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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION**

**INTERIM APPLICATION NO. 1969 OF 2025
IN
COMMERCIAL SUMMARY SUIT NO. 3 OF 2025**

Mumbai Metro One Private Limited ... Applicant

In the matter between:

Hindustan Construction Company ...Plaintiff

Versus

Mumbai Metro One Private Limited ...Defendant

Mr. Karl Tamboly a/w Mr. Tushad Kakatiya a/w Mr. Paresh Patkar, Mr. Kartik Hede, Mr. Ayaan Zariwalla and Ms. Bhakti Chandan i/b Mulla and Mulla & CBC, Advocate for the Applicant/Defendant.

Mr. Shanay Shah a/w Ms. Viloma Shah a/w Mr. Ativ Patel & Mr. Harshad Vyas i/b. AVP Partners, Advocate for the Respondent/Plaintiff.

CORAM	:	ABHAY AHUJA, J.
RESERVED ON	:	10th OCTOBER 2025
PRONOUNCED ON	:	18th DECEMBER 2025

ORDER. :-

1. This Interim Application has been filed by the Defendant seeking to refer the suit to Arbitration under Section 8 of the Arbitration and Conciliation Act, 1996 and accordingly dispose of Commercial Summary Suit No. 3 of 2025.

2. The background facts leading to the filing of this application has been stated in the Application as under:

2.1 The Applicant is a private limited company and statedly is operator/concessionaire of Mumbai Metro Line – 1 project, operating between Versova, Andheri and Ghatkopar in Mumbai. The Respondent is a company operating *inter alia* in the infrastructure and construction sector.

2.2 The Applicant appointed the Respondent as a contractor to execute various works in respect of the Mumbai Metro Line - 1 project (between Versova – Andheri - Ghatkopar). Thereafter parties entered into a contract agreement dated 16th August 2010 (the “Contract”) which set out the terms and conditions between the parties. The Clause 19.7 of the said contract provided for reference to arbitration. The said clause is reproduced as under:

19. CLAIMS, DISPUTES, CONCILIATION AND ARBITRATION

19.1 ...

.....

19.7 If the efforts to resolve all or any of the disputes, differences or controversy through negotiation fail, then such disputes or differences, whatsoever arising between the Parties, arising out of or relating to construction, measuring, operation or effect of the Contract or the breach thereof shall be referred to arbitration in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole arbitrator if the total value of the claim is upto Rupees ten (10) million and to a panel of three (3) arbitrators if total value of claims is more than Rs.10 million. The sole arbitrator shall be appointed mutually by the Parties and in case the Parties fail to agree on the sole arbitrator, then the sole arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996. In the arbitration panel each Party shall nominate one (1) arbitrator each and the third arbitrator shall be chosen by the two (2) arbitrators nominated by the Parties. The arbitrator(s) shall be appointed within a period of thirty (30) days from the date of receipt of written notice/demand of appointment of arbitrator from either Party.

(b) The arbitration proceedings shall be held in Mumbai. The language of proceedings, documents and communication shall be English.

(c) The award of the sole arbitrator or the award by majority of three arbitrators as the case may be shall be binding on all Parties.”

2.3 It is submitted that during the course of the works, disputes arose regarding certain performance bank guarantees furnished by the Respondent under the Contract. In view of the aforesaid arbitration clause, the Respondent preferred an application under Section 9 of the Arbitration and Conciliation Act, 1996 (the “Arbitration Act”) whereby *inter alia* release of performance bank guarantees was sought.

2.4 During the pendency of the said application the parties entered into a Settlement Agreement dated 28th March 2024 (the “Settlement Agreement”) whereby the Applicant agreed to return the performance bank guarantees furnished by the Respondent and pay a sum of Rs.9,00,00,000 (Rupees Nine Crores Only) to the Respondent towards full and final settlement of the disputes between the parties.

2.5 It is submitted that the Applicant returned the performance bank guarantees to the Respondent as well as issued the final taking-over certificates. The Application under Section 9 of the Act was disposed of as infructuous with liberty to the Plaintiff to adopt appropriate proceedings to recover the amount of Rs. 9 Crores in terms of the Settlement Agreement.

2.6 It is submitted that the Applicant was in financial difficulty due to which the amount of Rs. 9 Crores under the Settlement Agreement remained unpaid. In view of the same, the Respondent on 1st March 2025 filed the Commercial Summary Suit on the basis of the Settlement Agreement towards the settlement of its outstanding dues.

