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

*Reserved on: 16 March 2026*

*Pronounced on: 01 July 2026*

+ FAO (COMM) 112/2025 &CM APPL. 27327/2025

NEWGEN IT TECHNOLOGIES LTD EARLIER  
KNOWN AS VCARE INFOTECH SOLUTIONS  
AND SERVICES PRIVATE LIMITED .....Appellant

Through: Dr. Amit George, Ms. Aakashi  
Lodha, Ms. Nishtha Jindal, Mr. Bhrigu A.  
Pamidighantam, Mr. Vaibhav Gandhi,  
Mr. Adhishwar Suri, Ms. Madhavi Bhatia,  
Mr. Shivam Parashar, Mr. Rupam Jha and  
Mr. Kartikey Puneesh, Advs.

versus

NEWGEN SOFTWARE TECHNOLOGIES LTD ...Respondent  
Through: Mr. Sandeep Sethi and Mr.  
Ankit Jain, Sr. Advs. with Mr. J.V. Abhay,  
Mr. Dhruv Grover and Ms. Akshita Thapa,  
Mr. Krishna Gambhir and Ms. Shreya Sethi,  
Advs.

**CORAM:**  
**HON'BLE MR. JUSTICE C. HARI SHANKAR**  
**HON'BLE MR. JUSTICE OM PRAKASH SHUKLA**

**JUDGMENT**

% **01.07.2026**

**C. HARI SHANKAR, J.**

**A. The *lis***

1. This appeal assails order dated 23 April 2025 passed by the learned District Judge (Commercial)-05<sup>1</sup>, South District, whereby an

<sup>1</sup>“the learned Commercial Court” hereinafter



application, filed by the appellant under Section 8(1)<sup>2</sup> of the Arbitration and Conciliation Act, 1996<sup>3</sup>, seeking reference of the dispute between the appellant and the respondent to arbitration, has been dismissed.

2. The application in question was filed by the appellant in CS (Comm) 102/2025<sup>4</sup>, which stands instituted by the respondent against the appellant.

## B. Facts

### I. Case set up in the plaint

3. The case of the respondent, as the plaintiff in the suit, may be set out thus.

4. The respondent is the proprietor of various registered trade marks which incorporate “NEWGEN” as a dominant part thereof, in various classes. The plaint refers to them as the “NEWGEN marks” and so, too, will we. The respondent is also the registered proprietor



of the device mark “NEWGEN”, which it has been using since 1992. The respondent was providing software services.

<sup>2</sup>8. **Power to refer parties to arbitration where there is an arbitration agreement. –**

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

<sup>3</sup>“the 1996 Act” hereinafter

<sup>4</sup>“the suit” hereinafter



5. Figures representing the turnover from use of the NEWGEN marks, the amount spent towards promotion and advertisement of the marks, and other details, were provided in the plaint, to vouchsafe the goodwill and reputation thereof. The NEWGEN marks are claimed, in the plaint, to be a source identifier of the respondent.

6. The appellant-defendant was incorporated on 16 February 2016 under the name “VCARE INFOTECH SOLUTIONS & SERVICES PRIVATE LIMITED”. The appellant was providing services identical to those provided by the respondent.

7. On 12 July 2023, the appellant and respondent entered into a Partner Agreement, in which the appellant recognized the respondent’s rights in the NEWGEN mark and also agreed not to use the NEWGEN marks otherwise than in accordance with the Agreement. The following Articles of the Partner Agreement are of significance:

“ARTICLE 14 – Trademarks

(a) Newgen 'Trademarks' means those trademarks, trade names, slogans, tables, and other identifying symbols as are or have been developed and used by Newgen and/or any of its subsidiaries or affiliate companies anywhere in the world.

(b) Newgen authorizes VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD to use only the trademarks as approved by Newgen during the term of this agreement for the purpose of the sale and distribution of Newgen Products. VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD shall use these trademarks only in such a manner as to preserve all right of Newgen. VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD acquires no right to any Newgen trademark by its use or by the marketing, sale or servicing of products bearing such trademarks and may consequently only use the specified



trademarks for the duration of this agreement and to the extent specified therein.

(c) VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD shall not, without Newgen's prior written consent, remove, alter, or modify serial No. or identifying symbols from Newgen Products.

(d) VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD recognizes and concedes for all purposes that Newgen trademarks, whether or not registered, are valid and are the exclusive property of Newgen and that VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD's right to use any such trademarks arises only out of this agreement.

(e) Newgen shall have the sole and exclusive right in its sole discretion to bring legal action for trademark infringement with respect to any of the Newgen trademarks, VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD shall inform Newgen too promptly of any such trademark infringements of which it has knowledge and assist Newgen to bring charges against such infringements. Newgen shall bear the cost of any legal action if required against trademark infringements.

#### ARTICLE 15 – Intellectual Property Rights

**License:** No title to or ownership of any Software or any parts thereof is transferred to Customer by any delivery of Software to Customer hereunder. Newgen grants End Customer a non-exclusive nontransferable license to utilize the Software. The Software is licensed only for use with the Product unit with which such Software is incorporated. The license fee may be included within the price of each Product unit or charged separately for use with the Product

Newgen shall defend, indemnify, and hold VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD and their employees harmless from and against any claims, demand, action arising on account of infringement of the Intellectual Property rights of its product. Similarly, VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD will defend, indemnify, and hold Newgen and their employees harmless from and against any claims, demands, action on account of any breach or default by VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD in the performance of its obligations to the Client.



The End Customer may modify the Application Software with respect to which a license is granted, as set forth in this paragraph, provided such modifications are composed in consultation with Newgen, at Newgen's direction, or relate solely to the adjustment of product or process values using the safe parameters dictated by the process manufacturer. Any other modifications to the Application Software may at Newgen's discretion, void the warranty, maintenance obligations and proprietary rights indemnity provided by Newgen for such software or for the Newgen product. Third party software provided by Newgen may be subject to a separate license agreement and/or registration requirement, including but not limited to, prohibitions on copying and limitations on use.

**Designs, Engineering Details, and Other Data:** Newgen retains for itself all of its intellectual property rights in and any supporting documentation supplied hereunder, including but not limited to all designs, engineering details, and other data or information pertaining to any product sold except where such rights are assigned under written agreement by a corporate officer of Newgen.

THIS ARTICLE IS AN EXCLUSIVE STATEMENT OF ALL THE DUTIES OF THE PARTIES RELATING TO INTELLECTUAL PROPERTY RIGHTS AND DIRECT OR CONTRIBUTORY INFRINGEMENT AND OF ALL THE REMEDIES OF CUSTOMER RELATING TO ANY CLAIMS, SUITS, OR PROCEEDINGS INVOLVING INTELLECTUAL PROPERTY RIGHTS Compliance with this Article as provided herein shall constitute fulfillment of all liabilities of the parties under the Agreement with respect to intellectual property rights.”

