IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DEEPAK KHOT

ON THE 14th OF AUGUST, 2026

ARBITRATION CASE No. 83 of 2026

M/S EXPRESS FOOD SREVICES

Versus

UNION OF INDIA AND OTHERS

Appearance:

Mr. Aryan Gupta - Advocate for appellant through VC and Ms. Malvika Tiwari - Advocate for appellant.

Mr. Sunil Jain - Additional Solicitor General for the Union of India with Mr. S.M. Guru - Deputy Solicitor General for the Union of India

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ORDER

I.A. No. 12451 of 2026 is an application for exemption from filing certified copy of arbitration agreement.

For the reasons mentioned in the application, which is supported by an affidavit, the same is allowed and disposed of.

Applicant is exempted from filing certified copy of arbitration agreement.

The present application has been filed by the applicant under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996' for the sake of brevity) for appointment of an arbitrator to resolve the dispute arose between the parties pursuant to terms of an agreement dated 23.09.2024 (Annexure-A/1).

2. The facts of the case in brief are that the applicant, M/s Express Food Services, through its Partner Shri Shivakant Pandey, was awarded a contract by the Railway authorities for operating a General Minor Unit (GMU) at Platform No.1, Bina End, Bhopal Railway Station. The contract was renewed from time to time. The renewal for the period from 01.01.2021 to 30.09.2024 was granted vide letter dated 05.10.2021 and thereafter the Master License Agreement dated 23.09.2024 was executed between the parties, containing an arbitration clause under Article 19.2. [Annexure A/1 & A/3]. Thereafter, pursuant to the letter dated 11.09.2024 issued by the Railway authorities, the applicant submitted the requisite documents and its contract was successively renewed from 01.10.2024 to 31.12.2024, thereafter up to 31.03.2025, 30.06.2025 and finally up to 30.09.2025. [Annexure A/4 to A/8]. Vide letter dated 26.09.2025, the Railway authorities called upon the applicant to submit documents for further renewal. Accordingly, the applicant submitted its application dated 29.09.2025. However, vide letter dated 30.09.2025, the request for renewal was rejected on the ground that six instances of fines had been recorded against the applicant on account of alleged faulty services. [Annexure A/9 to A/11]. The aforesaid action was contrary to Article 16.2 read with Annexure-III of the Master License Agreement, which prescribed counselling, written warning and graded penalties before taking adverse action. The applicant further alleges that the penalties imposed upon it were not in accordance with the prescribed contractual procedure. The details of such penalties were relied upon by the Railway authorities in their letter dated 09.10.2025. [Annexure A/12].

3. The alleged deficiencies had already been dealt with by way of fines, counselling and warnings and, therefore, the same allegations could not subsequently be relied upon as a ground for non-renewal of the licence, particularly when the contract had repeatedly been renewed despite knowledge of such alleged deficiencies. Aggrieved by the rejection of renewal, the applicant filed W.P. No.40020/2025 before this Hon'ble Court, which was dismissed vide order dated 15.10.2025 on the ground of availability of the alternative remedy of arbitration. The applicant thereafter preferred W.A. No.3098/2025, which was disposed of on 08.04.2026, relegating the applicant to avail the arbitration mechanism under the agreement. [Annexure A/13 & A/14]. Pursuant thereto, the applicant invoked the arbitration clause by issuing notice dated 15.04.2026, calling upon the Railway authorities to initiate arbitration proceedings and appoint an Arbitrator. Despite service of the notice, the non-applicants failed to take any effective steps for appointment of an Arbitrator. [Annexure A/2] . The applicant submits that, due to the continued inaction of the Railway authorities, the subject GMU/Shop has remained non-operational, causing financial loss and hardship to the applicant. The applicant further apprehends that the Railway authorities may create third-party rights or issue a fresh tender in respect of the subject shop, which may prejudice the applicant and frustrate the arbitral proceedings. The applicant has also instituted proceedings under Section 9 of the Arbitration and Conciliation Act, 1996, before the Commercial Court, Bhopal, being MJC (AV) No.32/2026, which is stated to be pending. In the aforesaid circumstances, the applicant has

preferred the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking appointment of an independent Sole Arbitrator for adjudication of the disputes arising out of the Master License Agreement dated 23.09.2024.