2.7 It is submitted on behalf of the Applicant that the Settlement Agreement was executed in furtherance of the Contract, and in view of obligations arising there under, as well as Work Orders bearing numbers 23534303, 23523192 and 2523272. Accordingly, any disputes arising under the Settlement Agreement would also be required to be settled by way of Arbitration.

3. The Respondent/Plaintiff objects to the grant of any reliefs in the Application on the ground that Settlement Agreement has superseded the Contract and that being so, the Contract no longer exists. It is further stated that there is no arbitration clause in the Settlement Agreement and on this ground alone, this Application ought to be dismissed.

4. Further it is submitted that Article 2 of the Settlement Agreement provides the governing law and a jurisdiction clause which expressly omits the arbitration clause and only provides for courts at Mumbai to have jurisdiction over the subject matter thereof.

5. In rejoinder, the Applicant has submitted that the Settlement Agreement, in the absence of express written intent, could not have

superseded the Contract, and the arbitration clause contained therein applies to the disputes arising out of the Settlement Agreement as well. It is further stated that the arbitration clauses contained in a contract are separate and autonomous, and survive even after the termination of the main contract.

6. Mr. Karl Tamboly, Learned Counsel appearing for the Applicant has submitted that the reference under Section 8 would be necessitated in view of the Arbitration Clause contained in the contract agreement dated 16th August 2010.

7. Mr. Tamboly, has submitted that the recitals of the Settlement Agreement more particularly Recital E make it expressly clear that it arises in furtherance of the Contract and the Work Orders, and is therefore intrinsically linked to the same. The said recital contained in the Settlement Agreement is usefully reproduced as under:

“E. Further the Employer and the Contractor have jointly reconciled the total amounts that are due and payable to the Contractor under the Contract and WO and the Parties have agreed that the total amount, due and payable to the Contractor by the Employer under the Contract and WO, towards, full and final settlement, is Rs.9,00,00,000/- (Rupees Nine Crores Only) (“Settlement Amount”), as per the details given in Annexure-1.”

8. Next, Mr. Tamboly had drawn this Court's attention to the Contract Agreement dated 16th August 2010, Clause 1 of the Agreement which states the following documents constitute the Contract (a) Work Order dated July, 2010 (b) Contract Agreement dated August, 2010, (c) Schedules to the Contract Agreement dated August 2010, (d) Conditions of Contract signed on August 2010, (e) Schedules to the Conditions of Contract dated August 2010, (f) Employer's Requirements – Drawings, (g) Employer's Requirements – Technical Specifications (including Appendices) signed on August, 2010; (h) Employer's Requirements – General Specifications (including Appendices) signed on August 2010; (i) Other Tender Documents; and (j) Tender.

9. Learned Counsel would submit that the Clause 1.1.18 and Clause 1.1.19 which defines "Contract" and the "Contract Agreement" which is reproduced as under:-

"1.1.18 "Contract" means the agreement between the Employer and the Contractor for the Execution of the Works, including the Work Order, the Contract Agreement, the Conditions of Contract, the Schedules, the Employer's Requirements, the Tender, Other Tender Documents and such further documents which are listed in the Contract Agreement and includes any amendment thereto made in accordance with the

provisions hereof.

1.1.19 “Contract Agreement” means the agreement entered into by the Parties along with the Pricing Document and scope of Works and includes any amendment thereto made in accordance with the provisions hereof.”

10. Mr. Tamboly has also taken this Court through the Clause 19 to the Contract which provides for Claims, Disputes and Arbitration, clause 19.1 which sets out the procedure for claims and particularly clause 19.1(f) which is reproduced as under :

“19.1 (f) Notwithstanding anything contained in the Contract, the Employer shall not be liable for any claim for any matter, arising out of or in connection with the Contract or the Execution of the Works, unless the Contractor shall have given a notice to the Employer in respect thereof, in writing, within sixty (60) days from the date of issuance of the Final Taking Over Certificate. It is clarified for the avoidance of doubt for any such claim under this Clause 19.1(f), the Contractor shall still be required to comply with the procedure set out under Clause 19.1(a) to 19.1(e).”

11. Mr. Tamboly has submitted that Settlement Agreement was executed in furtherance of the Contract and Work Orders, and as the Contract contains a provision for the settlement of disputes through arbitration, in Clause 19.7 thereof accordingly this dispute arising under the Settlement Agreement would also be required to be settled

by way of arbitration. Learned Counsel would submit that the arbitration agreement contained in Clause 19.7 is wide enough to cover the dispute raised by the Respondent which arises out of the original contract.

