INDIA THROUGH ITS GENERAL MANAGER WESTERN RAILWAY AND OTHERS)*

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Shri Dharmanshu Singh, learned counsel for the applicant.

Shri Romesh Dave, learned Deputy Solicitor General for respondent No.1.

Heard on : 22.01.2026

Pronounced on : 04.05.2026

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This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator due to the failure of the respondents to grant consent for such appointment pursuant to the notice invoking arbitration (Annexure A-14).

Facts of the case:

2. The applicant is a private limited Company registered under the provisions of the Companies Act, 2013. Its registered office is situated at Flat No.705, Block A, Sagar Landmark Ayodhya, Bypass Road, Bhopal.

2.1 The respondents are Western Railways (an undertaking of the Government of India) and its officers, engaged in providing railway facilities to the public, with its operations spread across India.

2.3 The applicant is engaged in the business of carrying out various

service-related contracts among other specializations.

2.4 Respondent No.2 issued Notice Inviting Tender (NIT) dated 19.04.2023, thereby inviting bids for "*Contract for Activity and Outcome based Mechanised Cleaning, Manual Cleaning, Sanitation and Disinfection Services at Ujjain Station for a period of four years.*" The estimated costs of the project was mentioned as Rs.5,08,94,938.39. The scope of work and the special conditions of contract formed part of the said NIT.

2.5 Pursuant to the said NIT, the applicant along with other bidders submitted its bid. Upon finalising of the bid in favour of the applicant, the applicant and the respondents entered into a contract on the Digital Government e-Marketplace (GeM) on 14.07.2023. The total value of the contract was Rs.2,81,14,362.30/-. The commencement date of work under the contract was 28.07.2023 and the date of completion was 27.07.2027.

2.6 The applicant in furtherance of the aforesaid contract, commenced its work in accordance with the terms of the contract. The respondent issued payments for the work carried out by the applicant up to 27.02.2024. However, the respondent while issuing the invoice dated 23.07.2024, for the billing period from 29.07.2023 to 27.02.2024, deducted an amount of Rs.3,98,791/- towards penalties.

Facts relating to dispute in hand:

3. It is the case of the applicant that in terms of the contract, no penalty was leviable for performance scores between 85% to 100% and that the

maximum prescribed penalty threshold was 16% of the contract value. The deducted penalties amount to only 1.42% of the contract value, which according to the applicant is indicative of the satisfactory performance of its contract obligations.

3.1 However, respondent No.2 issued Performance Notice dated 23.07.2024, wherein various shortcomings were alleged against the applicant.

3.2 In response to the aforesaid notice, the applicant apprised respondent No.2 in its chamber that it is only due to illicit demands from the Chief Health Inspector, Ujjain because of which this notice has been issued and requested for taking action against him. However, when no action was taken, the applicant submitted its reply *vide* letter dated 03.08.2024 thereby informing and clarifying everything about the satisfactory performance of the applicant.

3.3 The Respondent No.2, without paying any heed to the above said explanation, issued notice dated 13.08.2024 there by instructing the applicant for improvement in the work so as to maintaining quality of cleanliness and hygiene at the station. It was also informed that for next 7 days, the quality of work will be assessed.

3.4 This notice was replied by the applicant *vide* a detailed representation dated 18.08.2024. However, ignoring the same, a second notice of similar nature was issued on 06.09.2024 to which the applicant submitted a representation on 10.09.2024.

Termination Notice:

4. Notwithstanding the above said representations, respondent No.2 while invoking Clause 7.4 of the General Conditions of Contract for Services (for short "GCC'), issued a notice of termination dated 20.09.2024 (Annexure A/12). The respondent No. 2, not only terminated the contract by this notice but also the applicant was debarred from participating in bids for executing any work being tendered by the Western Railway Division for a period of two years.

Invocation of Arbitration Clause:

4.1 Being aggrieved by the notice of termination, the applicant invoked the arbitration clause as contained in para 8 of the GCC *vide* notice dated 23.09.2024 (Annexure A/14). The applicant made several prayers in the said notice by invoking different clauses of the GCC, including the prayer for referring the dispute for arbitration.

4.2 The respondent No.2, in the meanwhile, issued a letter dated 25.09.2024 thereby making correction in the notice of termination of contract by correcting the name of the Western Railway Division by changing it to Western Railway Ratlam Division.