4. Learned counsel for the applicant submits that a valid and binding arbitration agreement exists under Article 19.2 of the Master License Agreement dated 23.09.2024, and the disputes arising from non-renewal of the GMU/Stall licence fall within its scope. It is submitted that the Applicant invoked the arbitration clause vide notice dated 15.04.2026, but despite its service, the non-applicants failed to take any steps for appointment of an Arbitrator, thereby attracting the jurisdiction of this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996. Learned counsel submits that the Railway authorities acted contrary to Article 16.2 read with Annexure-III of the Agreement by imposing penalties without following the prescribed procedure of counselling, warning and graded penalties, and thereafter relying upon the same penalties to deny renewal. It is further submitted that the continued inaction of the non-applicants has caused financial loss to the applicant, while there is also an apprehension of creation of third-party rights in respect of the subject GMU/Stall, which may prejudice the applicant and frustrate the arbitral proceedings. Learned counsel, therefore, prays that an independent Sole Arbitrator be appointed under Section 11(6) of the Arbitration and Conciliation Act, 1996, for adjudication of the disputes arising out of the Master License Agreement dated 23.09.2024.

5 . Learned counsel for the respondents submits that the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is premature, as the respondents have already initiated the contractual procedure for appointment of an Arbitrator under Clause 19.2(a), but the Applicant itself failed to submit the prescribed Arbitration Form despite being called upon to do so. It is further submitted that the respondents never refused to appoint an Arbitrator and that the agreed procedure has not failed. The disputes regarding penalties and non-renewal involve disputed questions of fact which are to be adjudicated by the Arbitral Tribunal. Learned counsel further submits that the renewal of the licence was conditional upon satisfactory performance and did not create any vested right in favour of the Applicant. The decision not to renew the licence was taken after considering the applicant's overall performance, complaints and departmental record. It is also submitted that the applicant has suppressed the material fact that its proceedings under Section 9 of the Act were dismissed on 08.07.2026 and that no interim protection presently operates in its favour.

6. Heard learned counsel for the parties and perused the record.

7. This Court finds that the existence of a valid arbitration agreement between the parties under Clause 19.2 of the Master License Agreement dated 23.09.2024 is not in dispute. Thereafter, dispute arose between the parties pertains to the refusal of the Railway authorities to further renew the Applicant's GMU/catering licence, allegedly on the basis of earlier penalties imposed for service deficiencies, and the Applicant's claim that such action was contrary to the terms and conditions of the Master License Agreement

dated 23.09.2024. The applicant had invoked the arbitration clause vide notice dated 15.04.2026, and the Respondents failed to complete the process of appointment of an Arbitrator within a reasonable time. The subsequent correspondence requiring the Applicant to furnish the Arbitration Form cannot defeat the Applicant's right to seek recourse under Section 11(6) of the Arbitration and Conciliation Act, 1996, as it is against the mandate of section 12 of the Act of 1996.

8. The Apex Court in the case of the case ***Perkins Estman Architects DPC vs. HSCC (India) Ltd. (2020) 20 SCC 760***, has held as under :-

"18. The issue was discussed and decided by this Court as under : (TRF case [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , SCC pp. 403-04, paras 50-54)

"50. First, we shall deal with clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a

nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement [State of Orissa v. Commr. of Land Records & Settlement , (1998) 7 SCC 162] . In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held

: (SCC p. 173, para 25)

> *'25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab [Roop Chand v. State of Punjab, AIR 1963 SC 1503] . In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by a n y officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate.'*

(emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P. [Behari Kunj Sahkari Awas Samiti v. State of U.P., (1997) 7 SCC 37] , which followed the decision in Roop Chand v. State of Punjab [Roop Chand v. State of Punjab, AIR 1963 SC 1503] . It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran [Indore Vikas Pradhikaran v. Pure Industrial Coke &

Chemicals Ltd., (2007) 8 SCC 705] .

52. Mr. Sundaram has strongly relied on Pratapchand Nopaji [Pratapchand Nopaji v. Kotrike Venkata Setty & Sons , (1975) 2 SCC 208] . In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se ". We may profitably reproduce the passage : (SCC p. 214, para 9)

> *'9. … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim:"qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only.'*

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only *concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view [TRF Ltd. v. Energo Engg. Projects Ltd., 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so."*

19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said clause, the first as an arbitrator and the *second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.*

20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , all cases having *clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.*

9. The Apex Court in the case of ***Central Organisation for Railway Electrification vs. ECI SPIC SMO MCML (JV) (2025) 4 SCC 641,*** has held as under :-

"31. The above extract suggests that an arbitration agreement entered into by the parties is subject to certain well-defined and mandatory legal principles. For instance, Section 34(2)(a)(v) allows for refusal of enforcement of arbitral awards if the composition of the Arbitral Tribunal or arbitral procedure was not following the agreement of the parties unless such agreement conflicts with the mandatory provisions of the law. [Section 34(2)(a)(v), Arbitration Act. It reads:"34. (2)(a)(v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing, such agreement, was not in accordance with this Part;"] The composition of the Arbitral Tribunal or the arbitral procedure must not only be in accordance with the agreement of the parties but also be consistent with the

mandatory standards laid down under the Arbitration Act. [Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session (3-6-1985 to 21-6-1985) Supplement No. 17 (A/40/17) [290]. The Report states:"290. As regards the standards set forth in the sub-paragraph, it was understood that priority was accorded to the agreement of the parties. However, where the agreement was in conflict with a mandatory provision of "this Law" or where the parties had not made an agreement on the procedural point at issue, the provisions of "this Law", whether mandatory or not, provided the standards against which the composition of the Arbitral Tribunal and the arbitral procedure were to be measured."] In case of a conflict, mandatory provisions of the Arbitration Act prevail over the arbitration agreement between the parties. [A/CN.9/246, para 135.]"