12. Mr. Tamboly has submitted that the Settlement Agreement does not operate to supersede and / or override the Contract, the principle that an arbitration agreement is separate and severable from the main contract is now settled law, and is statutorily recognized under Section 16(1) of the Arbitration Act. It is only in cases where the main contract is alleged to be void, illegal, or executed under fraudulent circumstances, that the arbitration agreement also ceases to hold force. Mr. Tamboly has relied upon the decision of the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 In re*,¹ in support of his contention.

13. It is submitted therefore that the reliefs as sought for in this Application be granted.

14. On the other hand, Mr. Shanay Shah, Learned Counsel for the Respondent has opposed the Application and would submit that this

¹ (2024) 6 SCC 1

application is nothing but merely an attempt to derail the entire proceedings. Mr. Shah would submit that it is an admitted fact that the Defendant has failed and neglected to pay the admitted amount of Rs. 9 Crores as the execution of the Settlement Agreement is not disputed. That there is an explicit admission of liability and this application proceeds on an erroneous basis.

15. Mr. Shah, has submitted that a bare perusal of the Settlement Agreement will make it evident that the Contract has been superseded/novated/abrogated by the Settlement Agreement. Mr. Shah would submit that the same is evident from Article 5(i) and Article 5(ii) of the Settlement Agreement which is reproduced as under:

“ARTICLE 5 MISCELLANEOUS

The Employer and the Contractor agree that the obligations as listed in Article 1 hereto are the full and final obligations to be performed by either/both of the Parties.

This Settlement Agreement supersedes any/all consideration, contemporaneous negotiations, understanding and agreement, whether written or oral, agreed upon by the Parties.”

16. Mr. Shah has submitted that therefore in light of the Article 5 (i) and (ii) the arbitration agreement contained in the Contract can have no nexus to the Settlement Agreement.

17. Mr. Shah has also submitted that the Article 2 of the Settlement Agreement sets out the governing law and jurisdiction wherein it is categorically mentioned that this Settlement Agreement shall be governed and construed in accordance with the laws of India and courts of Mumbai will have exclusive jurisdiction. That as the Settlement Agreement is silent on arbitration and as there is novation of contract and the previous contract does not survive the claim for non-payment of outstanding dues under the Settlement Agreement is not arbitrable.

18. Mr. Shah would draw this Court's attention to the Order dated 24th September 2024 passed in the Commercial Arbitration Petition (L) No. 34225 of 2023 and submit that the order records the categorical admission of the Applicant/ Defendant that it is in fact liable to pay the outstanding amount of Rs. 9 Crores and provided liberty to the Plaintiff to adopt appropriate proceedings to recover the admitted amount of Rs. 9 Crores. Mr Shah, would submit that if at all the arbitration clause contained in the Contract also applied to the Settlement Agreement, the observations made in the Order dated 24th September 2024 would never have been made.

19. Mr. Shah would submit that after the Section 9 Petition was disposed of, the Plaintiff addressed a legal notice calling upon the Defendant to pay a sum of Rs. 9 Crores along with interest at the rate of 18% a within a period of 14 days. Mr. Shah would draw attention of this Court to the response of the Applicant/Defendant dated 3rd January 2025 wherein the Applicant/Defendant has categorically admitted its obligations under the Settlement Agreement and requested for a few months time from the Respondent/Plaintiff. Mr. Shah would submit that even in this response the Applicant/Defendant has admitted its liability.

20. Mr. Shah would place reliance on the decision of the Delhi High Court in the case of *Larsen and Toubro Limited v. Ireo Victory Valley Private Limited*² submitting that the facts of this case are identical to the present application wherein the Court was dealing with a similar question of the survival of the arbitration clause in a contract after the contract is superseded by the execution of Settlement Agreement and submitted that if a mutual settlement supersedes the original contract, the original arbitration clause would not survive. Mr. Shah would submit that therefore in light of this decision this Court ought not to refer the dispute to arbitration.