**8.** Article 18 of the Partner Agreement provided for resolution of disputes by arbitration, and read thus:

“ARTICLE 18 – Arbitration


(a) All disputes or differences whatsoever arising between the parties shall be settled by arbitration in accordance with the proceedings as per the Arbitration and Conciliation Act 1996.



(b) The arbitrator shall be appointed mutually by Newgen & VCARE INFOTECH SOLUTIONS AND SERVICES PVT LTD and the arbitrator shall be based at New Delhi.



(c) All disputes pertaining to arbitration or otherwise shall be subject to the jurisdiction of the Laws of India and the venue shall be Now Delhi.

(d) Any matter on which Newgen's decision is expressly stated in these terms and conditions as final shall not be open to arbitration.”

9. On 10 July 2024, the appellant changed its name to “NEWGEN IT TECHNOLOGIES LIMITED”. This fact came to the notice of the respondent on receipt, by it, of an e-mail dated 25 June 2024 from the appellant, inviting the respondent to a get-together. On 16 July 2024, the appellant wrote to the respondent, informing the respondent of the change of its corporate name. Subsequently, the appellant also applied, to the Registrar of Trade Marks, for registration of the marks 

“  ”  
and,  though the marks have not been registered so far.

10. *Vide* letter dated 15 September 2024, the respondent terminated the Partner Agreement on the ground of illegal misappropriation, by the appellant, of the respondent’s trade marks. The respondent also called upon the applicant to cease and desist from using any of the NEWGEN marks.

11. The appellant, by response dated 11 December 2025, refused to comply.

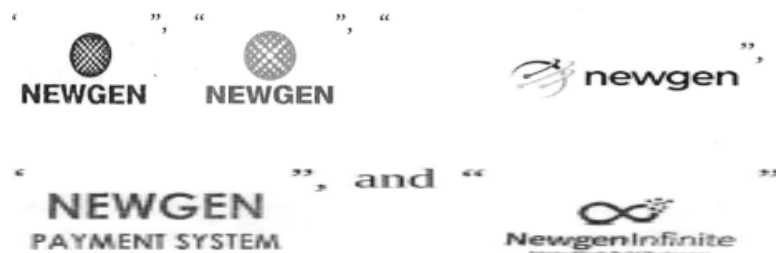


12. The respondent was, therefore aggrieved by the acts of the appellant, which amounted to infringement of the respondent's trade marks as well as passing off of its goods as those of the respondent.

13. Based on the above assertions and allegations, the respondent, in the suit, advanced the following prayers:

"In view of the facts and circumstances hereinbefore, it is respectfully prayed that this Hon'ble Court may be pleased to:

- a. Pass and pronounce a decree of permanent injunction against infringement of the Plaintiff's trade mark "



(among other variants) by restraining the Defendant, its directors, partners, officers, managers, assigns, successors-in-interest, licensees, sister concerns, representatives, servants, agents, employees, etc. and/or any person or entity acting for it from using the marks "NEWGEN", "NEWGEN IT",



and the corporate name "NEWGEN IT TECHNOLOGIES LIMITED" or any other mark similar to the Plaintiff's NEWGEN Marks, singularly or in conjunction with any other words or monogram/logo, as a trade mark, corporate name, trade name, trading style, domain name, third-party listings, website address, electronic mail identity or in any other manner whatsoever; on or in relation to its services/business including advertising, business papers, etc.;

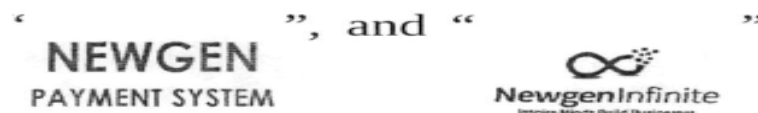
- b. Pass and pronounce a decree of permanent injunction against the Defendant, its directors, partners, officers, managers, assigns, successors-in-interest, licensees, affiliates, sister concerns, representatives,



servants, agents, employees, etc., and/or any person or entity acting for it from passing off its services/business as or for the services/business of the Plaintiff by restraining it from using the marks "NEWGEN", "NEWGEN IT",



and the corporate name "NEWGEN IT TECHNOLOGIES LIMITED" or any other mark similar to the Plaintiff's "NEWGEN trade mark/name "NEWGEN", SOFTWARE", "NEWGEN SOFTWARE TECHNOLOGIES LIMITED",



among other variants), singularly or in conjunction with any other words or monogram/logo, as a trade mark, corporate name, trade name, trading style, domain name, third-party listings, website address, electronic mail identity or in any other manner whatsoever; on or in its services/business, including relation advertising, business papers, etc.;

c. Pass and pronounce a decree of permanent injunction restraining the Defendant, its directors, partners, officers, managers, assigns, successors-in-interest, licensees, franchisees, sister concerns, representatives, servants, distributors, agents, family members, employees, etc. and/or any person or entity acting for it from applying for and/or obtaining registration from any competent body or Government authority for the marks/name including the marks "NEWGEN", "NEWGEN IT",



or any other mark similar to the Plaintiff's trade mark/name "NEWGEN", "NEWGEN SOFTWARE", "NEWGEN



SOFTWARE TECHNOLOGIES LIMITED”,



(among other variants), singularly or in conjunction with any other words or monogram/logo/device in respect of any trade mark, corporate name, trade name, third-party listings, domain name/website address or copyright or in any other manner whatsoever;

d. Pass and pronounce a decree directing the Defendant and/or its directors, representatives, officers, etc. to deliver-up to the Plaintiff for the purpose of destruction/erasure all infringing materials including but not limited to catalogues, pamphlets, brochures, billboards, stationery, business cards, bill books, vouchers, letterheads, signage, reprographic material bearing the marks "NEWGEN", "NEWGEN IT",



and the corporate name "NEWGEN IT TECHNOLOGIES LIMITED" or any other mark similar to the Plaintiff's trade mark/name "NEWGEN", "NEWGEN SOFTWARE", "NEWGEN SOFTWARE TECHNOLOGIES LIMITED”,



(among other variants), used in respect of advertising, selling or marketing the Defendant's business/its services.

e. Pass a preliminary decree for rendition of account directing the Defendant to produce before this Hon'ble



Court or any person nominated/designated/appointed by this Hon'ble Court all accounts in general and invoices and sales figures/revenues in particular;

f. Pass and pronounce a final money decree in favour of Plaintiff for payment of damages in the sum of INR 3,01,000/- (Rupees Three Lakh and One Thousand only) or any such higher sum as may be determined/ascertained pursuant to the rendition of accounts;

g. Pass and pronounce an order for costs of the proceedings; and

h. Pass and pronounce any further or other order or directions, as this Hon'ble Court may deem fit or appropriate in the facts and circumstances of the case in favour of the Plaintiff and against the Defendant.”

