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

% Reserved on: 28th October, 2022
Decided on: 23rd November, 2022

\+ **ARB.P. 829/2022**

PVR LIMITED ..... Petitioner
Through: Ms. Sonal Singh, Ms. Sukanya Lal, Advocates (M:7291059010)

versus

IMPERIA WISHFIELD PRIVATE LIMITED ..... Respondent
Through: Mr. Rishabh Pant, Advocate (M:9971919424)

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

% 23.11.2022

MINI PUSHKARNA, J.

1. The present petition has been filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeking appointment of an arbitrator for adjudication of the disputes that have arisen between the petitioner and the respondent.

2. Petitioner is engaged in the business of building, managing, running and operating multiplex theatres across the country, under various brand names such as 'PVR', 'PVR Premier', 'PVR Gold Class'. Respondent is engaged in the business of real estate and development.

3. A Memorandum Of Understanding dated 06.05.2016 was executed between the parties for entering into an arrangement for operating a multiplex having six screens and approximately 1151 seating capacity situated on 3rd and 4th floor of 37th Avenue Mall, Commercial Complex, Sector 37-C, Gurugram, Haryana.

4. As per Clause 7(n) of the MOU, the petitioner was to pay an interest free refundable security deposit to the respondent amounting to Rs.1,65,00,000/-, which was payable in four stages of different amounts as follows:

> "1. Rs. 27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand only) within 15 days of signing of the MOU.
>
> 2. Rs.55,00,000/- (Rupees Fifty Five Lakhs only) to be paid Post Legal due diligence and signing of agreement to lease, which shall be signed after the Developer provides the application for revised Sanctioned Plans.
>
> 3. Rs.55,00,000/- (Rupees Fifty Five Lakhs only) to be paid on Handover Date which shall be handed over upon receipt of revised Sanctioned Plans.
>
> 4. Rs.27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand) to be paid at the time of signing the lease deed, which shall be executed at the time of commencement of commercial operations at Multiplex."

5. Rs.27,50,000/- was to be given within 15 days of signing of the MOU which was duly paid by the petitioner to the respondent on the execution of the MOU towards security deposit.

6. Clause 7(y) of the MOU provides for resolution of disputes between the parties through arbitration. The said Clause is reproduced as below:

> ***"7(y) Arbitration***
>
> *Any dispute or difference arising between the Parties shall be resolved amicably at the first instance. Unresolved disputes, controversies, contests, disputes, if any, shall be submitted to arbitration. The arbitration shall be conducted in accordance with the Provisions of the Arbitration and Conciliation Act, I996, along with the rules framed there under and any amendments thereto by a sole arbitrator appointed mutually by both the Parties. The arbitration shall be conducted in English. The decision/award of the arbitrator shall be final/conclusive and binding on the Parties. The seat of arbitration shall be at New Delhi."*

7. The MOU provided that the parties shall execute an Agreement to lease within six months from the date of signing of the MOU and execute a lease deed within 60 days of obtaining occupation certificate/ any other document required to get Cinema Operating Licences.

8. Subsequent to the execution of the MOU, a tripartite agreement to lease was executed on 18.01.2017 between the petitioner, the respondent and Prime IT Solutions Pvt. Ltd. (which was the confirming party). Petitioner in terms of Clause 6.1.2 of the Agreement to Lease, paid further amount of Rs.42,87,085/- to the respondent on 25.01.2017. Therefore, total amount of Rs.70,37,085/- was paid by the petitioner to the respondent towards security deposit.

9. As per Clause 6.3 of the Agreement to Lease, the respondent was liable to refund the security deposit amount within a period of one month from the date of expiry or termination of the Agreement to

Lease. In case, any dispute arose between the parties, the same was to be settled through arbitration contained in Clause 14 of the Agreement to Lease. The same is reproduced as below:

> ***"CLAUSE 14. ARBITRATION:***
>
> *14.1 In the event of any dispute, controversy or claim arising out of or in connection with this Agreement/ Lease Deed, including any questions regarding its existence, validity or termination (a "Dispute") such Dispute shall be referred to be resolved in accordance with the Indian Arbitration and Conciliation Act 1996 (the "Act") and the rules prescribed by the Act. This Agreement and the rights and obligations of the Parties hereunder shall retain in full force and effect pending the award in such arbitration proceedings, which award shall determine whether and when termination of this Agreement, if relevant, shall become effective.*
>
> *14.2 The seat and venue of the Arbitration shall be at New Delhi, India and the language of the arbitration shall be English."*

10. It is the case of the petitioner that after entering into the aforesaid MOU and the Agreement to Lease, respondent failed to perform its part of the obligations as envisaged under the Agreement to Lease. Due to non-performance of obligations by the respondent, a 'Mutual Recession and Release Deed' (in short 'Release Deed') dated 23.08.2019 was executed and the MOU and the Agreement to Lease were brought to an end. In furtherance of the terms of the MOU and the Agreement to Lease, it was recorded in the Release Deed that the respondent shall refund to the petitioner, the amount of Rs.70,37,085/-

paid by petitioner under the MOU and Agreement to Lease as security deposit.