² 2024 SCC OnLine Del 2882

21. Mr. Shah has submitted that the findings of the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 In re(supra)* do not disturb the settled position of law namely that if the parties put an end to a validly executed contract, the arbitration clause of the original contract also perishes with it and has relied on the decision of this Court in the case of ***BKS Galaxy Realtors LLP v. Sharp Properties and Others.***³

22. Mr. Shah has submitted that a reference under Section 8 of the Arbitration Act as sought by the Applicant can only be made only if the matter in an action is also subject matter of Arbitration Agreement, and therefore this Court is required to ascertain whether the action in present Suit is also subject matter of Arbitration and has relied on the decision of this Court in the case of ***Capri Global Capital Limited v. M/s. Divya Enterprise and Others***⁴ in support. Mr. Shah has further submitted that the Hon'ble Supreme Court in the decision of ***Zenith Drugs & Allied Agencies Pvt Ltd. v. Nicholas Piramal India Limited***⁵ has laid down the following conditions to be satisfied for referring the

³ 2024 SCC OnLine Bom 3514

⁴ 2025: BHC-OS:18363

⁵ (2020) 17 SCC 419

parties to arbitration under Section 8 of the Act:-

- (i) there is an arbitration agreement
- (ii) a party to the agreement brings an action in the court against the other party;
- (iii) subject matter of the action is the same as the subject matter of the arbitration agreement
- (iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

23. Mr. Shah has submitted that the present summary suit as clearly stated in paragraphs 69, 70 and the prayers in the Plaint has been filed under Order XXXVII of the Code of Civil Procedure, 1908 ("CPC") on the basis of the Settlement Agreement and the subsequent default of the Defendant to repay the admitted amounts in terms of the Settlement Agreement and therefore the dispute between the parties is not an arbitrable dispute as the Settlement Agreement having an independent governing law and jurisdiction clause which expressly omits the arbitration clause and only provides for Courts at Mumbai to have jurisdiction over the subject matter.

24. In rejoinder, Mr. Tamboly would contend that the Respondent/Plaintiff themselves moved the Arbitration Court after the

Settlement Agreement and the Petition under Section 9 was only disposed of as infructuous as the reliefs claimed under the Section 9 were satisfied and nothing survived. Therefore, it would be incorrect on the part of the Respondent/Plaintiff that in view of the order passed in the Section 9 Petition, the arbitration clause does not survive.

25. Mr. Tamboly, has further relied on the decision of this Court in ***Shree Siddhivinayak Classic Construction Pvt Ltd & Anr v. IIFL Finance Limited & Anr.***⁶ where in an Application under Section 11, wherein the disputes and differences between the parties relating to a Settlement Agreement, the existence of an arbitration agreement itself was in doubt owing to a subsequent settlement having been reached between the parties, the Court in this decision referred the dispute to Arbitration. Mr. Tamboly would submit that in light of this decision this Court ought to refer this dispute to Arbitration.

26. Mr. Tamboly has submitted that even in cases where a settlement agreement was purported to supersede a prior contract courts have rightly distinguished that it was only in cases where the main contract was expressly superseded, rescinded, or overridden by a subsequent contract, that the arbitration clause contained in main agreement

⁶ 2025 BHC-OS : 12113

would also cease to have force and has relied on the following decisions:-

*(i) Gold Prism Realty Pvt Ltd v. M/s. Paradigm Ambit Buildcon*⁷

*(ii) Sirajuddin Kasim and Another v Paramount Investments Limited*⁸

27. Learned Counsel has submitted that the decision of the Delhi High Court in the case of *Larsen and Toubro Limited v. Ireo Victory Valley Private Limited (supra)* is based on the judgments of the Hon'ble Supreme Court in the case of *Union of India v. Kishorilal Gupta & Bros*⁹ and *Damodar Valley Corporation K.K.Kar*¹⁰ and that the Hon'ble Supreme Court in paragraphs 115 and 116 of the decision in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 (Supra)* noted that the separability doctrine has undergone a significant evolution, spurred in part by the enactment of the Arbitration and Conciliation Act, 1996 and the inclusion of Section 16 therein. Mr. Tamboly has submitted that therefore these developments have rendered the decisions of the Hon'ble Supreme Court in *Union of India v. Kishorilal Gupta & Bros (supra)* and *Damodar Valley Corporation v K.K.Kar (supra)* redundant.

⁷ 2019:BHC-OS:11039

⁸ (2010) 8 SCC 557

⁹ 1959 SCC OnLine SC 6

¹⁰(1974) 1 SCC 141

28. Mr. Tamboly has submitted that the findings of this Court in *BKS Galaxy Realtors LLP v. Sharp Properties and Others (supra)* would have to be read in the context in which they were rendered. That in that case, the Court concluded that the arbitration clause could not be said to have survived upon the Sale Deed being executed, since upon such execution, the prior Agreement for Sale would indisputably come to an end, however, in the present case the question of whether the Settlement Agreement has completely superseded the Contract is a question which is at large and that following the dictum of the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 (Supra)* this dispute between the parties about whether the subsequent agreement does or does not supersede the prior agreement must also be referred to the arbitral tribunal, as in any event, Section 16 of the Arbitration Act makes it clear that the arbitral tribunal is competent to rule on its own jurisdiction, and any objection thereto can be raised before the Arbitral Tribunal once constituted.