## II. Appellant's Section 8 application

**14.** Consequent on receiving summons, the appellant filed an application in the suit under Section 8 of the 1996 Act, seeking reference of the disputes in the suit to arbitration in terms of Article 18 of the Partner Agreement. It was submitted, in the application, that the Partner Agreement constituted the core of the *lis* between the parties. Article 14 of the Partner Agreement specifically proscribed any infringement, by the appellant, of the respondent's NEWGEN trademark. Inasmuch as Section 16(1)<sup>5</sup> of the 1996 Act empowered the Arbitral Tribunal to adjudicate on its jurisdiction, the appellant submitted that Article 18 of the Partner Agreement required the disputes to be referred to arbitration. Reliance was placed, in the

<sup>5</sup> 16. **Competence of arbitral tribunal to rule on its jurisdiction.—**

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

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

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



application, on the judgment of this Court in *Hero Electric Vehicles Private Ltd v. Lectro E-Mobility Private Ltd*<sup>6</sup>. It was submitted that in the said decision, as well as in *Golden Tobie Private Ltd v. Golden Tobacco Ltd*<sup>7</sup>, this Court has held that disputes relating to trademark infringement were not *ipso facto* non-arbitrable in nature.

15. In these circumstances, the application, as already noted, sought reference of the disputes raised in the suit to arbitration.

### C. The Impugned Order

16. The learned Commercial Court has, by the impugned order dated 23 April 2025, dismissed the application.

17. Unfortunately, the decision of the learned Commercial Court is largely unreasoned. It merely reproduces the submissions of both sides and holds that the judgments of the Supreme Court in *P. Anand Gajapathi Raju v. P.V.G. Raju*<sup>8</sup>, *Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Ltd*<sup>9</sup> and the judgment of the High Court of Bombay in *Jashu M. Patel v. Shivdatta*<sup>10</sup>, on which the appellant placed reliance, were inapplicable to the issue. The learned Commercial Court has also noted the reliance placed by learned Counsel on the judgments of the Supreme Court in *A. Ayyasamy v. Paramasivam*<sup>11</sup> and *Vidya Drolia v. Durga Trading Corporation*<sup>12</sup> as

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<sup>6</sup> 2021 SCC OnLine Del 1058

<sup>7</sup> 2021 SCC OnLine Del 3029

<sup>8</sup> (2000) 4 SCC 539

<sup>9</sup> (2020) 2 SCC 455

<sup>10</sup> 2003 (3) Mh.L.J. 487

<sup>11</sup> (2016) 10 SCC 386

<sup>12</sup> (2021) 2 SCC 1



well as the judgment of this Court in *Hero Electric Vehicles* and *Golden Tobie*, without expressing any opinion regarding the applicability of the said decisions.

**18.** The only aspect on which any opinion, worth the name, may be said to have been expressed by the learned Commercial Court is in the following paragraph:

“It is the case of the Plaintiff since beginning that it was due to defendant's illegal actions that the plaintiff was constrained to terminate the contract and once the main contract itself was recalled and terminated by the plaintiff, then there remained no scope for applicability of Arbitration clause. Moreover, the language of the agreement itself reveals that it was entered into between the plaintiff and the said M/s VCARE Infotech Solutions and Services Pvt. Ltd. and it did not provide anywhere that it would either include or would be binding upon their successors, assignees, agents or heirs etc., which essentially meant that with the change of the name of the said M/s VCARE Infotech Solutions and Services Pvt. Ltd., the agreement had come to an end by its natural death and once the main agreement executed between the erstwhile parties did not remain in existence, then the arbitration clause contained therein had also lost its significance and validity. Therefore, as on date, it could not be held with precision that their existed any independent arbitration clause between the parties so as to invoke the provisions of Section 8 of the Arbitration and Conciliation Act.”

**19.** Thereafter, after referring to the various submissions advanced before it, the learned Commercial Court proceeds in one line to dismiss the application.

**20.** The impugned order could have been set aside even on the sole ground that it is bereft of reasons. That, however, would require us to remand the matter to the learned Commercial Court. Inasmuch as the issue in controversy is short, we are not inclined to do so.



## D. Rival Contentions

21. We have heard Dr. Amit George, learned Counsel for the appellant and Mr. Sandeep Sethi and Mr. Ankit Jain, learned Senior Counsel appearing for the respondent at length.

### I. Submissions of Dr. George

22. Dr. George submits that, in a Section 8 proceeding, the applicant is only required to demonstrate the *prima facie* existence of an arbitration agreement, for which purpose he places reliance on paragraph 166 of *In re, Interplay Between Arbitration Agreements under Arbitration, 1996 and Stamp Act, 1899*<sup>13</sup>. The appellant had succeeded in doing so, in as much as (i) the dispute between the parties arose out of an alleged breach of Article 14 of the Partner Agreement, and (ii) Article 18 of the Partner Agreement specifically envisaged settling of disputes arising out of the Partner Agreement by arbitration. In such cases, Section 8, when invoked by one of the parties, mandated the Court to refer the dispute to arbitration.

23. Dr. George submits that the learned Commercial Court is clearly in error in holding that the mere change of name of the appellant from VCARE INFOTECH SOLUTIONS & SERVICES PRIVATE LIMITED to NEWGEN IT TECHNOLOGIES LIMITED rendered the arbitration clause in the Partner Agreement inoperable. If such an interpretation were to be accepted, any party to an arbitration

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<sup>13</sup>(2024) 6 SCC 1, hereinafter “**Interplay**”



agreement could easily circumvent its obligations thereunder by changing its corporate name.

24. In any case, submits Dr. George, in view of Section 16 of the 1996 Act, the Arbitral Tribunal was vested with complete power to rule on its own jurisdiction and, therefore, that would be the appropriate course of action to follow. Dr. George submits that the dispute between the parties cannot be treated as a simpliciter *in rem* trademark infringement dispute as would not be amenable to resolution by arbitration. Reliance has been placed, in this context, on the judgment of the Supreme Court in *K. Mangayarkarasi v. N.J. Sundaresan*<sup>14</sup>.

25. Dr. George further submits that termination of the Partner Agreement did not extinguish the arbitration clause contained therein and relies, for this purpose, on *National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd*<sup>15</sup>.

26. For all these reasons, submits Dr. George, the learned Commercial Court was in error in refusing to refer the dispute between the parties to arbitration as sought by the appellant in its Section 8 application.

