R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JULY, 2026

BEFORE

HON'BLE MS. JUSTICE TARA VITASTA GANJU

WRIT PETITION NO. 789 OF 2022 (GM-CPC)

BETWEEN:

BHARATH ELECTRONICS LIMITED,
HAVING ITS REGISTERED OFFICE AT:
OUTER RING ROAD, NAGAVARA,
BANGALORE-560 045.
HAVING OFFICE AT:
DISTRICT PAURI GARWAL,
KOTDWARA-246 149. UTTARANCHAL.
REPRESENTED BY ITS
ADDITIONAL GENERAL MANAGER,
MR. JITENDRA SINGH.

...PETITIONER

(BY SMT. LAKSHMY IYENGAR., SENIOR COUNSEL FOR
SRI. T.S.SURESH., ADVOCATE)

AND:

IBM INDIA PRIVATE LIMITED
HAVING ITS REGISTERED OFFICE AT:
SUBRAMANYA ARCADE,
17, BANNERGHATTA ROAD,
BENGALURU-560 029.
REPRESENTED BY ITS AUTHORISED SIGNATORY,
MR. AJAY DUA.

...RESPONDENT

(BY SRI. PRADEEP NAYAK., ADVOCATE A/W
SRI. SANKEERTH VITTAL., ADVOCATE &
SRI. PRANAM CHANDRASHEKAR., ADVOCATES)

THIS WRIT PETITION IS FILED PRAYING TO SET ASIDE THE ORDER DTD.9.8.2019 PASSED ON IA NO.3 OF 2017 FILED UNDER ORDER VII RULE 11(d) OF CODE OF CIVIL PROCEDURE 1908 IN COM O.S.NO.3996/2017 VIDE ANNEXURE-A ON THE FILE OF HON'BLE CITY CIVIL AND SESSIONS JUDGE AT

BANGALORE AND CONSEQUENTLY HOLD THAT THE PLAINT OUGHT TO HAVE BEEN REJECTED FOR WANT OF JURISDICTION AND BY ALLOWING THE APPLICATION FILED BY THE PETITIONER HEREIN UNDER ORDER VII RULE 11(d) OF CODE OF CIVIL PROCEDURE 1908.

THIS WRIT PETITION, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 29.04.2026, COMING ON FOR PRONOUNCEMENT THIS DAY, **HON'BLE MS. JUSTICE TARA VITASTA GANJU** PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MS. JUSTICE TARA VITASTA GANJU

CAV JUDGMENT

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I. Preface

1. The present petition is instituted under Article 227 of the Constitution of India, 1950 [hereinafter referred to as "the Constitution"] calling in question the Order dated 09.08.2019 passed by the LXXXII Additional City Civil and Sessions Judge, Bengaluru [hereinafter referred to as the "Commercial Court"] in Com. O.S. No. 3996 / 2017 [hereinafter referred to as the "Commercial Suit"], whereby I.A.No.3 filed by the petitioner / defendant under Order VII Rule 11(d) read with Section 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as the "CPC"), seeking rejection/return of the plaint came to be dismissed [hereinafter referred to as the "Impugned Order"].

2. The dispute in the present proceedings arises out of the invocation of a Performance Bank Guarantee dated 22.03.2006 furnished by the respondent/plaintiff [hereinafter referred to as the "PBG"] in connection with the implementation of the MTNL project. The petitioner/ defendant contends that the dispute concerning the PBG is governed by the agreement dated 24.06.2006 executed

between the parties [hereinafter referred to as the "Tripartite Agreement"], which contains an arbitration clause and an exclusive jurisdiction clause conferring jurisdiction upon the Courts at Delhi. Per contra, the respondent/plaintiff contends that the dispute pertaining to the PBG arises independently and is not governed by the Tripartite Agreement.

3. At the time the matter was initially examined, it was brought to the notice of this Court that Comm. O.S. No.3996/2017 was posted for trial and that, in the absence of interim protection, the present petition would be rendered infructuous. Taking note of the said submission, this Court, by order dated 10.07.2023, directed stay of all further proceedings in Comm. O.S. No.3996/2017 pending on the file of the learned Commercial Court, while reserving liberty in favour of the respondent/plaintiff to seek vacation or modification of the interim order.

3.1 Since the complete Trial Court Record was not available, this Court had requisitioned the same from the learned Commercial Court, which was subsequently returned.

4. This Court has, while examining a batch of petitions[1] on the question of interplay between the Commercial Courts Act, 2015 (hereinafter referred to as 'the CC Act') and Article 227 of the Constitution, by its Order dated 30.01.2026, directed as under:

> *"1. One of the issues that arise in the present petition is whether the interim orders passed by a Commercial Court are amenable to the jurisdiction of this Court under Article 227 of the Constitution of India.*
>
> *2. This Court is hearing a batch of matters on the same issue which is now listed for hearing on 04.02.2026 including WP No.3571 of 2023 and connected matters.*
>
> *3. Since the issue that arises is similar, list this petition along with WP No.3571/2023 and connected matters on 04.02.2026."*

4.1 Arguments on the issue of challenge to the orders passed by the Commercial Court were addressed by the learned Senior Counsel and learned counsel appearing for the parties in this matter along with their contentions on the merits of this case.

[1] W.P.Nos. 30565/2025, 28142/2025, 33094/2025, 11023/2021

4.2. Ms. Nayana Tara B G, was appointed as Amicus Curiae [in the connected matter in W.P.No.28142/2025 which was posted along with ***Kanpur Flowercycling Private Limited vs. M/s. Sarathi International Inc.***[2]], on this issue of interplay of the CC Act and Article 227 of the Constitution, who also addressed the Court on the scope of intervention by the High Court under Article 227 in the matters relating to the CC Act.

<u>II. Brief Facts:</u>

5. The Mahanagar Telephone Nigam Limited ("MTNL") floated a tender for implementation of a Customer Relationship Management [hereinafter referred to as the "Project"] for supply, installation, acceptance, testing, commissioning, support facility management for billing, printing as well as providing manpower at MTNL's facilities situated at Delhi and Mumbai and for a convergent billing system. Pursuant thereto, the petitioner/defendant and the respondent/plaintiff, along with other entities, participated

[2] 2026 SCC OnLine Kar 6536 : NC: 2026:KHC:26391

in the Project as part of a consortium lead arrangement for execution and implementation of the Project.

6. On 14.02.2006, MTNL issued a Purchase Order to the petitioner/defendant for the Project. Pursuant to the issue of the Purchase Order with MTNL, the petitioner/defendant entered into contracts with several parties including the respondent/plaintiff for the Project's implementation. The petitioner/defendant entered into a contract with Sojitz India Pvt. Ltd. (Sojitz) for the supply of hardware and software.

7. A Business Partner Agreement dated 03.03.2006 was signed between the respondent/plaintiff and Sojitz Corporation (hereinafter referred to as the "Sojitz Agreement"). Thereafter, the respondent/plaintiff furnished the PBG dated 22.03.2006 for Rs.10,47,72,665/- issued by Canara Bank, Bangalore in favour of the petitioner / defendant. Subsequently, a Tripartite agreement dated 24.06.2006 came to be executed between IBM India Pvt. Ltd. (IBM) for performance of additional services for

implementation of the MTNL Project. Certain disputes thereafter arose between the parties in relation to implementation of the MTNL Project and the petitioner/defendant proceeded to invoke the PBG alleging breaches and non-performance of contractual obligations on the part of the respondent / plaintiff on 16.05.2014.

8. Aggrieved by the invocation of the PBG, the respondent/plaintiff instituted the civil suit in O.S.No.3996/2017 before the Court of the City Civil and Sessions Judge, Bangalore *inter-alia* seeking a declaration that invocation of the PBG was illegal and wrongful and for refund of the amount recovered pursuant to invocation of the PBG along with consequential reliefs. The suit was subsequently transferred to the Commercial Court on 02.03.2019.

9. The petitioner/defendant filed IA No.3 under Section 20 read with Order VII Rule 11(d) of the CPC seeking rejection/return of the plaint principally on the ground that the dispute was governed by an arbitration clause and

exclusive jurisdiction clause contained in the Tripartite Agreement and therefore the Commercial Court at Bengaluru lacked jurisdiction to entertain the suit.

10. It is the case of the petitioner/defendant that the Tripartite Agreement contains an arbitration clause as well as an exclusive jurisdiction clause conferring jurisdiction upon the competent Courts at Delhi. While the respondent/plaintiff has averred that the Tripartite Agreement is not connected with the Sojitz Agreement and that the bank guarantee was furnished in pursuance of the Sojitz Agreement, and did not contain any arbitration clause.

III. Impugned Judgment:

11. The learned Commercial Court by the Impugned Order found that as per the materials on record that the PBG was furnished in terms of the Sojitz Agreement and was not connected with the Tripartite Agreement. The learned Commercial Court observed that the Sojitz Agreement was dated 03.03.2006 and that the PBG dated 22.03.2006 preceded the Tripartite Agreement which came to be

executed on 24.06.2006. The learned Commercial Court further observed that, at that stage, there was no material to conclusively establish that the dispute relating to the PBG arose directly out of or was governed by the Tripartite Agreement. It also took note of the fact that the invocation letter pertaining to the PBG did not specifically refer to the Tripartite Agreement and further noticed the contention that the Sojitz Agreement did not contain any arbitration clause.

12. The learned Commercial Court recorded the contention of the petitioner/defendant that the Tripartite Agreement contained an arbitration clause and therefore the dispute raised in the Commercial Suit was not maintainable before the learned Commercial Court. The learned Commercial Court however found that the PBG had been furnished pursuant to the Sojitz Agreement and that the dispute pertaining to invocation of the PBG constituted an independent cause of action distinct from the disputes arising under the Tripartite Agreement.

13. The learned Commercial Court thus held that the dispute relating to invocation of the PBG could not, at that stage, be treated as one arising under the Tripartite Agreement and consequently observed that the arbitration clause contained therein was not ex facie attracted to the dispute raised in the Commercial Suit. It was further held that it possessed the jurisdiction to entertain the Commercial Suit and accordingly dismissed I.A No.3.

14. During the pendency of the present writ petition, the respondent/plaintiff entered into a Scheme of Arrangement pursuant to which the Managed Infrastructure Services Business came to be transferred to Grand Ocean Managed Infrastructure Services Private Limited. It is stated that the said Scheme of Arrangement was sanctioned by the National Company Law Tribunal, Bengaluru Bench, by order dated 06.08.2021 and thereafter the resulting company came to be renamed as "Kyndryl Solutions Private Limited". Pursuant thereto, the petitioner/defendant filed IA No.1/2023 dated 09.08.2023 and IA No.2/2023 dated 17.10.2023 seeking amendment of the cause title in order

to substitute Kyndryl Solutions Private Limited in place of IBM India Private Limited as respondent/plaintiff in the present proceedings and the cause title has accordingly been amended. For the sake of convenience, reference to the respondent/plaintiff in the present judgment shall include Kyndryl Solutions Private Limited being the successor entity of IBM India Private Limited.