29. I have heard the Learned Counsel at length and considered the rival contentions. The hearing of this Application was concluded on 10th October 2025 and the order was reserved.

30. As noted above the Interim Application is filed under Section 8 of the Arbitration and Conciliation Act seeking to refer the disputes to Arbitration.

31. Under Section 8 of the Arbitration Act, an action brought before the Court in a matter which is the subject of an Arbitration Agreement needs to be referred to arbitration. Section 8 of the Arbitration Act is reproduced for reference:-

“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.

32. Thus an application under Section 8 of the Arbitration act can be made only if the subject matter of the suit is also the same as the subject-matter of arbitration and only those disputes which are specifically agreed to be resolved through arbitration can be the subject-matter of arbitration; and upon satisfaction of the same, the Court can refer the parties to arbitration.

33. The Hon'ble Supreme Court in the decision of *Zenith Drugs and Allied Agencies Private Ltd v. Nicholas Piramal India Ltd (Supra)* has laid the following conditions which have to be satisfied under Section 8 for referring the parties to arbitration:

(i) there is an arbitration agreement;

(ii) a party to the agreement brings an action in the court against

the other party;

(iii) subject-matter of the action is the same as the subject matter of the arbitration agreement;

(iv) the opposite party applies to the judicial authority for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

34. Therefore a reference under Section 8 of the Arbitration Act can be made only if the matter in an action is also subject of an Arbitration Agreement. Therefore, this Court is required to ascertain whether the action in the present Suit is also the subject matter of Arbitration.

35. The Summary Suit has been filed for a sum of Rs.9,00,00,000/- being the principal amount along with Rs.1,35,44,384/- as interest at the rate of 18% per annum from 27th April 2024 till filing of the suit. The said amount is claimed under the Settlement Agreement and admittedly there is no arbitration clause in the Settlement Agreement. Mr. Tamboly has sought to trace the arbitration clause to the Contract which was entered into for carrying out civil works by the Plaintiff for the Defendant in 2010. Owing to disputes between the parties the Plaintiff had instituted a Petition under Section 9 of the Arbitration Act against the Defendant and the disputes between the parties were settled in terms of the Settlement Agreement.

36. In *Zenith Drugs & Allied Agencies Pvt Ltd. v. Nicholas Piramal India Limited (supra)* the Hon'ble Supreme Court has relying on the decision of the Hon'ble Supreme Court in the case of ***Yogi Agarwal v. Inspiration Clothes & U¹¹*** observed that filing application under Section 8 of the Act should relate to the arbitration agreement or to be applicable to the dispute. Paragraph 15 of the decision is usefully quoted as under:-

“15. Observing that filing application under Section 8 of the Act should relate to the arbitration agreement or to be applicable to the dispute, in Yogi Agarwal v. Inspiration Clothes & U, it was held as under:

“9. When a defendant invokes Section 8 of the Act by alleging existence of an arbitration agreement, he should establish that such arbitration agreement related to, or is applicable to, the suit transaction/contract. The parties may enter into different contracts at different points of time or may enter into a series of unrelated transactions. It is possible that in regard to some, they may provide for arbitration. Obviously, the existence of an arbitration agreement with reference to some other transaction/contract to which the plaintiff was or is a party, unconnected with the transactions or contracts to which a suit relates, cannot be considered as existence of an “arbitration agreement” in regard to the suit transactions/contracts.”

¹¹ (2009) 1 SCC 372

37. In *Larsen and Toubro Limited v. Ireo Victory Valley Private Limited (supra)* the Delhi High Court had the occasion to consider a very similar fact situation as the present case wherein the Delhi High Court held that if a mutual settlement supersedes the original contract, the original arbitration clause would not survive. Paragraphs 32 and 33 are relevant and are usefully quoted as under:-

“32. In B.L Kashyap and Sons Ltd v. Mist Avenue Private Ltd ., 2023:DHC:3996, the Court laid down the principles as to cases in which the arbitration clause can be invoked from the original contract. The said principles are as under:

“23. For the purposes of the present case, the following principles emerge from these authorities:

a. An arbitration clause contained in an agreement which is void ab initio cannot be enforced as the contract itself never legally came into existence.

b. A validly executed contract can also be extinguished by a subsequent agreement between the parties.

c. If the original contract remains in existence, for the purposes of disputes in connection with issues of repudiation, frustration, breach, etc., the arbitration clause contained therein continues to operate for those purposes.

d. Where the new contract constitutes a wholesale novation of the original contract, the arbitration clause would also stand extinguished by virtue of the new agreement.