## II. Submissions of Mr. Sethi

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<sup>14</sup> (2025) 8 SCC 299

<sup>15</sup> (2007) 5 SCC 692



27. Mr. Sethi emphatically refutes Dr. George's contention that the disputes between the parties arose out of the Partner Agreement. He submits that the Partner Agreement was limited to channel-partner activities and did not extend to enforcement or protection of intellectual property rights. The dispute between the parties, he submits, is a simpliciter trademark infringement dispute, which constitutes an intellectual property dispute *in rem* and is, therefore, not arbitrable in nature. He also submits that the appellant could not seek to rely on the arbitration clause contained in the Partner Agreement once the Partner Agreement itself was terminated on 15 September 2024.

28. Re-emphasizing the point that the dispute did not arise out of the Partner Agreement, Mr. Sethi submits that reliance on the Partner Agreement was placed by the respondent only to demonstrate prior knowledge and acknowledgement, by the appellant, of the respondent's right in the NEWGEN marks. The dispute continued to remain an *in rem* intellectual property dispute, which, applying the law laid down in *A. Ayyasamy v. A. Paramasivam* and *Emaar MGF Land Ltd v. Aftab Singh*<sup>16</sup>, was not arbitrable.

29. Without prejudice, Mr. Sethi, submits that Article 14(e) of the Partner Agreement reserved right with the respondent to sue for trademark infringement and Article 18(d) excluded such matters from arbitration.

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<sup>16</sup> (2019) 12 SCC 751



**30.** It is further submitted that, having been filed after the filing of an application in the suit under Order XXXIX Rule 4 of the CPC, as well as an appeal before this Court, arising out of the order passed on the said application, the appellant was barred from moving the application under Section 8 of the 1996 Act, as the application was statutorily required to be filed before the “submission of the first statement on the substance of the dispute”. Relying on the judgment of the Supreme Court in *Rashtriya Ispat Nigam Limited v. Verma Transport Company*<sup>17</sup>, it is contended that the “first statement on the substance of the dispute” is not necessarily the written statement filed by way of response to the plaint, and that the submissions contained in the Order XXXIX Rule 4 of the CPC application and the appeal preferred thereagainst would amount to submission of the first statement on the substance of the dispute.

**31.** The judgments in *Hero Electric Vehicles* and *Golden Tobie* are sought to be distinguished on the ground that they directly involved breach of contract, whereas the present case is in the nature of a simpliciter trademark infringement dispute.

**32.** Mr. Sethi submits that, therefore, the learned Commercial Court has correctly rejected the appellant’s application under Section 8 of the 1996 Act.

## **E. Analysis**

### **I. Change of name of the appellant was irrelevant**

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<sup>17</sup>(2006) 7 SCC 275



33. In the first place, the observation, of the learned Commercial Court that, as there was a change in the name of the appellant, the arbitration agreement was no longer applicable, is obviously incorrect. The mere change in the corporate name of one of the parties does not bring the contract between them to an end. Dr. George is correct in his submission that, if this were so, a party to a contract could, by merely changing its corporate name, stand excused of its liabilities under the contract. The finding of the learned Commercial Court is, therefore, *ex facie* unsustainable in law and on facts.

34. Beyond this, the learned Commercial Court has not embarked on any discussion on the merits of the Section 8 application filed by the appellant. We, therefore, are constrained to do so.

## II. The observations and findings in *Interplay*

35. A Constitution Bench of seven Judges of the Supreme Court has, in *Interplay*, addressed all the issues which arise for consideration in the present case, and with a degree of finality. So detailed, indeed, is the said decision that the need to refer to earlier decisions of the Supreme Court on these aspects stands effectively obviated. The Constitution Bench has, in *Interplay*, dealt seriatim with the various issues which arose for consideration before it. Among the aspects which have been individually addressed by the Constitution Bench are (i) the separability of the arbitration agreement from the rest of the contract, (ii) the doctrine of *kompetenz-kompetenz* and Section 16 of the 1996 Act and (iii) the scope and ambit of Sections 8 and 11 of the



1996 Act. We may straightaway reproduce the relevant paragraphs from the decision in *Interplay* apropos these aspects, thus:

(i) Re. Separability of the arbitration agreement

“(i) Separability of the arbitration agreement

98. The concept of separability or severability of an arbitration agreement from the underlying contract is a legal fiction which acknowledges the separate nature of an arbitration agreement. *The separate nature of the arbitration agreement from the underlying contract is one of the cornerstones of arbitration law.* As Redfern and Hunter explain, an arbitration agreement is juridically independent from the underlying contract in which it is contained. [Redfern and Hunter on International Arbitration (7th Edn., Oxford University Press, 2023) 81.] The concept of separability reflects the presumptive intention of the parties to distinguish the underlying contract, *which captures the substantive rights and obligations of the parties, from an arbitration agreement which provides a procedural framework to resolve the disputes arising out of the underlying contract.* This presumption has various consequences in theory and practice, the most important being that *an arbitration agreement survives the invalidity or termination of the underlying contract.*

99. Schwebel, Sobota and Manton explain in a book on International Arbitration that the separability presumption [Stephen Schwebel, Luke Sobota, and Ryan Manton, International Arbitration : Three Salient Problems (Cambridge University Press, 2nd Edn., 2020) 4.] is based on four factors : first, *the intention of the parties to require arbitration of any dispute arising between them, including disputes over the validity of the contract*; second, preventing an unwilling party from avoiding its earlier commitment by alleging the invalidity of the underlying contract; third, since the arbitration agreement and the underlying contract are considered as two separate agreements, the insufficiency in fulfilling formalities in the underlying contract would not result in the invalidity of the arbitration agreement; and fourth, if the separability presumption is discarded, courts will have to rule on the merits of the disputes instead of the Arbitral Tribunals.



100. The rationale for the separability presumption lies in the contractual freedom of the parties to an arbitration agreement to settle their disputes by proceedings before an Arbitral Tribunal to the exclusion of courts. According to the common grain of business understanding and expectation, the parties intend all their disputes over substantive rights and obligations under the underlying contract to be resolved by the Arbitral Tribunal. [*Mulheim Pipecoatings GmbH v. Welspun Fintrade Ltd.*<sup>18</sup>] Therefore, the separability presumption *ensures that an arbitration agreement survives a termination, repudiation, or frustration of a contract to give effect to the true intention of the parties and ensure sanctity of the arbitral proceedings.*

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114. The separability presumption, as incorporated under Article 16(1) of the Model Law, as well as Section 16 of the Arbitration Act, is qualified by the expression “for that purpose”. A plain reading may suggest that Section 16 has incorporated the separability presumption only for the particular purpose of allocation of competence over jurisdictional disputes. However, the Digest of Case Laws on Uncitral Model Law states that:

“the language used in the second sentence does not prevent the application of the separability presumption when a jurisdictional question is raised before a court.” [*Ibid.*]