4.3 The respondent No. 2, thereafter, issued letter dated 16.12.2024 to the applicant thereby informing that the proposal for nomination of arbitrator has been approved by the DGM (L), Church Gate. However, as per the advice of the Deputy CJM (G), Church Gate (Annexure A-XV) the applicant

was required to furnish consent and waiver under Section 12(5) and 31A(5) of the Arbitration and Conciliation Act, 1996 in the prescribed format annexed as Annexure B.

4.4 In a sense, though the respondents accepted the invocation of arbitration but subject to waiver in terms of Section 12(5) of the Act of 1996.

4.5 The applicant refused to waive the applicability of Sections 12(5) and 31A(5) of the said Act *vide* its response dated 23.01.2025.

4.6 In absence of waiver by the applicant, the respondents did not nominate any person as Arbitrator and did not proceed further with the process of arbitration for resolution of dispute in hand.

5. In the backdrop of the above facts, the present application for appointment of arbitrator came to be filed before this Court.

Submissions of the applicant:

6. Learned counsel for the applicant submits that a perusal of the notice invoking arbitration (Annexure A/14) would show that the dispute raised by the applicant was not in relation to the termination of the contract, he submits, for the same separate remedy is required to be availed. However, as far as the statement of claim as contained in Para 8.18 of the said notice is concerned, the same demonstrates the existence of disputes between the parties. He submits that the applicant is entitled to the payment as quantified and claimed in the said statement. His submission is that the exception provided in arbitration clause will not cover these claims thus the arbitrator

should be appointed by the court.

6.1 He submits that in view of the facts pleaded in the application, a dispute does exist between the parties. There are outstanding dues on account of which a total claim of Rs.1,54,20,676/- has been raised by the applicant. Further, the respondent has failed to adhere to the procedure for appointment of arbitrator.

6.2 There is clear disagreement between the parties in as much as the respondent is seeking waiver of Section 12(5) of the Arbitration and Conciliation Act, 1996, whereas the applicant is not willing to waive the applicability of the said provision.

6.3 In these circumstances, it is submitted that it would be appropriate for this Court to appoint an arbitrator to adjudicate the disputes between the parties by invoking its powers under Section 11 of the Arbitration and Conciliation Act, 1996.

Submission of the respondents:

7. Controverting, the learned counsel for the respondents submitted that the respondents have filed their preliminary objections against the maintainability of the present application for appointment of arbitrator. He submits that the arbitration clause is contained in Annexure A-13 which comprises the General Conditions of Contract for services.

7.1 According to the learned Counsel for the respondent, chapter 8 of GCC provides for arbitration and the appointment of the arbitrator is

governed by Clause 8.1 of the GCC. He points out that as per Clause 8.1, certain matters are excluded from the purview of arbitration and are therefore not arbitrable.

7.2 According to him, Clause 7.4 is one of the clauses mentioned in the exception clause (i.e. Clause 8.1). He submits that Clause 7.4 provides for termination of the contract. In cases of default by the contractor, termination is required to be effected in terms of Clause 7.4, which in the present case has been done. The termination notice is stated to have been issued in terms of Clause 7.4.3 as reflected in Annexure A-15.

7.3 He further submits that Annexure A-15 also contains at its foot, a stipulation regarding debarment from participation in bids for execution of any work tendered by the concerned Railway Division for a period of two years. Thus, according to him, not only termination but also debarment is covered under Clause 7.4. Consequently, the termination notice, including the aspect of debarment, falls within Clause 7.4 which stands excluded under Clause 8.1 and therefore, the dispute involved in the present case is expressly excluded from arbitration and is not arbitrable.

7.4 Learned Counsel for the respondent submits that it is the duty of this court to have a limited review so as to ascertain whether the dispute in hand is arbitrable or not. In support of his submission he relies upon a judgment of the Hon'ble Apex Court passed in the case of ***Emmar India Limited Vs. Tarun Aggarwal Project LLP & Another, (2023) 13 SCC 661***.

Rejoinder by the applicant:

8. Responding to the submissions of the learned counsel for the respondent, learned counsel for the applicant submits that the applicant is not raising any grievances against the termination. Rather, the grievance is confined only to the claims enumerated in para 8.18 of the invocation notice which can very well be gathered from the notice itself whereby the applicant has invoked arbitration (Annexure A/14).