24. An application of these principles requires an

interpretation of the subsequent agreement between the parties-in this case, the MOU-to determine whether the arbitration clause in the original agreement remains enforceable.”

33. *The above stated judgment holds that in cases where there is a subsequent Settlement Agreement, a valid contract can be extinguished. The Settlement Agreement in the present case is the subsequent agreement, whose interpretation would show that the arbitration clause in the original agreement would not be enforceable as this is a full and final settlement with respect to the contract and will be treated as a foreclosed document. The text of the Settlement Agreement is clear to the effect that this is a final settlement and MOU, with respect to the disputes and claims that arose between the parties in consideration to the contract and that there are no pending claims, neither any future claims were permitted to be raised.”*

38. In the case of *BKS Galaxy Realtors LLP v. Sharp Properties and Others (supra)* this Court while dealing with an appeal against an order rejecting the Application under Section 8 of the Arbitration Act held that as there is only a general reference of the prior agreement in the subsequent Memorandum of Understanding between the parties there is absence of any specific reference to the arbitration agreement in the subsequent agreement and therefore there is no incorporation of the

arbitration agreement by reference in the Memorandum of Understanding.

39. Thus in cases where the parties therein enter into a subsequent agreement to a contract settling the disputes between the parties the Court has to examine whether the subsequent agreement supersedes the Original Contract and whether the arbitration clause contained in the Original Contract survives and is incorporated in the Settlement Agreement.

40. The Settlement Agreement as can be seen is between the Defendant and the Plaintiff. The recitals and in particular recital 'E' clearly indicates that the outstanding amount of Rs.17,99,80,506/- has been reconciled jointly by the parties and the parties have agreed that the total amount, due and payable to the contractor, viz. the Plaintiff by the employer, viz. the Defendant under the contract and the work order, towards full and final settlement is Rs.9 Crores. In recital 'F', it has been recorded that other than the amount stated in recital 'E' above, the parties unequivocally state and declare that there are no monies which are balance, outstanding and unpaid from the Defendant to the Plaintiff. The said recitals are usefully quoted as under :

A. The Employer is Concessionaire for a period of 35 years to build, own, operate and transfer, Mumbai Metro Line – 1 in the city of Mumbai.

B. The Employer has engaged the Contractor for construction, installation, testing and commissioning of civil works, by entering into a Contract Agreement (“Contract”) dated 16th August 2010.

C. Under the said Contract, Employer issued following Work Orders (“WO”) bearing Nos.23534303, 23523192 and 23523272 to Contractor to perform the Works as specified under the terms of the Contract.

D. Further Contractor raised several invoices, out of which, invoices amounting to Rs.17,99,80,506/- (Rupees Seventeen Crores Ninety-Nine Lakhs Eighty Thousand Five Hundred and Six Only), are payable to Contractor towards outstanding invoices.

E. Further the Employer and the Contractor have jointly reconciled the total amounts that are due and payable to the Contractor under the Contract and WO and the parties have agreed that the total amount, due and payable to the Contractor by the Employer under the Contract and WO, towards full and final settlement, is Rs.9,00,00,000/- (Rupees Nine Crores Only) (“Settlement Amount”), as per the details given in Annexure-1.

F. Other than the amount stated in Para E above (that is payable by the Employer to the Contractor as per Annexure-1), the parties unequivocally state and declare that there are no monies which are balance, outstanding and unpaid from the Employer to the Contractor.

41. The Settlement Agreement supports by recording that in consideration of the mutual agreements, covenants, representations and warranties set forth in the contract/work order, and for other good

and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, the parties have agreed as contained in Articles 1 to 5 of the said Agreement.