Gary Born suggests that the better view is that the separability presumption contained in Article 16(1) states a general rule of contractual validity “which is applicable for all purposes.” [Gary Born, International Arbitration Law and Practice (3rd Edn., 2021) 403.] The judicial view that emerges from the Indian courts also seems to suggest that *an arbitration agreement is treated as distinct and separate from the underlying contract as a general rule of substantive validity.*

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120. In view of the above discussion, *we formulate our conclusions on this aspect. First, the separability presumption contained in Section 16 is applicable not only for the purpose of determining the jurisdiction of the Arbitral Tribunal. It encapsulates the general rule on the*

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<sup>18</sup> 2013 SCC OnLine Bom 1048



*substantive independence of an arbitration agreement. Second, parties to an arbitration agreement mutually intend to confer jurisdiction on the Arbitral Tribunal to determine questions as to jurisdiction as well as substantive contractual disputes between them. The separability presumption gives effect to this by ensuring the validity of an arbitration agreement contained in an underlying contract, notwithstanding the invalidity, illegality, or termination of such contract. Third, when the parties append their signatures to a contract containing an arbitration agreement, they are regarded in effect as independently appending their signatures to the arbitration agreement. The reason is that the parties intend to treat an arbitration agreement contained in an underlying contract as distinct from the other terms of the contract; and Fourth, the validity of an arbitration agreement, in the face of the invalidity of the underlying contract, allows the Arbitral Tribunal to assume jurisdiction and decide on its own jurisdiction by determining the existence and validity of the arbitration agreement. In the process, the separability presumption gives effect to the doctrine of competence-competence.”*

(emphasis supplied)

(ii) The doctrine of *kompetenz-kompetenz* and Section 16 of the 1996 Act

“G. The doctrine of competence-competence

123. The doctrine of *kompetenz-kompetenz* (also known as competence-competence), as originally developed in Germany, was traditionally understood to imply that arbitrators are empowered to make a final ruling on their own jurisdiction, with no subsequent judicial review of the decision by any court. [Fouchard, Gaillard, Goldman on International Commercial Arbitration, Emmanuel Gaillard and John Savage (Eds.), (1999) 396.] However, many jurisdictions allow an Arbitral Tribunal to render a decision on its jurisdiction, subject to substantive judicial review. [Gary Born, International Arbitration Law and Practice (3rd Edn., 2021) 1143.]

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130. This position has now undergone a complete metamorphosis in the present legislation. Section 16 of the Arbitration Act, which is based on Article 16 of the Model



Law, recognises the doctrine of competence-competence in Indian arbitration law.

131. *Section 16 empowers the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of arbitration agreement.* Importantly, the parties have a right under Sections 16(2)<sup>19</sup> and 16(3)<sup>20</sup> to challenge the jurisdiction of the Arbitral Tribunal on grounds such as the non-existence or invalidity of the arbitration agreement. *The Arbitral Tribunal is obligated to decide on the challenge to its jurisdiction, and where it rejects the challenge, it can proceed with the arbitral proceedings and make an arbitral award.* It is the principle of procedural competence-competence which recognises the power of an Arbitral Tribunal to hear and decide challenges to its jurisdiction. Once the Arbitral Tribunal makes an arbitral award, Section 16(6)<sup>21</sup> allows the aggrieved party to make an application for setting aside the award under Section 34. Sections 16(5)<sup>22</sup> and 16(6) further show that Parliament has completely ousted the jurisdiction of Courts to interfere during the arbitral proceedings — courts can intervene only after the tribunal has made an award. *Thus, Section 16 is intended to give full effect to the procedural and substantive aspects of the doctrine of competence-competence.*

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136. In view of the above discussion, the issue that comes up for our consideration is whether an issue of stamping is a jurisdictional issue. *Jurisdiction is generally defined as the power of a court or tribunal to hear and determine a cause, and to adjudicate or exercise any judicial power in relation to such cause. [Sukh Lal Sheikh v. Tara Chand Ta<sup>23</sup>] Jurisdiction refers to the authority of a court or tribunal to decide matters that are litigated before it or to take cognizance of matters presented before it in a formal way for its decision.* In *Official Trustee v. Sachindra Nath Chatterjee<sup>24</sup>*, this Court held

<sup>19</sup> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

<sup>20</sup> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

<sup>21</sup> (6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34.

<sup>22</sup> (5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

<sup>23</sup> (1905) 2 Cri LJ 618 (FB)

<sup>24</sup> AIR 1969 SC 823



that for a court to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought. In *NTPC Ltd. v. Siemens Atkeingesellschaft*<sup>25</sup>, this Court observed that any refusal to go into the merits of a claim may be in the realm of jurisdiction. Accordingly, it was observed that the *issue of limitation goes to jurisdiction because if a claim is barred by limitation, a tribunal can refuse to exercise its jurisdiction.*

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(iii) Negative competence-competence

139. *The international arbitration law as well as domestic law prioritize the Arbitral Tribunal by permitting them to initially decide challenges to their authority instead of the Courts. The policy consideration behind this approach is two-fold : first, to recognize the mutual intention of the parties of choosing the arbitrator to resolve all their disputes about the substantive rights and obligations arising out of contract; and second, to prevent parties from initiating parallel proceedings before courts and delaying the arbitral process. This is the positive aspect of the doctrine of competence-competence.*

140. The negative aspect, in contrast, speaks to the national courts. It instructs the Courts to limit their interference at the referral stage by deferring to the jurisdiction of the Arbitral Tribunal in issues pertaining to the existence and validity of an arbitration agreement. Thus, *the negative aspect of the doctrine of competence-competence suggests that the Courts should refrain from entertaining challenge to the jurisdiction of the Arbitral Tribunal before the arbitrators themselves have had an opportunity to do so.* [George A. Bermann, “The “Gateway” Problem in International Commercial Arbitration”, (2012) 37 Yale Journal of International Law 1, 16.] *Allowing Arbitral Tribunals to first rule on their own jurisdiction and later allowing the Courts to determine if the tribunal exercised its powers properly safeguards both the power and authority of the Arbitral Tribunal as well as the Courts.* The negative aspect of the doctrine has been expressly recognised by Indian courts. Considering both the positive and negative facets, *the principle can be defined as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts.* [Fouchard,

<sup>25</sup> (2007) 4 SCC 451



Gaillard, Goldman on International Commercial Arbitration, Emmanuel Gaillard and John Savage (Eds.), (1999) 401.]

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143. In *ArcelorMittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd.*<sup>26</sup> this Court held that negative competence-competence prohibits courts from hearing disputes which the parties have mutually intended to submit to the jurisdiction of Arbitral Tribunal. As held in the preceding sections, *the issue of stamping is a jurisdictional issue. The principle of negative competence-competence requires the Courts to leave the issue of stamping to be decided by the Arbitral Tribunal in the first instance.*”

(Emphasis supplied)

(iii) The difference between Sections 8 and 11 of the 1996 Act

“164. The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. *Where Section 8 requires the Referral Court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the Court's jurisdiction to the examination of the existence of an arbitration agreement.* Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the Referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of *Patel Engg.*<sup>27</sup> where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.”