8.1 He further submits that in similar cases coordinate benches of this court have already sent matters for arbitration. In support of his submissions, learned counsel for the applicant has placed reliance on an order passed by co-ordinate Bench of this Court in the case of ***M/s Aishwarya Enterprises Proprietor Smt. Asha Arun vs. Union of India Western Central Railways and Others*** passed in ***AC No.21/2024*** on ***26.06.2025***. He submits that the said order was passed on similar facts. He submits that in the said case also, the very respondent was party and this Court after dealing with similar objections, proceeded to appoint the arbitrator.

Analysis and conclusions of the Court:

9. Heard learned counsel for the parties and perused the case file.

10. A perusal of the notice invoking arbitration would show that the applicant claimed in the same that it has performed its work in accordance with the terms of the contract and that the impugned termination notice is illegal. In para 8.18 of notice invoking arbitration, the applicant has put forth its claim for the work done by it, as under :

Claim No.	Description	Tentative claim amount
1	Machine	19,91,744.00
2	PG encashment	28,11,436.00
3	Illegal Penalty	12,28,000.00
4	Cleaning material	4,90,000.00
5	Regular bills for 01.03.2024 to 20.09.2024	41,00,010.00
6	Legal expense and other	8,79,053.00
7	Profit loss of 3 years (50000 per month)	18,00,000.00
8	Interest of above all @ 18%	21,02,433.00
Total claim		1,54,02,676.00
Note : This is tentative claim final claim		

10.1 The prayer in the notice invoking arbitration would also show that stay was sought on the encashment of the performance guarantee under the contract and further prayer was made for staying the issuance of fresh tenders till the completion of the arbitration proceedings.

10.2 It is thus clear that while invoking arbitration, the applicant has not sought to refer the dispute regarding termination of contract, rather, the claim pertains to payment for the work already executed, which arises out of the contract. According to the learned counsel for the respondents the present disputed is covered under the excepted matters.

10.3 Now, in order to ascertain that whether this dispute is covered under the 'excepted matters' thus not arbitrable or it is not covered in the same, we have to look into the arbitration clause. Chapter 8 of the Indian Railway Arbitration Rules (which are applicable in the present case)

provides for the "Settlement of Disputes", clause 8.1 of the same provides as under :

> *8.1 Matters Finally Determined by the Railways*
>
> *All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 3.5, 4.13, 4.22.4, 4.41.1, 5.4.2, 5.5.2. (c), 6.5, 6.6, 6.7, 6.8, 7.1, 7.2, and 7.4 and sub clauses thereof of General Conditions of Contract for Services or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor, provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause.*

As we can see from the above quoted arbitration clause there are certain matters which have been excepted from the preview of the arbitration, for the purpose of the present case we have to look at clause 7.1, 7.2 and 7.4 including its sub-clauses (all other clauses which are mentioned in clause 8.1 are not relevant for the present dispute).

Now, clauses 7.1, 7.2 and 7.4 provides as under :

> *7.1 Right of Railway to Determine the Contract*
>
> *The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other*

cause whatever, in which case the value of approved materials at site and / or of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefore shall be conclusive evidence thereof.

7.2 Payment on Determination of Contract

Should the contract be determined under clause 7.1 and the Contractor claims payment for expenditure incurred by her in the expectation of completing the whole of the work, the Railways shall admit and consider such claims as are deemed reasonable and are supported by vouchers to the satisfaction of the Manager. The Railway's decision on the necessity and propriety of such expenditure shall be final and conclusive.

7.4 Determination of Contract Owing to Default of Contractor

if the Contractor should —

(a) Become bankrupt or insolvent, or
(b) Make an arrangement with of assignment in favour of her creditors, or agree to carry out the contract under a Committee of Inspection of her creditors, or
(c) Being a Company or Corporation, go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or
(d) Have an execution levied on her goods or property on the services, or
(e) Assign the contract or any part thereof otherwise than as provided in Clause 4.5 of these Conditions, or
(f) Abandon the contract, or
(g) Persistently disregard the instructions of the Manager, or contravene any provisions of the contract, or
(h) Fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period, or

(i) Have been imposed with maximum cumulative penalty as per Clause 4.17.1, or

(j) Fail to remove materials from the site or to pull

down and rectify service wherever applicable after receiving from the Manager notice to the effect that the said materials, or

(k) Have been condemned or rejected under Clause 4.25, 4.27 and 4.28 of these Conditions, or

(l) Fail to take steps to employ competent or additional staff and labour as required under Clause 4.26 of the Conditions, or

(m) Fail to afford the Manager or Manager's representative proper facilities for inspecting the services or any part thereof as required under Clause 4.29 of the Conditions, or

(n) Promise, offer or give any bribe, commission, gift or advantage either herself or through her partner, agent or servant to any officer or employee of the Railway or to any person on her or on their behalf in relation to the execution of this or any other contract with this Railway.