42. In Article 1, the terms of settlement have been set out in clause (iii) thereof, the Plaintiff has agreed that all the disputes raised under the contract/work order shall be withdrawn/not proceeded in consideration of the settlement. Accordingly, on 24th September 2024, after recording the submissions on behalf of the parties and in particular on behalf of the Defendant that the Petition stood worked out, the Petition was disposed of as infructuous with liberty to the Plaintiff who was the Petitioner therein to adopt the appropriate proceedings to recover the admitted amount of Rs.9 Crores in terms of the Settlement Agreement. Moreover Article 2 of the Settlement Agreement sets out the governing law and jurisdiction wherein it is categorically mentioned that this Settlement Agreement shall be governed and construed in accordance with the laws of India and courts of Mumbai will have exclusive jurisdiction. However the said clause does not include an alternate dispute resolution mechanism.

43. The perusal of the clauses and the language of the Settlement Agreement leave no manner of doubt that the Settlement Agreement

clearly modified and superseded the Contract. I agree with Mr. Shah, that it is evident from reading of the Article 5(i) and Article 5(ii) of the Settlement Agreement that the Contract has no nexus with the Settlement Agreement. The Settlement Agreement has intentionally departed from the dispute redressal mechanism provided under the Contract by adding a governing law and jurisdiction clause without adding an alternate dispute resolution mechanism and thus expressly excluding the arbitration agreement contained in the Contract. There is also no specific reference to the arbitration clause of the Contract in the Settlement Agreement, and therefore in the light of the above facts, the arbitration clause of the Contract does not get incorporated or become applicable or govern the rights of the parties when the parties have settled their differences and compromised the matter and entered into a Settlement Agreement which is a different agreement. Therefore the arbitration clause in the prior Contract cannot be read into the terms of the Settlement Agreement unless expressly mentioned in the Settlement Agreement.

44. The Settlement Agreement has overridden the Contract and the claims therein and the Parties agreed to a full and final settlement amount of Rs. 9 Crores. The Settlement Agreement makes it

abundantly clear that it is a full and final settlement irrespective of whatever claims were raised under the Contract and Work Order. Therefore if all the claims are dealt with and settled no issues under the Contract are left to be adjudicated upon in arbitration.

45. The Applicant has in fact acted upon the Settlement Agreement and in terms of the Settlement Agreement, the Applicant handed over the performance bank guarantees and the final take over certificate to the Respondent. The Applicant has thus recognized that Settlement Agreement is binding between the parties but has failed to repay the settlement amounts within the stipulated timeline

46. Even in response dated 3rd January 2025 to the letter sent by the Plaintiff on 10th December 2024 the Applicant has stated that with an intent to resolve the matter amicably and to not precipitate the issues, they entered into a Settlement Agreement with the Respondent on 28th March 2024 and forthwith returned the Bank Guarantees. The Applicant has also recognized that the Settlement Agreement paved the way for resolving the Section 9 Petition filed by the Respondent herein. In paragraph 14 of the said letter the Applicant has categorically stated

that it is committed to liquidate its obligations and is keen to honor the Settlement Agreement but has been delayed in its ability in making such payment.

47. There are no claims raised by the Respondent/Plaintiff which arise out of the Contract at all as the full and final settlement amount in the Settlement Agreement was agreed to irrespective of the claims under the Contract and WO. Therefore the only claim is in respect of non-payment of the amount due under the Settlement Agreement which the Applicant/Defendant has acknowledged and not refuted.

48. In the present case, the Settlement Agreement makes a reference to the Contract but does not incorporate the Contract or the arbitration agreement in the Settlement Agreement and in fact as per Article 5 (ii) of the Settlement Agreement, the Settlement Agreement superseded any/all consideration, contemporaneous negotiations, understanding and agreement, whether written or oral, agreed upon by the Parties. Further, there is a governing law and jurisdiction clause in the Settlement Agreement but no reference to alternate dispute resolution mechanism.

49. The judgments which have been relied upon by the Applicant/Respondent in support of its contention that the issue of whether the Settlement Agreement supersedes the Contract is also an arbitrable dispute and the same ought to be referred to arbitration are not applicable in the present case. The facts of the aforesaid decisions are clearly distinguishable from the facts of the present case.

50. In the case of *Shree Siddhivinayak Classic Construction Pvt. Ltd. and Anr. V IIFL Finance Limited and Anr. (supra)* an application was made under Section 11 of the Arbitration Act and in that case there was an arbitration agreement between the Applicant and the Respondent, that agreement was assigned by the Respondent to a third party, the Respondent continued to collect amounts under the Loan Agreement even after the assignment agreement was entered into, and the relationship between the Applicant and the third party was governed by the assignment agreement for some time before a new settlement was reached between them. These facts are clearly distinguishable from the facts of the present case where there was a new settlement agreement entered into between the parties which specifically contained a governing law and jurisdiction clause but did not include an arbitration clause.