11. It was stipulated in the Release Deed that the respondent will be absolved of all its liabilities towards the petitioner under the MOU and the Agreement to Lease, following the refund of the security deposit by the respondent to the petitioner. The respondent was to refund the said amount towards security deposit to the petitioner within a period of one month from the date of execution of the Release Deed i.e. till 23.09.2019. However, respondent failed to do so.

12. Petitioner issued a letter dated 29.10.2021 to the respondent requesting the respondent to refund the amount of security deposit along with interest within a period of seven days. However, respondent neither replied to the letter dated 29.10.2021, nor released any amount towards the security deposit to the petitioner. Subsequently, petitioner issued a demand notice dated 29.11.2021 under The Insolvency and Bankruptcy Code, 2016 (in short 'IBC') to the respondent in respect of unpaid debt due from the respondent. In reply, by its letter dated 09.12.2021, respondent stated that the said notice was not sustainable under law since the MOU contained a Clause for arbitration under Clause 7(y). Petitioner did not pursue any proceedings under IBC thereafter.

13. As disputes had arisen between the parties towards refund of the security deposits in terms of the MOU and Agreement to Lease, a notice invoking arbitration was issued by the petitioner to the respondent, wherein the petitioner invoked the arbitration clause as contained in Clause 7(y) of the MOU and Clause 14 of the Agreement

to Lease. Since no reply was received from the respondent, the present petition came to be filed for appointment of an Arbitrator.

14. Respondent has objected to the present petition on the ground that on the date of filing of the present petition, no arbitration clause survives. It is the case of the respondent that the MOU dated 06.05.2016 and Agreement to Lease dated 18.01.2017 contained arbitration clauses. However, the parties thereafter entered into Release Deed dated 23.08.2019, which categorically and in no uncertain terms terminated and superseded both prior agreements and all terms and conditions contained therein. Thus, it is contended that the dispute as raised by the petitioner is not arbitrable and cannot be referred to arbitration.

15. It is further contended that scope of intervention/ examination by a Court in a petition under Section 11 of the Act is very restricted and this Court need only examine whether or not a valid Arbitration Agreement/ Clause exists between the parties. It is submitted that there is no incorporation of the arbitral clauses in the Release Deed and there is express termination and annulment of the MOU and the Agreement to Lease along with the terms and conditions therein. Reference has also been made to Section 62 of the Indian Contract Act, 1872 to contend that in the event a contract has been expressly terminated or rescinded and, thereafter substituted with a new contract, the original contract need not be performed by the parties. Thus, it is prayed on behalf of the respondent that the present petition is misconceived in the absence of any arbitration clause in the Release Deed.

16. In support of its submissions, respondent has relied upon the following judgments:

i. Bharat Sanchar Nigam Limited And Another vs. Nortel Networks India Private Limited, (2021) 5 SCC 738

ii. Vidya Drolia and Ors. vs. Durga Trading Corpn., (2021) 2 SCC1

iii. M. R. Engineers & Contractors Pvt. Ltd. Vs. Som Datt Builders Ltd. (Civil Appeal No. 4150 of 2009)

iv. M/s Elite Engineering and Construction (HYD.) Pvt. Ltd. Vs. M/s Techtrans Construction India Private Limited

17. Responding to the objections raised by the respondent, learned counsel for the petitioner contends that the Arbitration Agreement survived, even if the contract came to an end. Petitioner further relies upon the reply dated 09.12.2021 of the respondent, which according to the petitioner reflected the clear intention of the respondent to settle the disputes through arbitration.

18. I have heard the counsels for the parties and perused the record.

19. It is seen that the parties had entered into MOU dated 06.05.2016, followed by Agreement to Lease dated 18.01.2017, which contained the arbitration clauses. In terms of the said MOU and Agreement to Lease, petitioner paid total amount of Rs.70,37,085/- to the respondent towards security deposit. Subsequently, the parties entered into Release Deed dated 23.08.2019, which did not contain any arbitration clause. In terms of the said Release Deed, respondent was to release the said amount of Rs.70,37,085/- within a period of one month from the date of execution of the Release Deed. Since the

said amount has not been paid by the respondent, the present disputes have arisen between the parties.