IV. Contentions of the Petitioner/Defendant:

15. Learned Senior Counsel appearing for the petitioner/defendant has contended that the present petition under Article 227 of the Constitution is maintainable against orders passed under Order VII Rule 10 and Rule 11 of the CPC where the challenge pertains to wrongful assumption or exercise of jurisdiction by the Court below. It was contended that the supervisory jurisdiction of this Court is not barred merely on account of availability of alternate remedies and that Section 8 of the Commercial Courts Act does not oust the constitutional jurisdiction of this Court under Article 227 of the Constitution.

15.1 It was further contended by the learned Senior Counsel appearing for the petitioner/defendant that though the supervisory jurisdiction of this Court under Article 227 of the Constitution is required to be exercised sparingly and with circumspection, the same nevertheless remains available in cases involving patent jurisdictional error and absence of an efficacious alternate remedy. In this regard, reliance was placed upon the judgment of the Supreme Court in ***MITC Rolling Mills (P) Ltd. v. Renuka Realtors***[3], to contend that supervisory jurisdiction under Article 227 of the Constitution can be invoked where the subordinate Court acts beyond the bounds of its lawful jurisdiction or wrongly assumes jurisdiction contrary to the governing legal framework. Reliance was also placed upon the judgment of the Division Bench of this Court in ***Trimetramilan Product Protection Solutions Private Limited v. A.S. Narayanan***[4], to contend that such supervisory jurisdiction continues to remain available even in matters arising out of commercial proceedings.

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[3] 2025 SCC OnLine SC 2375
[4] COMAP No.195/2024 dt: 29.01.2026: 2026:KHC:5050-DB

15.2 It was accordingly contended that in the present case, the petitioner/defendant has specifically questioned the jurisdictional competence of the learned Commercial Court to entertain the Commercial Suit in view of the pending arbitral proceedings and the governing arbitral framework between the parties. According to the petitioner/defendant, once the dispute stood governed by the arbitration mechanism contained in the Tripartite Agreement, the petitioner/defendant was left without any efficacious statutory remedy and therefore invocation of the supervisory jurisdiction of this Court under Article 227 of the Constitution was both justified and necessary.

16. It was further contended that the learned Commercial Court had assumed jurisdiction despite the plaint averments and the documents relied upon by the respondent/plaintiff themselves disclosing the contractual and arbitral framework governing the dispute. According to the petitioner/defendant, the jurisdictional bar was therefore evident from the record itself.

17. Learned Senior Counsel further contended that the MTNL Project constituted one integrated and composite commercial transaction and that the Sojitz Agreement, the Purchase Orders, the PBG and the Tripartite Agreement were intrinsically interconnected. It was contended that the learned Commercial Court committed an error in artificially segregating the Sojitz Agreement from the Tripartite Agreement. It was contended that the Sojitz Agreement itself expressly refers to the MTNL tender, the Purchase Orders issued by the petitioner/defendant and implementation of the MTNL project. It was further submitted that the PBG itself specifically referred to the Purchase Orders issued in relation to the MTNL project and therefore the learned Commercial Court erred in holding that the PBG could not be linked to the Tripartite framework governing the said project and the disputes arising therefrom could not be treated independently.

18. Learned Senior Counsel further contended that Clause 9 of the Tripartite Agreement contains an arbitration clause and Clause 13 thereof confers exclusive jurisdiction upon

the Courts at Delhi. It was submitted that disputes between the parties were contractually required to be adjudicated within the agreed arbitral framework. It was further submitted that arbitral proceedings had already been initiated pursuant to the arbitration clause contained in the Tripartite Agreement and therefore the learned Commercial Court lacked jurisdiction to entertain the Commercial Suit. It was also averred that the respondent/plaintiff itself had filed a counterclaim before the learned Arbitral Tribunal in relation to invocation of the PBG and had sought refund of the amount recovered thereunder. It was contended that such conduct constitutes acknowledgment on the part of the respondent/plaintiff that the dispute concerning the PBG falls within the arbitral framework.

19. It was further contended that subsequent withdrawal of the counterclaim with liberty to pursue remedies in accordance with law does not alter the nature of the dispute. According to the petitioner/defendant, the respondent/plaintiff cannot be permitted to approbate and reprobate by initially pursuing arbitral remedies and

thereafter instituting civil proceedings concerning the same subject matter.

20. Learned Senior Counsel contended that the learned Commercial Court committed a patent error in observing that the Sojitz Agreement did not contain an arbitration clause. It was submitted that Clause 23 of the Sojitz Agreement itself contains an arbitration clause.

20.1 It was further contended that the petitioner/defendant was neither a party to the Sojitz Agreement nor aware of the same prior to institution of the Commercial Suit and therefore the respondent/plaintiff could not selectively rely upon the said agreement in order to avoid the arbitral framework governing the MTNL project.

21. On the aspect of non-filing of an application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "A&C Act"), at the time the petition was filed before the Commercial Court it was averred that the same was unnecessary in the facts of the present case since proceedings had already commenced

and had substantially progressed. It was submitted that once disputes had already been referred to arbitration, the question of seeking a fresh reference under Section 8 of the A & C Act, did not arise.

22. Lastly, learned Senior Counsel appearing for the petitioner/defendant also placed reliance upon the Arbitral Award dated 15.11.2025 (hereinafter referred to as the 'Arbitral Award'), wherein the learned Arbitral Tribunal held that invocation of the PBG by the petitioner/defendant was justified and that the PBG was linked to the Purchase Orders issued by the petitioner/defendant as well as the Tripartite framework. It was contended that the learned Arbitral Tribunal had also observed that the contrary stand subsequently adopted by the respondent/plaintiff constituted an afterthought.

23. It was thus contended by the learned Senior Counsel that the learned Commercial Court failed to appreciate the composite nature of the transaction, the contractual linkage between the various agreements, the effect of pending arbitral proceedings and the conduct of the

respondent/plaintiff before the learned Arbitral Tribunal. It was explained that even the documents relied upon by the respondent/plaintiff in the Commercial Suit disclosed the linkage between the PBG, the Purchase Orders and the MTNL project and therefore the learned Commercial Court erred in concluding that the dispute was wholly independent of the Tripartite Agreement. Accordingly, it was contended that the Impugned Order suffers from patent jurisdictional error and is liable to be set aside.

V. Contentions of the Respondent/Plaintiff:

24. Learned counsel appearing for the respondent/plaintiff contended that the supervisory jurisdiction of this Court under Article 227 of the Constitution is required to be exercised sparingly and only in cases involving patent lack of jurisdiction or manifest perversity. It was submitted that the present writ petition essentially seeks re-appreciation of the prima facie findings recorded by the learned Commercial Court while exercising jurisdiction under Order VII Rule 11(d) of the CPC, which is impermissible within the limited scope of Article 227 jurisdiction.

24.1 Learned counsel further contended that though the jurisdiction of this Court under Article 227 of the Constitution is not completely ousted by virtue of Section 8 of the CC Act, the said provision nevertheless manifests a clear legislative intent against interlocutory interference in proceedings arising out of commercial disputes and that challenges to interlocutory orders are ordinarily required to be raised in an appeal against the final decree. In support thereof, reliance was placed upon the judgments in ***Deep Industries Limited v. Oil and Natural Gas Corporation Limited***[5], ***Bhaven Construction v. Executive Engineer, Sardar Sarovar Narmada Nigam Limited***[6], ***Punjab State Power Corporation Limited v. EMTA Coal Limited***[7], and the judgment of the High Court of Orissa in ***Narayan Naik v. Ranjita Naik***[8].

24.2 In addition, reliance was also placed upon the decision of Supreme Court in ***Ranjit Projects Pvt. Ltd. v. Gujarat***

[5] (2020) 15 SCC 706
[6] (2022) 1 SCC 75
[7] (2023) 17 SCC 684
[8] 2025 SCC OnLine Ori 2805

State Road Development Corporation Ltd.[9] to contend that adjudicatory proceedings ought ordinarily to be permitted to proceed to their culmination without interlocutory interference.

24.3 It was accordingly contended that in matters arising out of commercial disputes involving arbitration-related objections, the threshold for exercise of supervisory jurisdiction under Article 227 of the Constitution of India is considerably higher and interference would be warranted only in rare cases involving patent lack of inherent jurisdiction apparent on the face of the record and not requiring elaborate adjudication.

25. Learned counsel appearing for the respondent/plaintiff further contended that the present writ petition had been instituted after an inordinate delay since the Impugned Order was passed on 09.08.2019 and the petition was filed on 06.01.2022. The explanations offered by the petitioner/ defendant relating to administrative difficulties, change of

[9] CIVIL APPEAL No.12488 OF 2017 v/o 11.09.2017

officers and circumstances arising during the Covid-19 pandemic were vague and insufficient to justify such delay. It was accordingly contended that the writ petition was liable to be rejected on the ground of delay and laches.

26. On the merits of the dispute, learned counsel has contended that while considering an application under Order VII Rule 11(d) of the CPC, the Court is required to confine its examination only to the averments contained in the plaint and the documents relied upon by the plaintiff and that the defence set up by the defendant cannot be looked into at such stage.

26.1 It was further submitted that the petitioner/defendant sought to convert the proceedings under Order VII Rule 11(d) of the CPC into a mini trial by relying upon disputed questions relating to the contractual framework between the parties, arbitral proceedings and subsequent developments. According to the respondent/plaintiff, such disputed questions cannot be conclusively adjudicated at the threshold stage while considering rejection of plaint.

27. It was further contended that the correspondence exchanged between the parties also indicated that the petitioner/defendant itself had acknowledged that the PBG pertained to the Sojitz Agreement and therefore the respondent/plaintiff could not be non-suited on the basis of the arbitration clause contained in the Tripartite Agreement.

28. Learned counsel for the respondent/plaintiff contended that the PBG had been furnished specifically in relation to the Sojitz Agreement dated 03.03.2006 and not pursuant to the Tripartite Agreement dated 24.06.2006. It was submitted that the PBG itself expressly referred to the contractual obligations arising under the Sojitz Agreement and not the Tripartite Agreement.