51. Similarly the case of *Gold Prism Realty Pvt. Ltd. v M/s. Paradigm Ambit Buildcon (supra)* is also distinguishable on facts as that was also a matter under Section 11 of the Arbitration Act and the settlement in this case did not contain any mention of a governing law and jurisdiction clause unlike the present case.

52. The case of *Sirajuddin Kasim and another v. Paramount Investments Limited (supra)* is also distinguishable on facts as in that case one of the Petitioners was not a party to the settlement agreement and hence his rights were not superseded by the settlement agreement.

53. Further, the aforesaid decisions are in applications under Section 11 of the Arbitration Act and as is settled law, the nature and scope of issues arising for consideration in an application under Section 11 of the Arbitration Act for appointment of the Arbitrator are far narrower than those arising in an application under Section 8 of the Arbitration Act seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Arbitration Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement

between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Arbitration Act, relying upon Sub-Section 2(b) (i) of that section. But where the issue of 'arbitrability' arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the Court seized of the suit and cannot be left to the decision of the Arbitrator. This view of the Hon'ble Supreme Court in the decision of ***Booz Allen and Hamilton Inc. Versus SBI Home Finance Limited and Others***¹² has also been followed by this Court in the case of *Capri Global Capital Limited v. M/s. Divya Enterprise (Partnership Firm) and Others (supra)*.

54. It is also pertinent to refer to decision of the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 (Supra)* relied upon by the Applicant which itself in paragraph 164 holds that the provisions of Section 8 and Section 11 of the Arbitration Act cannot be read as laying down a similar standard. The paragraph 164 is usefully quoted as under:-

¹²2011) 5 SCC 532

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

55. Therefore for the reasons discussed above, the reliance on the decisions in the cases of *Shree Siddhivinayak Classic Construction Pvt Ltd & Anr v. IIFL Finance Limited & Anr (supra)*, *Gold Prism Realty Pvt Ltd v. M/s. Paradigm Ambit Buildcon (supra)* and *Sirajuddin Kasim and Another v Paramount Investments Limited (supra)* is misplaced and does not advance the case of the Applicant.

56. The Applicant has also sought to canvas that the decisions of the Hon'ble Supreme Court in *Union of India v. Kishorilal Gupta & Bros (supra)* and *Damodar Valley Corporation v K.K.Kar (supra)* on which the Delhi High Court has relied upon in *Larsen and Toubro Limited v. Ireo Victory Valley Private Limited (supra)* are rendered redundant in view of what has been held by the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 (Supra)*. In the decision of *BKS Galaxy Realtors LLP v. Sharp Properties and Others* this Court has held that the findings of the Hon'ble Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899 (Supra)* do not disturb the finding in *Union of India v Kishorilal Gupta & Bros (supra)*, namely that if the parties put an end to a validly executed contract, the arbitration clause of the original contract also perishes with it. Applying the aforementioned decisions to the facts of the present case, it is clear that the parties have entered into a Settlement Agreement superseding any previous agreement between the parties and specifically incorporating a governing law and jurisdiction clause without incorporating an alternate dispute resolution clause and hence the Contract and the arbitration clause contained in it

are no longer applicable and it is the Settlement Agreement that prevails between the parties.

57. Section 16(1) (b) of the Arbitration Act provides that a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause. But this does not in any way suggest that when the parties consciously enter into a subsequent agreement that finally determines their rights, the arbitration clause embedded in the prior contract survived independently of that contract.

58. Even otherwise the judgments relied upon by the Applicant do not advance the case of the Applicant in as much as the construction of a judgment should be made in light of the factual matrix involved therein and the clauses of the agreement therein. In the facts of the present case, in view of the Settlement Agreement executed between the parties superseding and novating the Contract containing a Governing Law and Jurisdiction clause but not including an arbitration clause, thereby rendering the arbitration clause contained in the earlier Contract inapplicable and incapable of being invoked.

59. The Settlement Agreement is a separate agreement between the parties which does not contain any arbitration clause. The Settlement

agreement having superseded the Contract and as it does not make a specific reference to arbitration despite containing a specific governing law and jurisdiction clause, no case is made out under Section 8 of the Arbitration Act.

60. Ergo the dispute involved in the Suit cannot be referred to Arbitration. The Interim Application accordingly stands dismissed.

(ABHAY AHUJA, J.)