(o) At any time after the Bid relating to the contract, has been signed and submitted by the Contractor, being a partnership firm admits as one of its partners or employees under it, or being an incorporated company elect or nominate or allow to act as one of its directors or employee under it in any capacity whatsoever, any retired officer of the Gazetted rank or any other retired Gazetted officer working before her retirement, whether in the executive or administrative capacity, or whether holding any pensionable post or not, in the Railways for the time being owned and administered by the President of India before the expiry of one year from the date of retirement from the said service of such officer, unless such officer has obtained permission from the President of India or any officer duly authorised by her in this behalf, to become a partner or a director or to take employment under the contract as the case may be, or

(p) Fail to give at the time of submitting the said bid :
(i) The correct information as to the date of retirement

of such retired officer from the said service, or as to whether any such retired officer was under the employment of the Contractor at the time of submitting the said Bid, or

(ii) The correct information as to such officers obtaining permission to take employment under the Contractor, or

(iii) Being a partnership firm, the correct information as to, whether any of its partners was such a retired officer, or

(iv) Being in incorporated company, correct information as to whether any of its directors was such a retired officer, or

(v) Being such a retired officer suppress and not disclose at the time of submitting the said Bid the fact of her being such a retired officer or make at the time of submitting the said Bid a wrong statement in relation to her obtaining permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor.

Then and in any of the said clause, the manger on behalf of the Railway may serve the Contractor with notices stipulated in the clauses 7.4.1, 7.4.2 & 7.4.3.

7.4.1. Performance Notice

(a) In the event of the above and in any of the said clauses, the Manager on behalf of the Railway may serve the Contractor with a Performance notice as per Annexure-XII in writing to the effect to make good the default as well as initiation of bidding process for the balance service.

(b) Railways reserves the right to float a new tender and invite bids for the delivery of services to replace the contractor put on notice, from the date on which this notice is served. The existing contractor shall not be allowed to participate in any bid which includes

delivery of balance services of subject contract. However, in case the existing contractor's performance has improved to the satisfaction of the Manager, then Railways may terminate the bid proceedings, at any stage of the bid process.

(c) Notwithstanding Railway's initiation of the bidding process, the financial bids shall be opened only after the termination of the subject contract.

(d) After the issue of this notice, the performance of contractor shall be assessed on a weekly basis by the manager. Manager, if satisfied with the improvement in the performance of contractor, may issue a letter of revocation of the performance notice as per Annexure-XIII. If the performance is found unsatisfactory after the first week or thereafter, then Railways will be at liberty to issue the 7-day notice, which will be governed by Section 7.4.2.

7.4.2. Seven Days' Notice

After delivery of the performance notice to the contractor, if she does not proceed to make good her default and carry on the services or comply with such directions as aforesaid, to the entire satisfaction of the Manager, the Railway shall be entitled to serve 7 days' notice as per Annexure-XIV, further in writing to either commence the service or improve quality of services to the prescribed standard. The failure to do so shall entail a termination notice being served under the hand of the Manager, to rescind the contract as a whole or in part or parts (as may be specified in such notice).

7.4.3. Termination Notice

If no action to commence the service or improve the quality thereof is taken by the contractor with in the 7 days notice period, then a final termination notice as per Annexure — XV shall be issued.

10.4 As we can see, clause 7.1 pertains to the right of railway to determine the contract at any time for various reasons like paucity of funds etc. As

such, this clause is not related with termination of contract due to default of contractor. The next clause, i.e. clause 7.2 is for payment on determination of contract under clause 7.1, thus the payment of the contractor is to be done under clause 7.2 if the contract is terminated under clause 7.1. Undisputedly, both these clauses are out of the purview of arbitration in view of clause 8.1.