28.1 It was further contended that the chronology of events itself demonstrates the absence of any direct linkage between the PBG and the Tripartite Agreement inasmuch as the PBG had been furnished on 22.03.2006 prior to execution of the Tripartite Agreement on 24.06.2006. According to the respondent/plaintiff, the learned Commercial Court therefore rightly observed that, at that stage, there were no materials to conclusively connect the subject matter of the suit to the Tripartite Agreement.

29. Learned counsel appearing for the respondent/plaintiff contended that the existence of an arbitration agreement does not by itself operate as an automatic bar to the jurisdiction of the Civil Court and that reference to arbitration can arise only upon compliance with the requirements contemplated under Section 8 of the A&C Act. In support thereof, reliance was placed upon the judgment of the Supreme Court in ***Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya[10],*** to contend that in the absence of a proper application under Section 8 of the A&C Act, the jurisdiction of the Civil/Commercial Court continues to subsist.

29.1 It was submitted that the petitioner/defendant had admittedly not filed an application under Section 8 of the A&C Act, before the learned Commercial Court seeking reference of the parties to arbitration. According to the

[10] (2003) 5 SCC 531

respondent/plaintiff, in the absence of such application, the jurisdiction of the learned Commercial Court to entertain the Commercial Suit was not ousted.

30. Learned counsel appearing for the respondent/plaintiff contended that the present Commercial Suit pertains specifically to alleged wrongful invocation of the PBG and recovery of the amounts realized thereunder and that the said dispute constitutes an independent cause of action distinct from the disputes arising under the Tripartite Agreement. It was clarified that though the respondent/plaintiff had initially raised a counterclaim before the learned Arbitral Tribunal in relation to the PBG, the same subsequently came to be withdrawn with liberty to pursue remedies in accordance with law and thereafter the present Commercial Suit came to be instituted.

31. Learned counsel appearing for the respondent/plaintiff further contended that substantial parts of the cause of action had arisen within the jurisdiction of Bengaluru inasmuch as the PBG had been issued and invoked at Bengaluru and the registered offices of both parties were

situated at Bengaluru. It was therefore contended that the learned Commercial Court at Bengaluru possessed territorial jurisdiction to entertain the Commercial Suit.

32. Lastly, it was contended that the various contentions urged by the petitioner/defendant regarding the composite nature of the transaction, interconnection between agreements and effect of arbitral proceedings constitute matters of defence which require adjudication upon full trial and evidence which is not permissible in an adjudication under Order 7 Rule 11 CPC. Thus, it was averred that the learned Commercial Court, upon considering the plaint averments and documents placed on record, had taken a plausible prima facie view while dismissing IA No.3 and that the Impugned Order does not suffer from any patent jurisdictional error warranting interference under Article 227 of the Constitution.

VI. Issues for Consideration:

33. In view of the contentions of the parties, the following points arise for consideration by this Court:

(i) Whether the Impugned Order passed by the Commercial Court dismissing IA No.3 filed under Order VII Rule 11(d) of the CPC warrants interference in exercise of supervisory jurisdiction under Article 227 of the Constitution of India?

(ii) Whether, for the purpose of deciding IA No.3 under Order VII Rule 11(d) of the CPC, the dispute relating to the PBG can ex facie be said to arise out of or be governed by the Tripartite Agreement dated 24.06.2006 containing the arbitration clause and exclusive jurisdiction clause?

(iii) Whether this petition is barred on account of delay and laches?

VII. Analysis and Findings:

A. Scope of Interference under Article 227 of the Constitution of India:

34. At the outset, it is requisite to examine whether the Impugned Order warrants interference in exercise of the supervisory jurisdiction by this Court, given that the dispute has arisen on an interim order passed by the Commercial Court.

35. This Court, has in a recent judgment captioned ***Kanpur Flowercycling*** case while analysing the issue of interplay of the provisions of Article 227 of the Constitution with the Act, held that while the power to exercise supervisory jurisdiction cannot be taken away, it must be exercised sparingly and not as an appellate remedy. The power should be exercised when a party is remediless. This Court further held that clearly the intention of the legislature while enacting the CC Act was to not have an all pervasive access to the CC Act. Thus the powers must be exercised sparingly and only where the interference will lead to manifest injustice, patent perversity or jurisdictional failure. The relevant extract of the ***Kanpur Flowercycling*** case is set out below:

> ***(i) Scope and limits of High Court's supervisory jurisdiction under Article 227:***
>
> *12. The power under Article 227 of the Constitution of India is an extension of the jurisdiction of the Courts to exercise judicial review. It is a basic feature of the Constitution to exercise its constitutional authority of superintendence and supervision to adjudge the validity of orders passed by the District Courts. The Supreme Court in **L. Chandra Kumar** case held that the power of judicial review vested in the High Courts under Articles 226 and 227 of the Constitution, including the power of superintendence over subordinate courts and tribunals, forms part of the basic structure of the Constitution and cannot be ousted or excluded by legislative enactments.*

It was further held that the High Courts must retain the power to exercise supervisory jurisdiction to ensure that decisions of subordinate courts and tribunals conform to constitutional and legal standards. The relevant extract of the ***L. Chandra Kumar*** *case is set out below:*

> *"78. The legitimacy of the power of courts within constitutional democracies to review legislative action has been questioned since the time it was first conceived. The Constitution of India, being alive to such criticism, has, while conferring such power upon the higher judiciary, incorporated important safeguards. An analysis of the manner in which the Framers of our Constitution incorporated provisions relating to the judiciary would indicate that they were very greatly concerned with securing the independence of the judiciary. [See Chapter VII, "The Judiciary and the Social Revolution" in Granville Austin, The Indian Constitution : Cornerstone of a Nation, Oxford University Press, 1972; the chapter includes exhaustive references to the relevant preparatory works and debates in the Constituent Assembly.] These attempts were directed at ensuring that the judiciary would be capable of effectively discharging its wide powers of judicial review. While the Constitution confers the power to strike down laws upon the High Courts and the Supreme Court, it also contains elaborate provisions dealing with the tenure, salaries, allowances, retirement age of Judges as well as the mechanism for selecting Judges to the superior courts. The inclusion of such elaborate provisions appears to have been occasioned by the belief that, armed by such provisions, the superior courts would be insulated from any executive or legislative attempts to interfere with the making of their decisions.* ***The Judges of the superior courts have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it.*** *It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations.* ***It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence.*** *The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are*

not available to the Judges of the subordinate judiciary or to those who man tribunals created by ordinary legislations. ***Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.***

79. We also hold ***that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided.***

[Emphasis Supplied]

12.1 The Supreme Court in ***Surya Dev Rai*** *case held that the supervisory jurisdiction of the High Court under Article 227 of the Constitution remains unaffected by statutory limitations on revisional jurisdiction and extends even to interlocutory orders passed by subordinate courts. It was further held that such jurisdiction is to be exercised sparingly and only in cases where the subordinate court has acted without jurisdiction, in excess of jurisdiction, or in a manner resulting in grave injustice. The Court clarified that Article 227 of the Constitution cannot be invoked to correct mere errors of fact or law, and the High Court cannot act as an appellate court to reappreciate evidence or substitute its own view. The relevant extract of the* ***Surya Dev Rai*** *case is set out below:*

"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:

(1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the

jurisdiction of the High Court under Articles 226 and 227 of the Constitution.

(2) ***Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.***

(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction — by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction — by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.

(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) ***Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied****: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.*

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. ***Where two inferences are reasonably possible and the***

subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in

which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

[Emphasis Supplied]

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<u>(iii) Supervisory jurisdiction under Article 227 to be exercised sparingly, not as an appellate remedy:</u>

*14. The Supreme Court in **Shalini Shyam Shetty** case cautioned that the jurisdiction of the High Court under Article 227 is supervisory in nature and must be exercised sparingly to keep subordinate courts within the bounds of their authority. It was further held that such jurisdiction cannot be invoked to act as an appellate forum or to correct mere errors of fact or law, and interference is warranted only in cases of patent perversity, gross failure of justice, or violation of fundamental principles of law. The Court also reiterated that the power under Article 227, being part of the basic structure although cannot be curtailed by statute, but its exercise is subject to strict judicial discipline. The relevant extract of the **Shalini Shyam Shetty** case is set out below:*

"49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by the High Court under these two articles is also different.

<u>(b) In any event, a petition under Article 227 cannot be called a writ petition.</u> *The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of superintendence on the High Courts under Article 227 and have been discussed above.*

<u>(c) High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under</u>

Article 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of their power of superintendence have been repeatedly laid down by this Court. *In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh [AIR 1954 SC 215] and the principles in Waryam Singh [AIR 1954 SC 215] have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.*

(e) According to the ratio in ***Waryam Singh [AIR 1954 SC 215] , followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and courts subordinate to it, "within the bounds of their authority".***

(f) In order to ensure that law is followed by such tribunals and courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been ***a patent perversity in the orders of the tribunals and courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.***

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or courts subordinate to it, is a possible view. ***In other words the jurisdiction has to be very sparingly exercised.***

*(i) **<u>The High Court's power of superintendence under Article 227 cannot be curtailed by any statute</u>**. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] and therefore abridgment by a constitutional amendment is also very doubtful.*

*(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. **<u>At the same time, it must be remembered that such statutory amendment does not correspondingly expand the High Court's jurisdiction of superintendence under Article 227.</u>***

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

<u>(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court.</u>

<u>(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in</u>

the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counterproductive and will divest this extraordinary power of its strength and vitality.

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66. ***We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev [(2003) 6 SCC 675***] *and in view of the recent amendment to Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999.* ***It is urged that as a result of the amendment, scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the regime of law.***

67. ***As a result of frequent interference by the Hon'ble High Court either under Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227,*** *the Hon'ble High Court will follow the time honoured principles discussed above.* ***Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly."***

[Emphasis Supplied]

(iv) Article 227 confined to jurisdictional errors causing grave injustice, not for correcting trivial errors:

*15. A Division Bench of the High Court of Madras in **Ramanan Balagangatharan** case while examining an order of a Single Judge exercising original jurisdiction, held that the supervisory jurisdiction under Article 227 of the Constitution is to be exercised only to keep subordinate courts within the bounds of their jurisdiction, and interference is warranted only where the subordinate court has acted without jurisdiction, in excess of jurisdiction, or in a manner resulting in grave injustice. It was reiterated that such jurisdiction cannot be invoked to correct mere errors of fact or law and is confined to cases where the error is manifest on the face of the record and has resulted in gross failure of justice. The relevant extract of the **Ramanan Balagangatharan** case is set out below:*

> *"4. **It is settled law that the supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the Subordinate Courts within the bounds of their jurisdiction. When the Subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction. It is also settled law that the supervisory jurisdiction under Article 227 of the Constitution may not be exercised to correct mere errors of fact or of law and may be exercised only when the following requirements are satisfied:***
>
> > *(i) **the error is manifest and apparent** on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and*
> >
> > ***(ii) a grave injustice or gross failure of justice has occasioned thereby.***
>
> ***5. The supervisory jurisdiction under Article 227 can be exercised by the High Court only in the case of Subordinate Courts. The learned Single Judge of this Court cannot be termed as a subordinate to High Court.** When the order passed by the learned Single Judge cannot be termed as an order passed by the Court Subordinate to High Court**, Article 227 has no application.** In such view of the matter, the ratio*

laid down by the Gujarat High Court is not applicable to the facts and circumstances of the present case."