(emphasis supplied)

III. Re. finding that, with the termination of the Partner Agreement, Article 18 thereof ceased to apply

<sup>26</sup> (2022) 1 SCC 712

<sup>27</sup> *SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618



**36.** Paras 98 to 100, 114 and 120 of the decision in *Interplay* clearly hold that the arbitration agreement – which is but another expression for the arbitration clause in the agreement between the parties – is distinct from the rest of the agreement and has its own independent existence, which survives the end of the parent agreement. Whereas the agreement essentially captures substantive rights and obligations of the parties, the arbitration clause provides the procedural framework to resolve disputes arising out of the substantive agreement/underlying contract. The very purpose of according a separate and independent existence to the arbitration clause is to underscore the intent of the parties to have all disputes between them, arising from the agreement, resolved through arbitration. These, therefore, would also include disputes relating to repudiation, frustration or termination of the agreement itself. It is for this reason, holds the Constitution Bench, that the arbitration clause has its own substantive existence independent of the main or underlying contract. This existence is agnostic of the invalidity, illegality or *termination of the contract*.

**37.** Para 120 of the decision in *Interplay* sets out four justifications for the principle that an arbitration clause in a contract would have its own existence independent of the underlying contract. Of these, the fourth is of greatest significance for our purpose. The fourth reason cited by the Supreme Court in para 120 of *Interplay*, for treating the arbitration clause as having its own independent existence, agnostic of the underlying contract, is that, even if the underlying contract is invalid, the validity of the arbitration clause allows the Arbitral



Tribunal to assume jurisdiction and decide on its own jurisdiction by determining existence and validity of the arbitration agreement. This has been recognized to be a statutory *avatar* of the *kompetenz-kompetenz* principle.

**38.** Moreover, particularly in the context of the power of the Arbitral Tribunal to rule on its own jurisdiction, clause (a) of Section 16 of the 1996 Act statutorily treats the arbitration clause, forming part of the contract, as independent of the other terms of the contract.

**39.** Thus, the submission of Mr. Sethi, as also advanced before the learned Commercial Court, that, as the Partner Agreement stood terminated on 15 September 2024, Article 18 of the Partner Agreement also ceased to have effect, is clearly unsustainable in law, being directly contrary to the afore-extracted paragraphs from *Interplay* as well as other decisions on the point. It is, accordingly, rejected.

#### IV. Section 8 or Section 16?

**40.** This issue, particularly in the facts of the present case, stands answered not only by *Interplay* but also by the judgment of the Supreme Court in *K. Mangayarkarasi*.

#### IV.A Two preliminary aspects

**41.** Two apparent ingredients of Sections 8 and 16 of the 1996 Act, which stand out on a bare reading thereof, may be noted at the outset.



**42.** Section 16 expressly empowers an Arbitral Tribunal to rule on its own jurisdiction, *including* ruling on any objections with respect to the existence or validity of the arbitration agreement. The fact that Section 16 expressly refers to the power of the Arbitral Tribunal to rule on the existence or validity of the arbitration agreement, needless to say, does not derogate from the width of the earlier part of the provision, which empowers the Arbitral Tribunal to rule on its own jurisdiction.

**43.** Para 136 of *Interplay* explains the concept of “jurisdiction” in clear terms, referencing, for the purpose, the judgment of the Supreme Court in *Sachindra Nath Chatterjee* and *NTPC* and of the High Court of Calcutta in *Sukh Lal Sheikh*. Applying the understanding of the expression “jurisdiction” in para 136 of *Interplay*, it is clear that the aspect of whether the dispute between the appellant and the respondent, forming subject matter of the *lis* in the suit is, or is not, amenable to arbitration, is a jurisdictional issue. Clearly, therefore, the Arbitral Tribunal is empowered under Section 16 to decide on the issue of whether it is competent to adjudicate on the controversy raised in the suit.

**44.** Here, the second aspect of the statute, relating to Section 8, becomes relevant.

**45.** Section 8 envisages the Court, exercising power under the said provision, only addressing itself on the issue of whether there is a *prima facie* valid arbitration agreement i.e. a *prima facie* valid



arbitration clause in the contract between the parties. As plainly read, therefore, Section 8 does not envisage any inquiry by a Court beyond the *prima facie* existence of a valid arbitration agreement. This aspect has also been noticed by the Constitution Bench in para 164 of the judgment of the Constitution Bench of the Supreme Court in *Interplay*, reproduced *supra*.

**46.** In this backdrop, a reading of paragraphs 123, 130, 131, 136, 139, 140 and 143 of *Interplay*, reproduced *supra*, clearly hold that the concept of *kompetenz-kompetenz* has a positive as well as a negative connotation, and that the negative aspect of the doctrine envisages the Arbitral Tribunal being, in the first instance, permitted to rule on the aspect of jurisdiction, before the Court pronounces on it.

**47.** Clearly, the aspect of jurisdiction is one on which the Court, as well as the Arbitral Tribunal, are empowered to pronounce. In other words, whether the disputes between the parties are arbitrable or non-arbitrable is an aspect which, jurisprudentially, can be addressed both by the Court as well as by the Arbitral Tribunal. Even in a case in which the dispute is *ex facie* non-arbitrable, it is open to the Court, as well as the Arbitral Tribunal, to so hold. In the present case, for example, the submission of the respondent is that the dispute between the parties is in the nature of a simpliciter trademark infringement suit, which is *ex facie* non-arbitrable, as it relates to rights *in rem*. A pronouncement to this effect can as well be made by the Arbitral Tribunal as by the Court. The question is as to whether when the Court, if approached under Section 8, it should straightaway rule on this aspect or should allow the Arbitral Tribunal an opportunity to take



a view thereon – in view of Section 16 – before addressing the issue on its own.

**48.** *It has, therefore, to be decided whether, despite the Arbitral Tribunal having statutorily been conferred the power to adjudicate on its jurisdiction to adjudicate on the dispute before it, the Court, when moved under Section 8, should pronounce on the issue, without allowing the Arbitral Tribunal to do so in the first instance.*

#### IV.B Answering the issue – *Interplay* and *Mangayarkarasi*

**49.** Paragraph 140 of *Interplay* clearly holds, while explaining the negative aspect of the *kompetenz-kompetenz* doctrine, that Court should refrain from entertaining challenges to the jurisdiction of an Arbitral Tribunal before the Tribunal has itself had an opportunity to do so. This, as the Courts holds, properly safeguards the power and authority of the Arbitral Tribunal as well as the Court. The principle has, in the concluding sentence in paragraph 140 of *Interplay*, been explained “as a rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, which is subject to subsequent review by courts”.