169. In the present reference, we have upheld the decisions of this Court in TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and Perkins [Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760] which dealt with situations dealing with sole arbitrators. Thus, TRF [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and Perkins [Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760] have held the field for years now. However, we have disagreed with

Voestalpine [Voestalpine Schienen GmbH v. DMRC Ltd., (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] and CORE [Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712] which dealt with the appointment of a three-member Arbitral Tribunal. We are aware of the fact that giving retrospective effect to the law laid down in the present case may possibly lead to the nullification of innumerable completed and ongoing arbitration proceedings involving three-member tribunals. This will disturb the commercial bargains entered into by both the government and private entities. Therefore, we hold that the law laid down in the present reference will apply prospectively to arbitrator appointments to be made after the date of this judgment. This direction only applies to threemember tribunals.

170.3. A clause that allows one party to unilaterally appoint a sole arbitrator gives rise to justifiable doubts as to the independence and impartiality of the arbitrator. Further, such a unilateral clause is exclusive and hinders equal participation of the other party in the appointment process of arbitrators;

10. The Apex Court in the case of ***SBI General Insurance Co. Ltd vs. Krish Spinning (2024) SCC OnLine SC 1754,*** has held as under :-

"108. Section 11 of the Act, 1996 is provided to give effect to the mutual intention of the parties to settle their disputes by arbitration in situations where the parties fail to appoint an

arbitrator(s). The parameters of judicial review laid down for Section 8 differ from those prescribed for Section 11. The view taken in SBP & Co. (supra) and affirmed in Vidya Drolia (supra) that Sections 8 and 11 respectively of the Act, 1996 are complementary in nature was legislatively overruled by the introduction of Section 11(6-A) in 2015. Thus, although both these provisions intend to compel parties to abide by their mutual intention to arbitrate, yet the scope of powers conferred upon the courts under both the sections are different.

110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16 implies that the scope of enquiry under section 11(6-A) is limited to a prima facie scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to 'rule' under Section 16. The prima facie view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

11. On the basis of aforesaid enunciation of law by the Hon'ble Apex

Court, it is clear that section 12(5) has been inserted in the statute with an object to curtail one sided contract based on bias. The only exception has been carved out is the waiver of the applicability, that too, with the consent of both the parties. A party to an agreement alone cannot decide to have an Arbitrator of their choice when the second party is not consenting to the said proposal.

12. The disputes raised by the Applicant arise out of the Master License Agreement and are arbitrable in nature. The contentious issues relating to the penalties, alleged breach of contractual procedure and non-renewal of the licence involve matters which are appropriately left for adjudication by the Arbitral Tribunal and need not be examined on merits at this stage.

13. However, any question which goes to the root of the matter including the jurisdiction and limitation is always to be determined by the Arbitrator in view of the law laid down by the Hon'ble Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455*** and in the case of ***Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd., (2025) 1 SCC 502.***

14. The Hon. Apex Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Ltd. (supra)***, while over-ruling the order of this Court in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coalfield Limited, 2018 (4) MPLJ 45***, has held that after the amendment in the Act of 1996, section 6A has been inserted which provides that all the questions in regard to jurisdiction, limitation or which goes to the root shall

be decided by the Arbitrator and those are not to be decided by this Court at the referral stage. For ready reference the principle laid down in Para 7 is reproduced here and below :-

"7. We have heard the learned counsel for the parties and perused the pleadings.

7.1. Section 21 of the 1996 Act provides that arbitral proceedings commence on the date on which a request for disputes to be referred to arbitration is received by the respondent.

7.2. In the present case, the notice of arbitration was issued by the petitioner Contractor to the respondent Company on 9-3-2016. The invocation took place after Section 11 was amended by the 2015 Amendment Act, which came into force on 23-10-2015, the amended provision would be applicable to the present case.

7.3. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11: first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under sub-section (6-A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.

7.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide:

(i) whether there was a valid arbitration agreement; and

(ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and

(iii) whether the party making the motion had approached the appropriate High Court.