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vi) As in the A & C Act, the remedy to be exercised where the party is remediless:

17. The learned Amicus Curiae has in addition to submitting on the aspects referred to above, has contended that the scheme of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "A&C Act") contemplates expeditious resolution of disputes with minimal judicial intervention, the Act being a self-contained and exhaustive code. It was submitted that supervisory jurisdiction under Articles 226 and 227 ought not to be routinely invoked such as is the case in arbitral matters and may be exercised only in exceptional situations, such as where a party is rendered remediless or where manifest bad faith is demonstrated. In this regard, reliance was placed on the judgment in the case of ***Deep Industries Ltd. v. ONGC.***[11] *The relevant extract is below:*

*"15.**<u>Given the aforesaid statutory provision and given the fact that the 1996 Act repealed three previous enactments in order that there be speedy disposal of all matters covered by it, it is clear that the statutory policy of the Act is that not only are time-limits set down for disposal of the arbitral proceedings themselves but time-limits have also been set down for Section 34 references to be decided</u>**. Equally, in Union of India v. Varindera Constructions Ltd. [Union of India v. Varindera Constructions Ltd., (2020) 2 SCC 111 : (2020) 1 SCC (Civ) 277] , dated 17-9-2018, disposing of SLP (C) No. 23155 of 2013, this Court has imposed the self same limitation on first appeals under Section 37 so that there be a timely resolution of all matters which are covered by arbitration awards.*

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17.This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years.

[11] (2020) 15 SCC 706

*At the same time, **we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction.***

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*23. **We reiterate that the policy of the Act is speedy disposal of arbitration cases. The Arbitration Act is a special Act and a self-contained code dealing with arbitration. This Court in Fuerst Day Lawson Ltd. [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.,** (2011) 8 SCC 333: (2011) 4 SCC (Civ) 178], has specifically held as follows: (SCC p. 371, para 89)*

> *"89. It is, thus, to be seen that Arbitration Act, 1940, from its inception and right through to 2004 (in P.S. Sathappan [P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672]) was held to be a self-contained code. **Now, if the Arbitration Act, 1940 was held to be a self-contained code, on matters pertaining to arbitration, the Arbitration and Conciliation Act, 1996, which consolidates, amends and designs the law relating to arbitration to bring it, as much as possible, in harmony with the UNCITRAL Model must be held only to be more so. Once it is held that the Arbitration Act is a self-contained code and exhaustive, then it must also be held, using the lucid expression** [S.N. Srikantia & Co. v. Union of India, 1965 SCC OnLine Bom 133 : AIR 1967 Bom 347] of Tulzapurkar, J., that it carries with it*
>
> > *'19. ... a negative import that only such acts as are mentioned in the Act are permissible to be done and acts or things not mentioned therein are not permissible to be done. ...' (S.N., Srikantia & Co. case [S.N. Srikantia & Co. v. Union of India, 1965*

> *SCC OnLine Bom 133 : AIR 1967 Bom 347] , SCC OnLine Bom para 19)*

In other words, a letters patent appeal would be excluded by the application of one of the general principles that where the special Act sets out a self-contained code the applicability of the general law procedure would be impliedly excluded."

What becomes clear is that ***had the High Court itself disposed of the first appeal in the present case, no Article 227 petition could possibly lie — all that could perhaps have been done was to file an LPA before a Division Bench of the same High Court.*** *This, as we have seen, has specifically been interdicted by Fuerst Day Lawson Ltd. [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC 333 : (2011) 4 SCC (Civ) 178] Merely because, on the facts of this case, the first appeal was disposed of by a court subordinate to the High Court, an Article 227 petition ought not to have been entertained.*

*24.****Mr. Rohatgi is also correct in pointing out that the legislative policy qua the general revisional jurisdiction that is contained by the amendments made to Section 115 CPC should also be kept in mind when the High Courts dispose of petitions filed under Article 227. The legislative policy is that no revision lies if an alternative remedy of appeal is available.*** *Further, even when a revision does lie, it lies only against a final disposal of the entire matter and not against interlocutory orders. These amendments were considered in Tek Singh v. Shashi Verma [Tek Singh v. Shashi Verma, (2019) 16 SCC 678 : (2020) 2 SCC (Civ) 753] in which this Court adverted to these amendments and then stated: (SCC p. 681, paras 5-6)*

> *"5.… A reading of this proviso will show that, after 1999, revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders.*
>
> *6.… Even otherwise, it is well settled that the revisional jurisdiction under Section 115 CPC is to be exercised to correct jurisdictional errors only. This is well settled. In DLF Housing & Construction Co. (P) Ltd. v. Sarup Singh [DLF Housing & Construction Co. (P) Ltd. v. Sarup Singh, (1969) 3 SCC 807] this Court held: (SCC pp. 811-12, para 5)*

*'5.... The position thus seems to be firmly established that while exercising the jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. Clauses (a) and (b) of this section on their plain reading quite clearly do not cover the present case. It was not contended, as indeed it was not possible to contend, that the learned Additional District Judge had either exercised a jurisdiction not vested in him by law or had failed to exercise a jurisdiction so vested in him, in recording the order that the proceedings under reference be stayed till the decision of the appeal by the High Court in the proceedings for specific performance of the agreement in question. Clause (c) also does not seem to apply to the case in hand. The words "illegally" and "with material irregularity" as used in this clause do not cover either errors of fact or of law; they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may, in our view, relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. <u>**The High Court does not seem to have adverted to the limitation imposed on its power under Section 115 of the Code. Merely because the High Court would have felt inclined, had it dealt with the matter initially, to come to a different conclusion on the question of continuing stay of the reference proceedings pending decision of the appeal, could hardly justify interference on revision under Section 115 of the Code when there was no illegality or material irregularity committed by the learned Additional District Judge in his manner of dealing with this question. It seems to us that in this matter the High Court treated the revision virtually as if it was an appeal.' (SCR at p. 373)...."**</u>*

[Emphasis Supplied]

*17.1 A similar view has been taken by the Supreme Court in the case of **Bhaven Construction v. Sardar Sarovar Narmada Nigam Ltd.** [See: (2022) 1 SCC 75] While examining the A&C Act, the Supreme Court has also cautioned against judicial interference beyond as is prescribed under the statute. It was held as follows:*

> *"12. **<u>We need to note that the Arbitration Act is a code in itself. This phrase is not merely perfunctory, but has definite legal consequences.</u>** One such consequence is spelled out under Section 5 of the Arbitration Act, which reads as under:*
>
> > *"5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."*
> >
> > *(Emphasis Supplied)*
>
> *The non obstante clause is provided to uphold the intention of the legislature as provided in the Preamble to adopt UNCITRAL Model Law and Rules, to reduce excessive judicial interference which is not contemplated under the Arbitration Act.*
>
> *13. **<u>The Arbitration Act itself gives various procedures and forums to challenge the appointment of an arbitrator. The framework clearly portrays an intention to address most of the issues within the ambit of the Act itself, without there being scope for any extra statutory mechanism to provide just and fair solutions.</u>***
>
> *xxx xxx xxx*
>
> *17. Thereafter, Respondent 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the Arbitration Act through a petition under Articles 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as*
>
> > *"**34. Application for setting aside arbitral award**.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)".*

(Emphasis Supplied)

<u>The use of term "only" as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.</u>

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<u>18. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a constitutional right.</u> *In Nivedita Sharma v. COAI [Nivedita Sharma v. COAI, (2011) 14 SCC 337 : (2012) 4 SCC (Civ) 947] , this Court referred to several judgments and held : (SCC p. 343, para 11)*

> *"11. We have considered the respective arguments/ submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation — L. Chandra Kumar v. Union of India [L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577] .* ***<u>However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency /instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.</u>****"*

(Emphasis Supplied)

<u>It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity,</u>

wherein one party is left remediless under the statute or a clear "bad faith" shown by one of the parties. *This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.*

19. In this context we may observe Deep Industries Ltd. v. ONGC [Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706], ***wherein interplay of Section 5 of the Arbitration Act and Article 227 of the Constitution was analysed as under :*** *(SCC p. 714, paras 16-17)*

> *"16. Most significant of all is the non obstante clause contained in Section 5 which states that notwithstanding anything contained in any other law, in matters that arise under Part I of the Arbitration Act, no judicial authority shall intervene except where so provided in this Part. Section 37 grants a constricted right of first appeal against certain judgments and orders and no others. Further, the statutory mandate also provides for one bite at the cherry, and interdicts a second appeal being filed [see Section 37(2) of the Act].*
>
> *17. This being the case, there is no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37, the entire arbitral process would be derailed and would not come to fruition for many years. At the same time, we cannot forget that Article 227 is a constitutional provision which remains untouched by the non obstante clause of Section 5 of the Act. In these circumstances, what is important to note is that though petitions can be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy as adumbrated by us hereinabove so that interference is restricted to orders that are passed which are patently lacking in inherent jurisdiction."*
>
> *(Emphasis Supplied)*

20. In the instant case, Respondent 1 has not been able to show exceptional circumstance or "bad faith" on the part of the appellant, to invoke the remedy under Article 227 of the Constitution. No doubt the ambit of Article 227 is broad and

<u>pervasive, however, the High Court should not have used its inherent power to interject the arbitral process at this stage.</u> *It is brought to our notice that subsequent to the impugned order of the sole arbitrator, a final award was rendered by him on merits, which is challenged by Respondent 1 in a separate Section 34 application, which is pending."*

[Emphasis Supplied]

<u>B. Article 227 and Commercial Disputes</u>

18. The CC Act was enacted in view of the increasing pendency of commercial cases. It was observed in the Statement of objects and reasons of the CC Act, that there was required an effective mechanism for speedy and efficient disposal of commercial disputes, including by amendments to the CPC, Arbitration and Conciliation Act, 1996 and other statute. When this writ petition was initially considered, a doubt was expressed as to whether a petition under Article 227 of the Constitution would be maintainable and the extent of interference to be exercised by the Court, since challenges to interlocutory orders passed by the Commercial Court were curtailed under the CC Act.