**50.** Paragraph 143 of *Interplay* is even more explicit on the issue. After holding that the aspect of whether the agreement between the parties has or has not been properly stamped is a jurisdictional issue, the court holds that the principle of negative *kompetenz-kompetenz* requires the court to leave this issue to be decided by the Arbitral Tribunal in the first instance.



**51.** This principle – i.e., that issues of jurisdiction should, in the first instance, be left to the Arbitral Tribunal, before the court addresses it – is, to our mind, innocent of Section 8 and 11. It applies universally, irrespective of whether the court is exercising jurisdiction under Section 11 or Section 8.

**52.** Applying the principle enunciated in paragraphs 140 and 143 of *Interplay* to the case before us, the sequitur would be that, as the issue of whether the dispute forming subject matter of controversy in the suit instituted by the respondent against the appellant is, or is not, arbitrable, is an issue of jurisdiction, it has, in the first instance, to be left to the Arbitral Tribunal to decide.

**53.** The decision in *Mangayarkarasi*, which reiterates the above principles is, in fact, similar to the case before us even on facts.

**54.** The dispute, as in the case before us, dealt with a trade mark infringement. Asserting trademark rights, *Mangayarkarasi*, as the plaintiff in the original suit, sought an injunction against *Sundaresan* from using the marks “SRI ANGANNAN BIRIYANI HOTEL” or “ABH SRI ANGANNAN HOTEL”, *Sundaresan* filed an application under Section 8 of the 1996 Act, seeking reference of the dispute to arbitration. The Supreme Court dealt with the aspect thus:

“8. The law on the subject is no longer *res integra*. When the Arbitral Tribunal is constituted at the instance of one of the parties and other party takes up the position that such proceedings are not valid in law then what is the court expected to do in law has been



explained very succinctly by this Court in *Kvaerner Cementation (India) Ltd. v. Bajranglal Agarwal*<sup>28</sup>, as under:

“3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.

5. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.”

9. What would be the position in case a suit is filed by the plaintiff and in the said suit, the defendant files an application under Section 8 of the 1996 Act questioning the maintainability of the suit on the ground that the party had agreed to settle the disputes through the means of arbitration having regard to the existence of an arbitration agreement between them?

10. This has been very elaborately explained by this Court in *A. Ayyasamy v. A. Paramasivam*. The Court held as under:

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<sup>28</sup> (2012) 5 SCC 214



“13. ... Obviously, in such a case, the court is to pronounce upon arbitrability or non-arbitrability of the disputes.

14. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The courts have held that 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 [See O.P. Malhotra on The Law and Practice of Arbitration and Conciliation 3rd Edn., authored by Indu Malhotra. See also note 10 *ibid.*] :

- (i) patent, trade marks and copyright;
- (ii) anti-trust/competition laws;
- (iii) insolvency/winding up;
- (iv) bribery/corruption;
- (v) fraud;
- (vi) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

15. “Fraud” is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines “fraud” as a concealment or false representation through a statement or conduct that injures another who relies on it [See ***Ramesh Kumar v. Furu Ram***<sup>29</sup> (a decision rendered under the Arbitration Act, 1940)] . However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject-matter of

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<sup>29</sup> (2011) 8 SCC 613



dispute from arbitration and decision thereof necessary by the civil court.”

11. In *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.*<sup>30</sup>, this Court in the context of Section 8 of the 1996 Act considered the question as to whether the subject-matter was “arbitrable” i.e. arbitrable by private forum (Arbitral Tribunal). In this context, the Court discussed the term “arbitrability” by pointing out three facets thereof, namely:

- (1) whether the disputes are capable of adjudication and settlement by arbitration?
- (2) whether the disputes are covered by the arbitration agreement?
- (3) whether the parties have referred the disputes to arbitration?

12. The Court held as under:

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

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up

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<sup>30</sup> (2011) 5 SCC 532



matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

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

13. In *Vidya Drolia v. Durga Trading Corpn.*, this Court held that the grant and issue of patents and registration of trade marks are matters that fall within the sovereign or government functions and have *erga omnes* effect. *Prima facie*, the nature of disputes sought to be raised by the petitioners cannot be considered as actions *in rem*.

14. *The assumption that all matters relating to trade marks are outside the scope of arbitration is plainly erroneous. There may be disputes that may arise from subordinate rights such as licences granted by the proprietor of a registered trade mark. Undisputedly, these disputes, although, involving the right to use trade marks, are*



*arbitrable as they relate to rights and obligations inter se the parties to a licence agreement.*

15. At this juncture, we would like to refer to the recent decision of this Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning***<sup>31</sup>, wherein one of us, J.B. Pardiwala, J., was a part of the Bench, which considered, *inter alia*, the issue as to whether a party could seek referral of a matter to arbitration, having previously executed a discharge voucher as the full and final settlement of all pending dues.

16. Referring to the position of law elucidated in ***National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.***<sup>32</sup>, the Court observed that the aspect of full and final settlement having been obtained by fraud or coercion itself gives rise to an arbitrable issue and thus does not act as a bar to arbitration.

17. The relevant paragraphs are reproduced hereinbelow:

“59. The position that emerges from the aforesaid discussion is that there is no rule of an absolute kind which precludes arbitration in cases where a full and final settlement has been arrived at. In ***Boghara Polyfab***, discussing in the context of a case similar to the one at hand, wherein the discharge voucher was alleged to have been obtained on ground of coercion, it was observed that the discharge of a contract by full and final settlement by issuance of a discharge voucher or a no-dues certificate extends only to those vouchers or certificates which are validly and voluntarily executed. Thus, if the party said to have executed the discharge voucher or the no-dues certificate alleges that the execution was on account of fraud, coercion or undue influence exercised by the other party and is able to establish such an allegation, then the discharge of the contract by virtue of issuance of such a discharge voucher or no-dues certificate is rendered void and cannot be acted upon.

60. It was further held in ***Boghara Polyfab*** that the mere execution of a full and final settlement receipt or a discharge voucher would not by itself operate as a bar to arbitration when the validity of such a receipt or voucher is challenged by the claimant on the ground of fraud, coercion or undue influence. In other words, where the parties are

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<sup>31</sup> (2024) 12 SCC 1

<sup>32</sup> (2009) 1 SCC 267



not ad idem over accepting the execution of the no-claim certificate or the discharge voucher, such disputed discharge voucher may itself give rise to an arbitrable dispute.”