7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a *dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] was followed by this Court in Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , and other decisions.*

7.6. The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law Commission of India (August 2014), p. 20.] recommended that:

> *"33. … the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the [Ed.: The matter between two asterisks has been emphasised in original.] nature [Ed.: The matter between two asterisks has been emphasised in original.] of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal."*
>
> *(emphasis supplied)*

7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the kompetenz-kompetenz principle enshrined in Section 16 of *the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:*

> *"(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."*
>
> *(emphasis supplied)*

7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in Duro Felguera S.A. v. Gangavaram Port Ltd. [Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764. Refer to TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , wherein this Court held that: (SCC p. 759, para 48)

> *"48. … From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."*
>
> *(emphasis supplied)*

7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral

Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement.

Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

7.14. In the present case, the issue of limitation was raised by the respondent Company to oppose the appointment of the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In ITW Signode (India) Ltd. v. CCE [ITW Signode (India) Ltd. v. CCE, (2004) 3 SCC 48] a three-Judge Bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law. Reliance is also placed on the judgment of this Court in NTPC Ltd. v. Siemens Atkeingesellschaft [NTPC Ltd. v. Siemens Atkeingesellschaft, (2007) 4 SCC 451] , wherein it was held that the Arbitral Tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34. In Iffco Ltd. v. Bhadra Products [Iffco Ltd. v. Bhadra Products, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the Uncitral Model Law which enshrines the kompetenz principle.

15. This view has also been taken by the Larger Bench of the Hon'ble Apex Court in the case of ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), (2025) 4 SCC 641***, wherein it is held that at

the stage of deciding an application for appointment of an Arbitrator, the Court must not conduct an intricate enquiry into the matter, where the claim raised by the applicant is time barred and should be left open for determination by the Arbitrator. Such an approach gives true meaning to the view taken in the case of ***Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1.***

11. The Hon'ble Apex court in the case of ***Aslam Ismail Khan Deshmukh (supra)*** has held as under :-

50. As evident from the aforesaid discussion and especially in light of the observations made in Krish Spg. [SBI General Insurance Co. Ltd. v. Krish Spg., (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754] , this Court cannot conduct an intricate evidentiary enquiry into the question of when the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time-barred. This has to be strictly left for the determination by the Arbitral Tribunal. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in Respondent 1 company are concerned with the merits of the dispute which squarely falls within the domain of the Arbitral Tribunal.

51. It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists — nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process....

52. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused *the process of law and caused unnecessary harassment to the other party to the arbitration.*

53. The existence of the arbitration agreement as contained in Clause 13.10 of the shareholders' agreement is not disputed by either of the parties. The submissions as regards the claim of the petitioner being ex facie time-barred may be adjudicated upon by the Arbitral Tribunal as a preliminary issue.

54. In view of the aforesaid, the present petitions are allowed. Taking into consideration the fact that an Arbitral Tribunal comprising of a sole arbitrator, Mr Mayur Khandeparkar (Advocate, High Court of Judicature at Bombay) has already been constituted for the adjudication of disputes between the same parties in relation to the service agreement dated 18-10-2011, it would be desirable to constitute an Arbitral Tribunal comprising of the same sole arbitrator for adjudication of the present disputes pertaining to the shareholders' agreement dated 25-7-2011. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

55. In the facts of the present case, it would be apposite to observe that, in the event the Arbitral Tribunal ultimately finds the present claims of the petitioner to be time-barred, it may direct that the costs of the arbitration pertaining to these claims be borne solely by the petitioner herein.

56. It is made clear that all the other rights and contentions of the parties are left open for adjudication by the learned arbitrator.

12. Considering the fact that there exists arbitration clause and the dispute still exits between the parties, the question of limitation is always open to be agitated before the arbitrator in view of the law laid down by the Hon'ble Apex Court in the cases referred hereinabove, the application is, therefore, allowed and an independent Sole Arbitrator is appointed to adjudicate the disputes arising between the parties out of the Master License Agreement dated 23.09.2024, in accordance with law.

13. Considering the list of empanelled Arbitrators issued by the M.P. Arbitration Centre, Jabalpur, following order is passed:

(i) *Shri Anil Thakre, Retired District and Sessions Judge, 36, Rachna Nagar, Govindpura, Bhopal (M.P.), 462023, Contact No.94250-25431, thakre1952@gmail.com is appointed as sole Arbitrator to resolve the dispute between the parties in the case.*

(ii) Arbitrator shall issue the notices and fix the date and suitable venue for arbitration. Said arbitration will take place at Bhopal.

(iii) Parties are directed to deposit necessary charges and fees as per M.P. Arbitration Center (Domestic and International) Rule, 2019.

(iv) Director of Madhya Pradesh Arbitration Centre, Domestic and International, Jabalpur (M.P.D.I.A.C.) shall communicate the decision of this Court to the Sole Arbitrator.

(v) Other provisions of Section 15(3)(4) of the Arbitration and Conciliation Act, 1996 will apply to substitute Arbitrator.

14. With the aforesaid, the Arbitration Case is disposed of.

(DEEPAK KHOT)
JUDGE

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