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<u>20.Clearly the intention of the legislature was not to have an all-pervasive access to the challenges made to the CC Act.</u> *Thus, the question that would arise is whether parties should be able to circumvent these statutory provisions by making frequent recourse to Article 227 of the Constitution, to challenges under the CC Act.*

21. An examination of the law as set out hereinabove reflects that:

(i) It is important for the Courts to ensure that the power ***<u>under Article 227 be exercised to ensure compliance with the objectives of the enactment of the CC Act remains intact.</u>***

(ii) The powers of superintendence under Article 227 are circumscribed and supervisory jurisdiction is to be ***<u>exercised sparingly and cannot be used to substitute the judgment of a Subordinate Court or Tribunal to correct trivial errors.</u>***

(iii) Article 227 of the Constitution should be used for jurisdictional errors causing grave injustice. The power should be exercised where a party is left remediless.

(iv) What has been barred by Section 115 of the CPC through Section 8 of the Commercial Courts Act, cannot be subsequently revived by use of powers under Article 227 of the Constitution.

(v) Decrees and judgments are amenable to challenge within the period of limitation as is prescribed under Section 13 of the CC Act.

(vi) Interlocutory Orders passed which are amenable to challenge under Order 43 of the CPC and Section 37 of the CC Act, may be challenged by way of an appeal under Section 13 of the CC Act as well.

(vii) Interference in petitions arising from Commercial Courts is limited to only instances where non-correction under Article 227 will lead to manifest injustice. Some circumstances would be when errors (a) are incapable of correction at a later stage, and (b) give rise to the level of patent perversity or jurisdictional failure."

[Emphasis Supplied]

36. In the present case, since the jurisdictional competence of the learned Commercial Court to entertain a dispute where an arbitral clause exists has been questioned, as well as the territorial jurisdiction of the Courts of Bangalore, the invocation of the supervisory jurisdiction of this Court becomes necessary.

B. Enquiry under Order VII Rule 11(d) of the CPC:

37. As discussed above, in the present case, the learned Commercial Court has decided an application filed by the petitioner/defendant under Section 20 read with Section 151 and Order 7 Rule 11(d) of the CPC. It was contended therein that the governing law and jurisdictional clause under the Tripartite Agreement provided for jurisdiction of the Courts at Delhi. Thus, the application invoked Order 7 Rule 11(d) CPC and prayed that the plaint be rejected for a lack of territorial jurisdiction.

37.1 Section 20 of the CPC provides for cause of action in filing where suits may be instituted and states that a suit may be instituted where (a) the defendant / defendant's resides or works for gain; (b) where one of these defendants reside and other defendants acquiesce to such jurisdiction or (c) where the whole or part of the cause of action arises in the following terms:

> *"20. **Other suits to be instituted where defendants reside or cause of action arises.** Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-*

(a) ***<u>the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain</u>****; or*

(b) ***<u>any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides</u>****, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given,* ***<u>or the defendants who do not reside, or carry on business, or personally works for gain, as aforesaid, acquiesce in such institution;</u>*** *or*

<u>(c) The cause of action, wholly or in part, arises.</u>

[Explanation].-A corporation shall be deemed to carry on business at its sole or principal office in [India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

37.2 Order VII Rule 11(d) CPC provides that a plaint shall be rejected where the suit appears from the statements in the plaint to be barred by any law. It is apposite to extract the provision below:

"11. Rejection of plaint.— *The plaint shall be rejected in the following cases:—*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

> ***(d) where the suit appears from the statement in the plaint to be barred by any law****;*
>
> *(e) where it is not filed in duplicate;*
>
> *(f) where the plaintiff fails to comply with the provisions of rule 9:*
>
> ***Provided that*** *the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."*
>
> [Emphasis Supplied]

38. The provision invoked in the application filed by the petitioner/defendant before the learned Commercial Court is under Order VII Rule 11 CPC. It is the contention of the petitioner/defendant that the suit is not maintainable in view of the provisions of Section 20 of the CPC and thus the suit is barred by law in terms of Order VII, Rule 11(d) of the CPC. Although Section 20 of the CPC has been added in the body of the application, the application invokes the provisions of Order VII Rule 11(d) CPC stating that the suit is barred by law since the Courts at Bangalore do not have any jurisdiction to entertain this petition.

38.1 It is settled law that in order to be governed by the provisions of Order VII Rule 11(d) CPC, the application must set out the specific law that the suit is barred by. In addition, the plea of ouster of jurisdiction would require to be examined in the light of the defence which has been placed on record by the plaintiff, which is not permissible in an examination under the provisions of Order VII Rule 11 of the CPC.

38.2 In its Reply to the application filed, respondent/plaintiff states that the subject matter of the suit filed by the respondent/plaintiff is the wrongful encashment of the PBG since the bank guarantee clearly and expressly provides that it has been issued for the sole performance of the Sojitz Agreement and therefore is restricted to the contents of the Sojitz Agreement. It states that the Sojitz Agreement and the Tripartite Agreement are not connected in any manner since the Tripartite Agreement was signed later and the bank guarantee issued earlier. The reply thus states that there is no arbitration agreement executed in respect of the bank guarantee nor is the jurisdiction clause applicable.

39. A plain reading of Order VII Rule 11(d) CPC indicates that the enquiry is confined to the statements contained in the plaint. The legislature has consciously employed the expression *"appears from the statements in the plaint"* and therefore the Court, at this stage, is not concerned with the correctness or otherwise of the defence set up by the petitioner/defendant. Thus, it is a settled position of law that while considering an application under Order VII Rule 11 of the CPC, the Court is confined to the averments contained in the plaint and the documents relied upon therein. The pleas raised by the defendant are wholly irrelevant at that stage.

39.1 In ***Srihari Hanumandas Totala v. Hemant Vithal Kamat***[12], the Supreme Court considered the scope of Order VII Rule 11(d) of the CPC and held that, while deciding an application seeking rejection of the plaint on the ground that the suit is barred by law, the Court must confine its examination to the averments contained in the plaint. The question whether the suit is barred by law must be

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determined solely from the statements made in the plaint and it is impermissible to adjudicate such an application on the basis of the defence set up by the defendant or any material outside the plaint. The Supreme Court further reiterated that no amount of evidence can be looked into at the stage of Order VII Rule 11(d) CPC and that disputed questions of fact or law, requiring examination beyond the plaint, fall outside the scope of such enquiry. At the stage of Order VII Rule 11(d) CPC application is required to be examined, to undertake a meaningful reading of the plaint alone and ascertain whether the alleged bar is apparent on the face of the pleadings, without embarking upon an adjudication of disputed issues or considering the defence of the defendant. The relevant extract of ***Srihari Hanumandas Totala*** case is set out below:

> *"17. Order 7 Rule 11(d) CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed.* ***The court while deciding such an application must have due regard only to the statements in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case.****…*

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19. At this stage, it would be necessary to refer to the decisions that particularly deal with the question whether res judicata can be the basis or ground for rejection of the plaint. ***In Kamala v. K.T. Eshwara Sa [Kamala v. K.T. Eshwara Sa, (2008) 12 SCC 661] , the trial Judge had allowed an application for rejection of the plaint in a suit for partition and this was affirmed by the High Court.*** *S.B. Sinha, J. speaking for the two-Judge Bench examined the ambit of Order 7 Rule 11(d) CPC and observed : (SCC 668-69, paras 21-22)*

> ***"21. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint.*** *Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at.* ***What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction.*** *Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.*
>
> *22.* ***For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."***
>
> *(emphasis supplied)*

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20. The Court further held: (Kamala case [See: (2008) 12 SCC 661], SCC p.669, paras 23-25)

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> *25.* ***The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be***

> ***<u>culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law.</u>*** *In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained."*
>
> *(emphasis supplied)*

xxx xxx xxx

21.The above view has been consistently followed in a line of decisions of this Court. In Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust [Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust, (2012) 8 SCC 706 : (2012) 4 SCC (Civ) 612] , P. Sathasivam, J. (as the learned Chief Justice then was), speaking for a two-Judge Bench, observed that : (SCC pp. 713-14, paras 10-11)

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> *11. This position was explained by this Court in* ***<u>Saleem Bhai v. State of Maharashtra [Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557]</u>*** *, in which, while considering Order 7 Rule 11 of the Code, it was held as under : (SCC p. 560, para 9)*
>
> ***<u>'9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint.</u>*** *The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial.* ***<u>For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage,</u>*** *therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court.'*

It is clear that in order to consider Order 7 Rule 11, the court has to look into the averments in the plaint and the

> *same can be exercised by the trial court at any stage of the suit. It is also clear that the averments in the written statement are immaterial and it is the duty of the court to scrutinise the averments/pleas in the plaint.* ***In other words, what needs to be looked into in deciding such an application are the averments in the plaint. At that stage, the pleas taken by the defendant in the written statement are wholly irrelevant and the matter is to be decided only on the plaint averments.*** *These principles have been reiterated in Raptakos Brett & Co. Ltd. v. Ganesh Property [Raptakos Brett & Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184] and Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express [Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100].”*
>
> *[Emphasis Supplied]*

39.2 The Supreme Court in ***Manjula v. D.A. Srinivas***[13] after considering the earlier decisions in ***Dahiben v. Arvindbhai Kalyanji Bhanusali***[14]***, T. Arivandandam v. T.V. Satyapal***[15]***, Saleem Bhai v. State of Maharashtra***[16] and other precedents, reiterated that the remedy under Order VII Rule 11 of the CPC is an independent and special remedy intended to terminate sham and vexatious litigation at the threshold. The Supreme Court also reiterated that, for deciding an application under Order VII Rule 11 of the CPC, only the averments in the plaint and the documents

[13] 2026 SCC OnLine SC 831
[14] (2020) 7 SCC 366
[15] (1977) 4 SCC 467
[16] (2003) 1 SCC 557

filed along with the plaint can be looked into. The relevant extract of the ***Manjula*** case is set out below:

> *"8.9. However, when it comes to Clause (a) or (d), the Court has no option. **The clauses under Rule 11 of Order VII, except Clause (d), do not use the word "suit". If, upon perusal of the averments in the plaint, the suit is barred by law, then the plaint can be rejected. The bar can be express or by necessary implication. Therefore, while considering a claim that the suit is barred by law, a thorough and meaningful reading of the plaint must be undertaken**. A suit can be held to be barred by law if the right asserted is legally unavailable or, even if available, there exists a bar to seek the relief in view of any other substantive law which conditions enforcement of such right upon satisfaction of certain requirements or compliance with prescribed procedures. It is needless to state that while carefully analysing the plaint averments, the relief sought and all relevant laws must be considered. Clauses (a) and (d) are stand-alone provisions. Yet, depending upon the facts of each case, they may also overlap. **Similarly, if by clever drafting a fictional cause of action is created to veil a bar under law, it is imperative for the Court to reject the plaint.***
>
> ***xxx xxx xxx***
>
> *9.4. Every plaint must be presented along with the documents relied upon in the plaint as per Rule 14 of Order VII. **A document is ordinarily relied upon in the plaint, and the narration in the bundle of facts contribute to the cause of action. Therefore, it is imperative upon the plaintiff to produce such document.** It is trite law that the plaint can be rejected for failure to produce documents relied upon or referred to in the plaint. **There can be no quarrel with the well settled position that while considering an application for rejection of plaint, only the averments in the plaint and the documents filed along with the plaint can be looked into**. Though we agree with the learned Senior Counsel for the Respondent/Plaintiff on this proposition, the plaint cannot be read in an incomprehensive manner. What is implied in Order VII is a meaningful reading of the plaint, because the bar under law may be either express or by necessary*

implication. [See T. Arivandandam v. T.V. Satyapal (supra), Sopan Sukhdeo Sable v. Assistant Charity Commissioner ((2004) 3 SCC 137) and Madanuri Sri Rama Chandra Murthy v. Syed Jalal ((2017) 13 SCC 174 :(2017) 5 SCC (Civ) 602)].”