18. Further, referring to the time-sensitive nature of arbitration proceedings and the broad jurisdiction of Arbitral Tribunals under Section 16 of the 1996 Act, the Court observed that the aspects like full and final settlement, frivolity or dishonesty in litigation, etc. were well within the domain of the Arbitral Tribunal to consider and the courts, acting under Section 11 of the 1996 Act must limit their scope of examination merely to ascertaining the existence of the arbitration agreement. The approach taken by this Court in *Krish Spg.* not only furthers the interpretation adopted by this Court in its previous decisions in *Mayavati Trading (P) Ltd. v. Pradyut Deb Burman*<sup>33</sup> and *Interplay Between Arbitration Agreements under Arbitration & Conciliation Act, 1996 & Stamp Act, 1899, In re*, but also gives meaningful effect to the change brought about by the 2015 Amendment to the 1996 Act.

19. The relevant paragraphs are reproduced hereinbelow:

“126. The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint an arbitrator. Thus, by delving into the domain of the Arbitral Tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if its Section 11 application is rejected.

127. Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the Arbitral Tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to “accord and satisfaction” and the like,

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<sup>33</sup> (2019) 8 SCC 714



then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.

128. We are also of the view that ex-facie frivolity and dishonesty in litigation is an aspect which the Arbitral Tribunal is equally, if not more, capable to decide upon the appreciation of the evidence adduced by the parties. We say so because the Arbitral Tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the Arbitral Tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material.”

20. The law is well settled that allegations of fraud or criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the Arbitral Tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

21. *Once an application in due compliance with Section 8 of the 1996 Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted.* There is a lot of difference between the two approaches.

22. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, *the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law — generalia specialibus non derogant.* In such a situation, *the approach shall not be to see whether there is still jurisdiction in the civil court under the general law.* Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.

23. *Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject-matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or*



*judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration.*

24. In view of the foregoing, we are of the view that no error, not to speak of any error of law, could be said to have been committed by the High Court in passing the impugned judgment and order.

25. The special leave petition stands, accordingly, dismissed. Pending application(s), if any, stands disposed of.”

(Emphasis supplied)

55. Thus, in a case where Section 8 applies, the Court is left with no discretion in the matter, and reference of the disputes to arbitration is the inexorable rule.

56. An interesting feature of the discussion in the above paragraphs from *Mangayarkarasi* is that, even while dealing with Section 8 of the 1996 Act, the Supreme Court has relied on decisions, including *Krish Spinning*, rendered in the context of Section 11. Indeed, though there is, facially, a distinction between the two provisions, the distinction is more one of degree than of substance. As has been held in para 164 of *Interplay* and reiterated in *Mangayarkarasi*, a Section 8 Court “looks into the *prima facie* existence of a valid arbitration agreement” whereas a Section 11 Court “(examines) the existence of an arbitration agreement”. How far this is a distinction of substance, to our mind, may be debatable.

57. We need not, however, venture into that somewhat thorny thicket, as the observations and findings of the Supreme Court in *Mangayarkarasi* practically cover the present case on facts as well as in law. In fact, in that case, even while holding that the disputes



relating to infringement of trademark, in which injunction was sought, were, generally speaking, non-arbitrable in nature, the Supreme Court held that, once there was a contract between the parties which contained an arbitration clause, and the dispute fell within the four corners of the contract, the decision in this regard had to be left in the first instance to the Arbitral Tribunal.

**58.** As in the present case, there was a pre-existing agreement between the parties. Mr. Sethi's contention that the Partner Agreement was not intended to protect intellectual property stands belied by Articles 14 and 15 thereof, already extracted earlier. In fact, the Partner Agreement was self-contained and complete with respect to preservation of the intellectual property rights of the respondent. The plea of trademark infringement was specifically pleaded to be a direct breach of Article 14 of the Partner Agreement. The link between the cause of action for instituting the suit and the Partner Agreement is, therefore, live and palpable.

**59.** The observation, in para 14 of *Mangayarkarasi*, to the effect that, though the dispute sought an injunction against the use by Sundaresan, of specified trademarks, the dispute nonetheless remained arbitrable as it related to the rights and obligations *inter se* to a license agreement would apply, therefore, to the present case on facts.

**60.** In paras 21 to 24 of *Mangayarkarasi*, the Supreme Court has clearly held that the overarching principle, in a case where there was an agreement between the parties containing an arbitration clause, and the suit court was approached under Section 8 of the 1996 Act, would



not be to see whether it has jurisdiction to proceed with the matter, but to see whether its jurisdiction stood ousted. Ouster of jurisdiction would take place only where the jurisdiction of the court stood divested by a special statute. In applying this principle, the Court had to proceed on the basis of the maximum *generalia specialibus non derogant*. Keeping these principles in mind, the Supreme Court has observed that, where there was an arbitration agreement between the parties, and the disputes between the parties covered the subject matter of the arbitration agreement, the court was under a positive obligation to refer the parties to arbitration.

**61.** In these circumstances, the Supreme Court upheld the decision of the High Court to allow the Section 8 application filed by the defendant and refer the disputes to arbitration.

#### V. The sequitur

**62.** There can be no quarrel, on facts, with the proposition that the dispute forming subject matter of the suit instituted by the respondent against the appellant is clearly relatable to the Partner Agreement. The Partner Agreement was specifically executed to confer a right on the appellant to use the NEWGEN mark. The agreement also prohibited the use of the NEWGEN mark only in furtherance of the business of the respondent. The Partner Agreement also specifically proscribed use, by the appellant, of the NEWGEN mark in any manner as would infringe the registered trademarks of the respondent. The specific allegation of the respondent against the appellant in the suit, as is also obvious from the prayers in the suit is that, by changing



its corporate name to NEWGEN IT TECHNOLOGIES LIMITED, the appellant had breached the Partner Agreement and had effectively infringed the registered NEWGEN trademarks of the respondent.

**63.** *Prima facie*, therefore, the dispute in the suit was squarely relatable to the subject matter of the Partner Agreement between the parties.

**64.** Whether, despite this, the dispute between the parties would be nonetheless non-arbitrable, to our mind, is an aspect which, given the law in that regard and the scope of Section 16 of the 1996 Act, ought to be left for decision, in the first instance at least, by the Arbitral Tribunal.

**65.** Ergo, keeping in mind the law laid down by the Supreme Court in *Interplay* and *Mangayarkarasi* as well as in view of the very structure of Sections 8 and 16 of the 1996 Act, the court would be bound to refer the disputes between the parties to arbitration in terms of Article 18 of the Partner Agreement.

## **F. Conclusion**

**66.** Accordingly, we quash and set aside the impugned order dated 23 April 2025 passed by learned Commercial Court on the Section 8 application filed by the appellant. The application would stand allowed and the disputes between the parties referred to arbitration.



**67.** The parties would be at liberty to take appropriate steps, in accordance with law and the provisions of the 1996 Act, to invoke and set the arbitral process in motion.

**68.** The appeal stands allowed accordingly with no orders as to costs.

**C. HARI SHANKAR, J.**

**OM PRAKASH SHUKLA, J.**

**JULY 01, 2026/aky/yg**