10.5 The next clause i.e. clause 7.4 provides for determination of contract due to default on the part of the contractor, various circumstances have been provided in which the contract can be terminated. The present matter, as far as the question of termination of contract is there, certainly covered under this clause. However, as the applicant says, it has not raised the issue of termination of contract in the notice of invoking arbitration but for other matters arising out of the termination are being sought to be referred for arbitration.

10.6 Now, the question is what are those matters which have arose pursuant to termination of contract, those issues as per applicant are the payment of work already performed by the contractor. Here comes the relevance of clause 7.5 of the GCC, the said clause provides as under :

> *7.5 Right of Railway after rescission of contract owing to default of contractor*
>
> *In the event of any or several of the courses, referred to in clause 7.4.3, being adopted :*
>
> *7.5.1. The Contractor shall have no claim to compensation for any loss sustained by her by reason of her having purchased or procured any materials or entered into any commitments or made any advances on account of or with a view to the delivery of the*

services wherever applicable or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for the services wherever applicable thereto actually performed under the contract unless and until the Manager shall have certified the performance of such services wherever applicable and the value payable in respect thereof and the Contractor shall only be entitled to be paid the value so certified.

7.5.2, The Manager or the Manager's Representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the services wherever applicable or on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the services wherever applicable or any part thereof until the completion of the services without the Contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof.

7.5.3.The Manager shall as soon as may be practicable after removal of the Contractor fix and determine ex parte or by or after reference to the parties or after such investigation or enquiries as she may consider fit to make or institute and shall certify what amount (if any) had at the time of rescission of the contract been reasonably earned by or would reasonably accrue to the Contractor in respect of the services then actually done by her under the contract and what was the value of any unused, or partially used materials, any tools and plants and any temporary works upon the site. The legitimate amount due to the contractor after making necessary deductions and certified by the Manager should be released expeditiously.

It is, thus, clear that the payment of any services or related to contract in any manner has to be done in accordance with the procedure provided in clause 7.5 and significantly this clause is not covered under the excepted matters in clause 8.1 (Arbitration clause).

10.6 In view of the above analysis of the facts of the present case and the relevant clauses of the GCC this Court is of the view that the issue of

payment of dues as sought to be referred to arbitral tribunal by the applicant is not covered under the excepted matters thus the same is arbitrable.

10.7 There is one more significant factor in the matter. It is not the case that the respondents straightaway denied to appoint arbitrator pursuant to notice invoking arbitration dated 23.09.2024. On the contrary, they initially issued letter dated 16.12.2024 calling upon the applicant for submitting its consent for waiver of the requirements of Section 12(5) of the Arbitration and Conciliation Act, 1996. This clearly indicates that the respondents were agreeable to arbitration, subject to waiver of the requirements of Section 12(5). However, when the applicant denied to give waiver they started to object to arbitration.

11. As far as the judgment in the case of ***Emmar (supra)***, in view of the above conclusions drawn by the court, it is clear that the court has found the issue arbitrable. Present is not a case where it can be said that the matter is 'demonstrably non-arbitrable'. It has to be kept in mind that the issue of arbitrability of the matter is to be reviewed only *prima facie* by this court. As regards the exception carved out in clause 8.1 of the GCC, suffice it to say that the arbitrator can always ascertain which parts of the statement of claims are arbitrable and which fall within the category of "excepted matters". In any event, as per the submissions of the learned counsel for the applicant, there is no intention to challenge the termination in the arbitral proceedings. The claims sought to be raised before the arbitrator pertain to payment for executed work and ancillary issues. Thus the decision as cited by the learned counsel for the respondent will not rescue the respondent in the present case.

12. Apart from the above, the Hon'ble Apex Court in a recent decision while referring to Emmar (supra) in the case of ***Office for Alternative Architecture v. Ircon Infrastructure & Services Ltd., 2025 SCC OnLine SC 1098*** held as under:

> *4. Per contra, the learned counsel for the respondent submitted that the High Court is empowered to exclude non-arbitrable claims in light of the decision of this Court in "Emaar India Limited v. Tarun Aggarwal Projects LLP".*
>
> *5. We have considered the rival submissions and have perused the materials on record.*
>
> *6. The short question that falls for our consideration is whether while exercising power under Section 11 of the 1996 Act, the Court has to confine its consideration as to the existence of an arbitration agreement between the parties. If so, whether it would be permissible, while exercising jurisdiction under Section 11, to hold that some of the claims raised are non-arbitrable or fall within excepted category.*
>
> *7. Sub-section (6A) of Section 11, which was inserted by Act 3 of 2016, with effect from 23.10.2015, makes it clear that while considering an application under sub-section (4) or sub-section (5) or sub-section (6), the Supreme Court or the High Court, as the case may be, shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*
>
> *8. Act 33 of 2019 omitted sub-section (6A) but the amending Act has not been notified thus far. In consequence, sub-section (6A) of Section 11 of the 1996 Act remains in the statute book.*
>
> *9. The statement of objects and reasons of the 2015 amendment with reference to insertion of sub-section (6A) in Section 11 of the 1996 Act, reads thus:*
>
> *"(iii) an application for appointment of an Arbitrator shall be disposed of by the High Court or the Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of 60 days.*
>
> *(iv) to provide that while considering any application*

for appointment of Arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."

10. The significance of the use of the expression "not other issues" in the statement of objects and reasons of the 2015 amendment was noticed by a seven-Judge bench of this Court in In Re : Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Indian Stamp Act, 1899, and it was observed:

"209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an Arbitrator shall 'examine the existence of prima facie arbitration agreement and not other issues'. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings."

11. Relying on the above observations made by this Court in In Re : Interplay (supra), a three-judge bench of this Court in "SBI General Insurance Co. Ltd. v. Krish Spinning" observed:

"114. …. that ***the scope of enquiry at the stage of appointment of Arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else****. For this reason, we find it difficult to hold that the observations made in 'Vidya Drolia v. Durga Trading Corporation (supra) and adopted in 'NTPC v. SPML Infra Limited (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under section 11 extends to weeding out ex-facie non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in In Re : Interplay (supra)".* ***Emphasis Supplied***

12. As the above decision has been rendered by a three-Judge bench of this Court after considering the seven-Judge bench decision of this Court in In Re : Interplay (supra), we are of the view that the respondent cannot profit from certain observations made by a two-Judge bench of this Court in Emaar (supra). In our view, therefore, the High Court fell in error in bisecting the claim of the appellant into two parts, one arbitrable and the other not arbitrable, when it found arbitration agreement to be there for settlement of disputes between the parties. The correct course for the High Court was to leave it open to the party to raise the issue

> *of non-arbitrability of certain claims before the arbitral tribunal, which, if raised, could be considered and decided by it.*
>
> *13. The appeal is, therefore, allowed. The order of the High Court to the extent it excludes claims mentioned in para 48 (ii), (iii) and (iv), as referred to in paragraph 8 of the impugned order, is set aside. The parties are, however, at liberty to take the plea of non-arbitrability of certain claims before the arbitral tribunal, which shall decide the same without being prejudice by any observations made in the order of the High Court. There is no order as to costs.*

13. As such, in the considered view of this Court, the present is not a case which is squarely covered under excepted matters. Hence, it would be appropriate for the dispute to be referred to arbitration, where the arbitrator shall also rule upon the issue of arbitrability.

14. As already recorded above, the parties have failed to agree upon the appointment of am arbitrator as one party is insisting upon waiver of the requirement of Section 12(5) while the other party is not ready to waive the same. Consequently, there is no possibility of appointment of arbitrator by mutual consent. This Court, therefore, is of the considered view that not only does a dispute exist between the parties, but there is also no likelihood of appointment of arbitrator by consent. Hence, it is a fit case for appointment of arbitrator by invoking the provisions of Section 11 of the Arbitration and Conciliation Act, 1996.

15. It is made clear that the observations made herein above are only preliminary in nature and all issues including the arbitrability of the dispute shall be decided by the arbitrator during the arbitral proceedings.

16. Accordingly, the name of **Hon'ble Shri Justice Duppala Venkata**

Ramana (Retd. Judge of M.P. High Court) is proposed for appointment as the Arbitrator.

17. Let a declaration in terms of Section 11(8) read with Section 12(1) of the Arbitration & Conciliation Act, 1996 in the prescribed form as contained in sixth Schedule of the Act be obtained from the proposed Arbitrator by the Principal Registrar of this Court before the next date of hearing.

List the matter on **07.05.2026**.

(PAVAN KUMAR DWIVEDI)
JUDGE

Anushree