[Emphasis Supplied]

40. Since the application that has been filed by the petitioner/defendant before the Commercial Court was principally invoking Order VII Rule 11 of the CPC, the basis of this judgment shall be an examination of the plaint and the documents that were filed along with the plaint.

40.1 A plaint was filed by the respondent/plaintiff on 28.04.2017 in respect of the wrongful invocation by the petitioner/defendant of a PBG for Rs.10,47,72,665/- which was issued on 22.03.2006 by Canara Bank, M. G. Road, Overseas Branch, Bangalore, in favour of the petitioner/defendant, at the request of the plaintiff. The plaintiff sought a declaration that the PBG was wrongfully invoked by the petitioner/defendant and for the recovery of money along with interest thereon. The prayers in the plaint are extracted below:

“a. Declaring that the performance bank guarantee dated 22nd March 2006 (Document 1 herein, and as extended) issued in favour of the Defendant by Canara Bank at the

request of the Plaintiff was wrongfully invoked by the Defendant;

b. Directing the Defendant to refund a sum of Rs.10,47,72,665/- which it received upon encashment of the performance bank guarantee dated 22nd March 2006, together with interest at 18% thereon from the date of encashment i.e. 22nd May 2014 until the date of payment;

c) Awarding costs of the suit; and

d) Granting such other relief/s as this Hon'ble Court deems fit in the facts and circumstances of the case, in interest of justice and equity."

41. Shortly thereafter, an application was filed under Section 20 read with Section 151 and Order VII Rule 11(d) CPC by the petitioner/defendant on 20.09.2017 setting out that the performance bank guarantee was intrinsically connected with the MTNL project and that the onus of performance of the MTNL contract as well as execution was that of the respondent/plaintiff and that it was this fact that the entire transaction premised itself on. It was stated in the application that while the onus of supply of goods under the MTNL contract was entirely upon ORG Informatics Limited (hereinafter referred to as 'ORG'), the performance bank guarantee for 5% of the purchase order value, was on the respondent/plaintiff.

41.1 The application also set out that the PBG was issued to cover the failure of installation commission and performance, which is covered by the Tripartite Agreement as well as the statement of work. It further stated that the Court does not have territorial jurisdiction to entertain this petition in view of clause 13 of the Tripartite Agreement, which sets out that the Courts at Delhi have jurisdiction in the matter. It is contended that the Tripartite Agreement also contains an arbitration clause. Thus, it was prayed that the suit be rejected or returned inasmuch as the Court has no jurisdiction to try and determine the suit.

42. It is a settled position of law that an examination under Order VII Rule 11 CPC, cannot be undertaken where disputed questions of fact exist. In addition, where the determination of an objection requires adjudication of disputed questions of fact or mixed questions of law and fact requiring appreciation of evidence, the same cannot be undertaken while exercising jurisdiction under Order VII Rule 11 of the CPC and must be left for trial.

43. In ***Kamala v. K.T. Eshwara Sa,***[17] the Supreme Court while considering the scope of Order VII Rule 11(d) of the CPC, held that the provision has a limited application and the question whether a suit is barred by law has to be determined solely on the basis of the averments contained in the plaint, without any addition or subtraction. It was further held that no amount of evidence can be looked into while deciding an application under Order VII Rule 11(d), and issues on the merits of the matter or disputed questions requiring appreciation of evidence fall outside the scope of such proceedings. The relevant extract of ***Kamala*** case is set out below:

> *"21**. Order 7 Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.***

[17] (2008) 12 SCC 661

> *22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into.* ***The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject-matter of an order under the said provision."***
>
> [Emphasis Supplied]

44. Thus, an application under Order VII Rule 11 CPC can only be decided on a demurrer. Unless there are glaring averments in the plaint which show that a suit is barred by a specific law, the Court will not be inclined to dismiss a suit at the threshold.

C. Is the suit barred in view of the existence of an arbitration clause or a jurisdiction clause in the Tripartite Agreement:

45. The principal issue raised by the petitioner/defendant, which forms part of the application filed, was that the Tripartite Agreement contains an arbitration clause as well as a clause which provided exclusive jurisdiction to the Courts at New Delhi. It was further contended that the Commercial Court also committed a patent error in holding that the Sojitz Agreement had no arbitration clause as Clause 23 of the Sojitz Agreement refers to arbitration

between the parties. It will thus be apposite to examine the contract between the parties in the light of the law reproduced above.

46. An examination of the terms of the Tripartite Agreement which has been executed between the respondent / IBM and ORG Informatics on the one side and the petitioner/defendant on the other. The agreement is dated 24.06.2006 and references the purchase order executed with MTNL that BEL has placed on ORG for the supply of systems for the MTNL project, as well as a 3 year AMC, by a purchase order dated 14.02.2006, for which IBM has agreed to provide services for integration in terms of the statement of work. The relationship of the parties is also defined in this agreement and it is stated that the parties are independent contractors and principals respectively. The Tripartite Agreement contains an arbitration clause as well as a governing law and jurisdiction clause and is duly signed by all parties on 24.06.2006. The relevant extract of the Tripartite Agreement is set out below:

> ***"This AGREEMENT entered into this 24 day of June 2006 by and between M/s IBM India Pvt. Ltd.,*** *a*

company having its registered office at Subramanya Arcade, 12, Bannerghatta Road, Bangalore-560029 (herein after referred as IBM which expression shall include their successor and permitted assigns).

M/s ORG Informatics Ltd., *a company having its registered office at 3rd Floor, Abhishek Complex, Akshar Chowk, Old Pandra Road, Vadodara-390020 (herein after referred as ORG which expression shall include their successor and permitted assigns),*

AND

Bharat Electronics Ltd., *is a company organised and existing under the laws of India, and having registered office at Outer Ring Road, Nagavara, Bangalore-560 045, India (hereinafter referred to as "BEL" which expression shall include their successor and permitted assigns).*

(IBM, ORG and BEL hereinafter also referred to individually as "Party" and collectively as "Parties" as per the context).

WHEREAS, IBM is engaged in the business of IT Hardware and Services,

WHEREAS ORG is engaged in the business of Information System Integration, VAS etc.

AND WHEREAS, BEL is engaged, *inter alia, in the design, manufacture and supply of electronic communication equipment, radar systems, tank electronics, electro-optical equipment, VSAT and Wide Area communication systems and products Transmission, Switching and Access products for BSNL amongst others, for use by defence services and civilian sector;*

AND WHEREAS Mahanagar Telephone Nigam Limited, New Delhi (herein referred at MTNL) has placed a order for procurement of Convergent Billing System, CRM and supply of Telecom / IT Equipments through tender number MTNL/20-80(293)/2002-MM dated 13.04.2004 and subsequent clarifications (herein after referred to as "Tender") on BEL.

AND WHEREAS BEL has placed order on ORG for Supply including 3 Year Warranty, Installation & Commissioning, Integration of individual Applications, Software Requirement Specifications (SRS), Change Management, Overall System Integration, Validation, Acceptance Testing of complete systems, successfully handing over *the project to MTNL and obtaining Taking Over Certificate (TOC) from MTNL & 3 year AMC for the above tender vide PO No MTNL/20-80(93)/2004-MM/Convergent Billing/Vol III/8 Dated 14.02.2006 and as amended. For which IBM has agreed to provide services for integration of individual applications in accordance with the following terms and the attached Statement of Work (SOW).*

NOW, THEREFORE, IT IS HEREBY AGREED BETWEEN THE PARTIES i.e. BEL, ORG & IBM AS FOLLOWS:

1.0 SCOPE AND METHOD OF PROGRESSING

The scope of work under this Tripartite Agreement is Integration of individual Applications, in accordance with the attached SOW for integration services. For the avoidance of doubt, in the event of a conflict between the terms and conditions of between this Agreement and any other agreement signed between BEL and ORG for this project, the rights and obligations of ORG and BEL with respect to each other shall be governed by the terms and conditions of the other agreement.

2.0 RESPONSIBILITIES

2.1 Overall project management is the responsibility of BEL.

2.2 IBM will be responsible for the services for integration of individua applications as more fully described in the attached SOW.

2.3 ORG will provide BEL with a performance Bank guarantee for an amount equivalent to 2% of the total PO amounts as per PO placed by BEL on ORG.

3. RELATIONSHIP OF PARTIES

The relationship between IBM, ORG and BEL under this TRIPARTITE AGREEMENT is solely of a independent contractors and principal respectively. *Under no circumstances shall any Party hold itself out to be an agent of the other party/ parties. Each Party shall be deemed to be independent contractor and not an agent, joint venture, or representative of the other, and none of the Parties may assume or create any obligations or responsibility on behalf, or in the name of the other whether in writing or otherwise. Under no circumstances shall any party hold itself out to be a legal partner, employee, franchisee, representative, servant, or agent of* *the other. Parties also agree that they will not make false or misleading statements, claims or representation about the other or the relationship to the other(s)."*

[Emphasis Supplied]

46.1 Clause 9 of the Tripartite Agreement, contains an arbitration clause while Clause 13 of the Tripartite Agreement provides for the jurisdiction of the Courts at Delhi. It is apposite to set out these two clauses below:

9. ARBITRATION

Any dispute, controversy, or claim arising out of or relating to this TRIPARTITE AGREEMENT, *or the breach, termination or invalidity thereof, shall be referred to and finally settled by arbitration under and in accordance with* ***the Arbitration and Conciliation Act, 1996, by one or more arbitrators appointed in accordance with the Act and agreed upon by the parties in dispute under this TRIPARTITE AGREEMENT. The venue for such proceedings shall be in Delhi.***

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13. GOVERNING LAW AND JURISDICTION

This TRIPARTITE AGREEMENT shall be governed by and construed in accordance with the laws of India. Subject to the arbitration provision hereof, any dispute arising between the parties shall be under the jurisdiction of Courts in Delhi."

[Emphasis Supplied]

47. In addition and so far as concerns the existence of an arbitration clause in the Sojitz Agreement, this Court agrees that Clause 23 of the Sojitz Agreement did contain an

arbitration clause. Clause 23 of the Sojitz Agreement is set out below:

> ***"23. Governing Law:***
>
> *The laws of India will govern construe and enforce all the rights, duties and obligations arising under or relating, in any manner to, the subject matter of this Agreement, notwithstanding conflicts of laws principles.*
>
> *The "United Nations Convention on Contracts for the International Sale of Goods" does not apply.*
>
> ***Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Bangalore, India in accordance with the laws of India then in effect.*** *The arbitration award shall be final and binding for the parties without appeal and shall be in writing and set forth the findings of fact and the conclusions of law.*
>
> ***The number of arbitrators shall be three, with each side to the dispute being entitled to appoint one arbitrator.*** *The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the Bar Council of India. Other vacancies shall be filled by the respective nominating party. Proceedings shall continue from the stage they were at when the vacancy occurred.*
>
> *If one of the parties refuses or otherwise fails to appoint an arbitrator within 30 days of the date the other party appoints its, the first appointed arbitrator shall be the sole arbitrator, provided that the arbitrator was validly and properly appointed.* ***All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version."***

[Emphasis Supplied]

48. Section 8 of the A & C Act provides that when a party to an Arbitration Agreement applies to the Court no later than submitting his first statement of dispute, then the Court shall refer the parties to arbitration unless it *prima facie* finds that no valid Arbitration Agreement exists. Sub-section (2) of Section 8 of the A & C Act also sets out that the application shall not be entertained unless it is accompanied by the original Arbitration Agreement. Section 8 of the A & C Act is reproduced below:

> *"8. Power to refer parties to arbitration where there is an arbitration agreement.— (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*
>
> *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:*
>
> *Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.*

> *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."*

48.1 The Supreme Court in the ***Sukanya Holdings*** case, has held that in case a suit is filed in relation to an Agreement where an arbitration clause exists, the party would be required to file an application under Section 8 of the A&C Act prior to filing their defence in the suit, which concededly has not been done. The relevant extract of the ***Sukanya Holdings*** case is set out below:

> *"12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matters governed by Part I of the Act, the judicial authority shall not intervene except where so provided in the Act.* ***Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the Arbitral Tribunal, if: (1) the parties to the arbitration agreement have not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that the Arbitration Act does not oust the jurisdiction of the civil court to decide the dispute in a case where parties to the arbitration agreement do not take appropriate steps as contemplated under sub-sections (1) and (2) of Section 8 of the Act."***

[Emphasis Supplied]

48.2 The Supreme Court in ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd.***[18], while dealing with the scope of enquiry to be undertaken by a judicial authority on an application under Section 8 of the Arbitration and Conciliation Act, 1996, held that the judicial authority cannot mechanically refer the parties to arbitration merely because an arbitration agreement exists. It was held that the Court is required to examine whether a valid arbitration agreement exists, whether the disputes forming the subject matter of the suit fall within the scope of the arbitration agreement, whether all the parties are bound by the arbitration agreement, whether the application under Section 8 has been filed before submission of the first statement on the substance of the dispute, and whether the reliefs sought are capable of being adjudicated by an arbitral tribunal. The relevant extract is set out below:

> *"18. In SBP & Co. v. Patel Engg. Ltd. [(2005) 8 SCC 618] this Court held thus: (SCC p. 649, para 19)*
>
> > *"19. … **When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the***

[18] (2011) 5 SCC 532

> ***judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause****. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration."*
>
> *(emphasis supplied*
>
> *19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:*
>
> *(i) whether there is an arbitration agreement among the parties;*
>
> *(ii) whether all the parties to the suit are parties to the arbitration agreement;*
>
> *(iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;*
>
> *(iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and*
>
> *(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration."*
>
> [Emphasis Supplied]

49. Undisputably in the present case, no application under Section 8 of the A & C act was filed, much less any examination being undertaken by the Commercial Court as is requisite. Thus and given that it is undisputed that application under Section 8 of the A & C has not been filed,

in terms of the settled legal position, this question cannot be examined either by this Court. Given the discussion above, this objection of the petitioner/defendant cannot be sustained.

50. So far as concerns the governing law and jurisdiction clause in the Tripartite Agreement, although the clause does refer to the jurisdiction of the courts at Delhi, it would require to be examined whether this clause could said to be an exclusive jurisdictional clause. The clause sets out that subject to the provision for arbitration of disputes arising between the parties shall be governed under the jurisdiction of the Courts at Delhi.

51. The applicability of an exclusive jurisdiction clause is no longer *res integra.* The Supreme Court has time and again set out that the parties may, by contract, limit the jurisdiction to a particular Court and that the same is not barred by any law. In the judgment of ***Swastik Gases vs. IOCL***[19] case, the Supreme Court held that such clauses

[19] (2013) 9 SCC 32

which specify the jurisdiction of one particular Court may expressly exclude the jurisdictions of other Courts, by using the words for ouster such as "alone", "only" or "exclusive" would be read to mean the exclusion. The relevant extract of ***Swastik Gases*** case is set out below:

> *"32. For answer to the above question, **we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties-by having Clause 18 in the agreement is clear and unambiguous that the courts at** Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like Clause 18 in the agreement, the maxim expression unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. **This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.***
>
> *33. The above view finds support from the decisions of this Court in Hakam Singh A.B.C. Laminart, R.S.D.V. Finance, Angile Insulations, Shriram City, Hanil Era Textiles and Balaji Coke."*

[Emphasis Supplied]

51.1 A similar view has been taken by the Supreme Court in ***EXL Careers and Another vs. Frankfinn Aviation Services Private Limited***[20], while adjudicating an application under Order VII Rule 10 of an exclusive jurisdiction clause has also held that where two or more Courts have jurisdiction, it is always open for the parties to confer jurisdiction on one of those Courts by consent. The relevant extract is below:

> *"12. It is no more res integra that in a dispute between parties where two or more courts may have jurisdiction, it is always open for them by agreement to confer exclusive jurisdiction by consent on one of the two courts. Clause 16-B of the agreement extracted above leaves us in no doubt that the parties clearly indicated that it was only the court at Delhi which shall have exclusive jurisdiction with regard to any dispute concerning the franchise agreement and no other court would have jurisdiction over the same. In that view of the matter, the presentation of the plaint at Gurgaon was certainly not before a court having jurisdiction in the matter. This Court considering a similar clause restricting jurisdiction by consent in Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd. [Swastik Gases (P) Ltd. v. Indian Oil Corpn. Ltd., (2013) 9 SCC 32 : (2013) 4 SCC (Civ) 157] , observed as follows: (SCC pp. 47-48, para 32)".*

51.2 The Supreme Court in ***Rakesh Kumar Verma v. HDFC Bank Ltd.***[21]*,* reiterated the settled legal position

[20] (2020) 12 SCC 667
[21] 2025 SCC OnLine SC 752

governing exclusive jurisdiction clauses and has further held that the parties must either impliedly or explicitly confer jurisdiction on a specific set of courts as follows:

> *"17. **The issue as to how an exclusive jurisdiction clause has to be read and understood is, thus, no longer res-integra.***
>
> *18. A bare perusal of the above decisions leads to the conclusion that for **an exclusive jurisdiction clause to be valid, it should be (a) in consonance with Section 28 of the Contract Act, i.e., it should not absolutely restrict any party from initiating legal proceedings pertaining to the contract, (b) the Court that has been given exclusive jurisdiction must be competent to have such jurisdiction in the first place, i.e., a Court not having jurisdiction as per the statutory regime cannot be bestowed jurisdiction by means of a contract and, finally, (c) the parties must either impliedly or explicitly confer jurisdiction on a specific set of courts. These three limbs/criteria have to be mandatorily fulfilled.***
>
> *19. **Swastik Gases (P) Ltd. (supra) is wholly applicable to the facts at hand, and being a larger Bench decision, binds us."***
>
> [Emphasis Supplied]

52. As has been stated by the respondent/plaintiff, the major part of the cause of action arose in Bangalore where the PBG had been issued and also where it was invoked and the registered offices of both parties were also situated in Bangalore. The contention of the petitioner/defendant is that the Courts at Bangalore, India have no jurisdiction to entertain any petitions under the Tripartite agreement.

Clause 13 of the Tripartite Agreement provides for 'Governing Law and Jurisdiction', which has been extracted in paragraph 46.1 above. However, Clause 23, of the Sojitz Agreement which has been reproduced at paragraph 47, provides for the jurisdiction of the Courts at Bangalore. The question as to which of these Agreements would be applicable to the subject matter of the dispute and whether the parties either impliedly or explicitly confer jurisdiction on a specific set of Courts, that is, Courts at Delhi or Bangalore have jurisdiction, would be a matter to be decided by the learned Commercial Court.

D. Disputed Questions of Fact:

53. The plaint and the documents filed along with the plaint, *prima facie* reflect that firstly the Tripartite Agreement contains a jurisdiction clause. The Sojitz Agreement contains a jurisdiction clause which sets out that the Courts at Bangalore have jurisdiction where the commercial suit has been filed. In addition and as is the settled legal position, the cause of action has to be adjudged by ascertaining as to where the cause of action for the

dispute arose and it is the contention of the respondent/plaintiff that the substantial part of the cause of action has arisen within the jurisdiction of Bangalore where both the performance bank guarantee was issued and the registered office of the parties are situated. This would require to be examined and decided by the learned Commercial Court especially given that this is a Commercial suit filed by the respondent/plaintiff and several disputed questions of fact have been raised. Concededly, where disputed questions of fact are involved , these cannot be made the subject matter of an examination under Order VII Rule 11 CPC.

54. A Bank Guarantee is essentially a contract of guarantee, whereby a Bank undertakes to make payment of a sum of money in the event of non-performance by the party on whose behalf the guarantee has been issued. The statutory definition of a 'Bank guarantee' emanates from the provisions of Section 126 of the Contract Act, 1872 (hereinafter referred to as 'the Contract Act'), which reads as under:

> ***"126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor'*** *– A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may either be oral or written."*

54.1 It is settled law that the bank guarantee is to be treated as a separate and independent contract and to be invoked on the basis of its terms. A bank guarantee does not concern itself with the beneficiary or the issuing authority and in the case of an unconditional bank guarantee, the Bank would undertake to give money on demand without demur or protest. The Bank would also not concern itself with the contract between the supplier and the customer nor with whether contractual obligations have been complied with and must be payable in accordance with its terms, without proof and on demand.

55. An examination of the PBG executed reflects that it is a performance bank guarantee and has been executed between IBM (the respondent/plaintiff) and its business partner. The PBG further states that it has been executed

in terms of the Business Partner Agreement (Contract number INV727942TA02) dated 03.03.2006, which is defined as the "Agreement" executed in relation to the MTNL tender and the MTNL purchase order placed on the petitioner/defendant on 14.02.2006. It further states that Canara Bank, M. G. Road, Overseas Branch, Bangalore, hereby undertakes to pay the petitioner/defendant amounts due under the guarantee not exceeding 10,47,72,665/- against any direct loss or damage caused or suffered or would be caused or suffered by BEL by reason of contract failure to install, commission and perform, acceptance testing for validation of products under and in accordance with the terms of the Agreement. The liability of the bank is for the said amount and upto 18.09.2006. The relevant extract of the bank guarantee is set out below:

> *"WHEREAS IBM India Pvt. Ltd., (hereinafter called 'the said Contractor") has agreed* ***inter alia to provide installation services under the terms of its Business Partner Agreement executed with its authorized Business Partner (Contract No. INV727942TA02) dated 3rd March 2006 (hereinafter called "the said Agreement")*** *in relation to the* ***MTNL Tender No MTNL/20-80(293)/2002-MM dated 13 April 2004*** *and MTNL Purchase Order NoMTNL/20-80(293)/2004-MM/Covergent Billing/VOL.III/8 Dated* ***February 14, 2006 placed on Bharath Electronics Limited ("BEL").***

1. We, Canara Bank, Overseas Branch, MG Road, Bangalore-560001 hereinafter refer to as "the bank") at the request of Contractor do hereby undertake to pay to CMD, BEL an amount not exceeding Rs 10,47,72,665/-(Rupees Ten Crores Forty Seven Lakhs Seventy Two Thousand Six Hundred and Sixty Five Only) against any direct loss or damage caused to or suffered or would be caused to or suffered by BEL by reason of Contractor's failure to install, commission and perform acceptance testing for validation of products under and in accordance with the terms and conditions contained in the said Agreement.

2. We Canara Bank, Overseas Branch, MG Road, Bangalore-560001 ***do hereby undertake to pay the amounts due and payable under this guarantee without any demur, merely on a demand from BEL by reason of the Contractor's' failure to install, commission and perform acceptance testing for validation of products under and in accordance with the terms and conditions of the said Agreement.*** *Any such demand made on the bank shall be conclusive as regards the amount due and payable by the Bank under this guarantee where the decision of BEL in these counts shall be final and binding on the bank. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs 10,47,72,665/-(Rupees Ten Crores Forty Seven Lakhs Seventy Two Thousand Six Hundred and Sixty Five Only).*

xxx xxx xxx

7. We Canara Bank, Overseas Branch, MG Road, Bangalore-560001 lastly undertake not to revoke this guarantee during its currency except with the previous consent of BEL in writing.

"Notwithstanding anything contained herein :

i. Our liability under this Bank Guarantee shall not exceed Rs 10, 47,72,665/-(Rupees Ten Crores Forty Seven Lakhs Seventy Two Thousand Six Hundred and Sixty Five Only)
ii. This Bank Guarantee shall be valid upto 18.09.2006.
iil. We are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only and only if you serve upon us a written claim or demand on or before 18.09.2006"

[Emphasis Supplied]

56. It is not disputed that this bank guarantee was extended from time to time and was in force when invoked.

57. The bank guarantee refers to performance under the agreement. The contract date and the reference number corresponds to the Sojitz Agreement which is between Sojitz and the respondent/plaintiff. However, the PBG is issued in relation to the MTNL Tender and the MTNL Purchase Order, which was placed on the petitioner/defendant.

58. In addition, the Sojitz Agreement also references the MTNL Tender and the MTNL Purchase Order which was placed on the petitioner/defendant. Paragraphs 1 and 2 of the PBG also state that the payment shall be made by the Bank against direct loss or damage suffered by the petitioner/defendant. The relevant extract of the Sojitz Agreement referencing this is below:

> *"By signing below, each of us agrees to the terms of the following (collectively* ***called the "Agreement"):***
>
> *(a) this Profile;*
>
> *(b) Transaction Agreement -* ***Remarketer (BXTRRT), as specified,*** *and*

(c) the applicable Attachments referred to in this Profile.

This Agreement and its applicable transaction documents are the complete agreement regarding this transaction, and replace any prior oral or written communications between us. Once this Profile is signed, 1) any reproduction of this Agreement or a transaction document made by reliable means (for example, photocopy or facsimile) is considered an original, to the extent permissible under applicable law, and 2) all Products you order and Services you perform under this Agreement are subject to it. After signing, please return a copy to the IBM address shown below.

Revised Profile (yes/no): no Date received by IBM:

Agreed to	*Agreed to*
Sojitz India Private Limited	***IBM India Private Ltd.***
Sd/-	*Sd/-*
(authorised signature)	*(authorised signature)*
Name (type or print)	*Name (type or print)*
M. MATSKSHITA	*AMIT SHARMA*
Date:	*Date: 3/8/2006*
Your Organization address:	*IGVI address:*
2nd Fl, Mercantile House 15	*Subramanya Arcade,*
Kasturba Gandhi Marg	*12, Bannerghatta Road,*
New Delhi-110 001.	*Bangalore-560 023.”*

xxx xxx xxx

DETAILS OF THE TRANSACTION

Contract Start Date (month/year): 3 March 2006

End Date: 2 March 2013

Contract Number: INV727942TA02

Approval/Acceptance of Additional Terms:
Each of us agrees to the terms of the following by signing this Profile.

Relationship Terms	*Applicable (yes/no)*	*Attachment*
Transaction Agreement-Remarketer	*Yes*	*BXTRRT*

Transaction Attachment	*Yes*	*BXDIST*
Transaction Agreement – Remarketer Attachment for IBM as Subcontractor for Services	*Yes*	*BPSVSC-02-00 03-2005*

With reference to:

(1) MTNL Tender No. MTNL/20-80(293)/2002-MM dated 13.04.2004 *for procurement of Convergent billing system and CRM and*
(2) MTNL Purchaser Order No. P.O. No. MTNL/20-80(293)/2004-MM/Convergent Billing/Vol.III18 Dated February 14, 2006 on Bharat Electronics Limited

xxx xxx xxx

The following footnotes apply, as noted, to the above Products.

(1) This Product contains Licensed Internal Code.

(2) The End User's signature is required on the Program License Agreement.

(3) Eligible for Price decrease and discount increase. Lookback period in months is stated.

Price/Discount or Fee
If you are approved under the terms of the Transaction Agreement-Remarketer, our price or discount, as applicable, for the Products and Services we approve you to market is below. If you request a change to the configuration, we will provide a revised price or discount schedule to you in writing.
All Approved Product/Services
Price: Rs.308,105.853.00"

[Emphasis Supplied]

59. Concededly, the PBG was invoked by the petitioner/defendant on 16.05.2014 citing that the

respondent/plaintiff has not performed his contractual obligations. Upon receipt of this invocation, the respondent/plaintiff addressed a communication to the Manager, Canara Bank, stating that under the terms of the bank guarantee, the only agreement that is referred to is the 'Sojitz Agreement' and that the respondent/plaintiff has not alleged breach of Sojitz Agreement, thus, the bank guarantee could not have been invoked.

60. Subsequently, the petitioner/defendant also addressed a communication dated 03.06.2014 setting out that the bank guarantee was encashed in view of the failure of the respondent/plaintiff to perform its obligations under the Tripartite Agreement. Thus, raising several questions which could only be decided by the leading of evidence by the parties.

61. As stated above, it is not disputed that pursuant to the invocation letter, the bank guarantee was encashed by the petitioner/defendant and that arbitral proceedings were also initiated between the parties in respect of their *inter se* disputes. It is however relevant for the purposes of this

judgment is not the *inter se* disputes between the parties, but the application filed by the petitioner/defendant which has been decided by the Impugned Order and which references the provisions of Order VII Rule 11 of CPC.

62. As has been discussed above, the Court while deciding such an application is only required to examine the plaint and the documents annexed with the plaint. The plaint as filed by the respondent/plaintiff only references the Sojitz Agreement and the fact that the bank guarantee was executed for performance of the Sojitz Agreement. For the purposes of examining this application, the Court would not be permitted to examine the defence as set out by the petitioner/defendant and all the gamut of communication *inter se* the parties or the disputed questions.

63. In addition, it has also been contended by the petitioner/defendant that the Arbitral Award which was pronounced on 15.11.2025 between the petitioner/ defendant and the respondent/plaintiff, has conclusively adjudicated on the issue which is pending before the learned Commercial Court.

64. However, this aspect would also require to be examined by the learned Commercial Court. Concededly, the order that is under challenge before this Court is an order dated 09.08.2019 which was passed much prior in time to the Arbitral Award being pronounced. Thus, this Court would be unable to examine the subsequent proceedings either.

E. Delay and Laches:

65. This Court also finds that this petition has been filed by the petitioner/defendant after an inordinate delay. The Impugned Order was passed on 09.08.2019 and the petition was filed 2 ½ years later. Although an explanation relating to circumstances emanating from Covid-19 Pandemic have been set out in the petition, given the fact that this is a commercial dispute, this Court finds that the delay in filing the petition has not been properly justified.

VIII. Conclusion:

66. In view of the aforegoing discussions, the issues involved in this case cannot be decided on a cursory

examination of the plaint and documents annexed with the plaint and would require trial and evidence.

67. The petition is accordingly ***dismissed***. Pending applications stand closed. This order shall not be construed as an examination of the suit on merits. All rights and contentions of both parties are left open to be agitated before the learned Commercial Court.

Sd/-
(TARA VITASTA GANJU)
JUDGE

KS
List No.1 Sl.No.1