20. The relevant terms of the Release Deed, as relied upon by the respondent are as follows:

> ***"Recitals:***
>
> *A. Parties have entered into a Memorandum of Understanding dated 6th May 2016, Agreement to Lease dated 18th January 2017 and Deed of Indemnity dated 18th January 2017 (hereinafter Jointly referred to as "Agreements") for a Multiplex Space of 42,649 sq. ft. Super Area (subject to actual area calculation/measurement, based on CAD drawings) derived from 34,119 sq. ft. of Carpet Area on 3rd and 4th Floor planned for 6 screens multi-screen cinema with approx. 1151 seats (hereinafter* ***"Multiplex Space")*** *at the* ***"37th Avenue Mall"*** *proposed to be developed in the revenue estate of Village Garauli Khurd, Tehsil and District Gurugram, Haryana.*
>
> *B. The Parties have decided to mutually terminate the Agreements upon the terms and conditions herein.*
>
> *C. .....*
>
> ***NOW THIS DEED WITNESSETH THAT IN CONSIDERATION OF MUTUAL PROMISES AND CONVENANTS CONTAINED HEREIN THE PARTIES HAVE AGREED AS FOLLOWS:***
>
> *1. Memorandum of Understanding dated 6th May 2016, Agreement to Lease dated 18th January 2017 and Deed of Indemnity dated 18th January 2017, executed between the Parties is hereby terminated from the date of execution of this Deed.*
>
> *2. .....*

3. The Parties have agreed that in lieu of mutual recession/termination of the Agreements, the Developer shall refund Rs. 70,37,085/- (Rupees Seventy Lakh Thirty Seven Thousand Eighty Five Only) paid by PVR under the said MOU and ATL. On repayment of said amount the Developer shall be absolved of all liabilities towards PVR under the said Agreements.

4. Parties hereby release and forever discharge one another of and from all actions, cause of actions, suits, debts, obligations, claims, demands whatsoever which they have or hereafter can, shall or may have under the terms of the Agreements.

5. This Deed shall supersede any prior or previous understanding or Deed(s) or arrangement(s) not limited to MOU, ATL, Deed of Indemnity between the Parties, whether written or oral, in relation to such matters, and any such prior Deed(s) and arrangement(s) between the Parties shall stand rescinded and terminated and cancelled from the date hereof."

21. A perusal of the terms of the Release Deed clearly discloses that the same expressly states in Clause 3 that the respondent will be absolved of its liabilities towards the petitioner under the MOU and the Agreement to Lease only upon repayment of the amount of security deposit, as paid by the petitioner to the respondent.

22. Further, the MOU and the Agreement to Lease also clearly stipulated that the respondent was to refund the security deposit at the time of termination of the Agreement. Clause 7(n) of the MOU dated 06.05.2016 is reproduced as below:

"7. The basic terms subject to appropriate & mutually acceptable legal documentation amongst parties is defined herein below:

n) One time Interest Free Refundable Security Deposit. (IFRSD)	*PVR shall pay an Interest Free Refundable Security Deposit of Rs. 1,65,00,000/- (Rupees One Crore Sixty Five Lakhs Only) in the following manner:* *1. Rs. 27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand Only) within 15 days of signing of the MOU.* *2. Rs. 55,00,000/-(Rupees Fifty Five Lakhs only) to be paid Post Legal due diligence and signing ATL, which shall be signed after the Developer provides the application for revised Sanctioned Plans for 7-8 screens.* *3. Rs. 55,00,000/- (Rupees Fifty Five Lakhs only) to be paid on Handover Date which shall be handed over upon receipt of revised Sanctioned Plans for 7-8 screens.* *4. Rs. 27,50,000/- (Rupees Twenty Seven Lakhs Fifty Thousand) to be paid at the time of signing the Lease deed, which shall be executed*

	at the time of commencement of commercial operations at Multiplex. *The IFRSD payable shall be deposited with the Developer during the subsistence of the MOU/ Definitive agreement and shall be refunded back to PVR simultaneous to PVR returning the vacant possession of the Multiplex Space back to the Developer, and adjustment of the dues towards Rent, CAM and Utility Charges, if any of PVR.*

23. Similarly, Clause 6.3 of the Agreement to Lease dated 18.01.2017 is reproduced as below:

> *"6.3. IFRSD shall be retained by the Imperia till the end of Lease Deed Term or early termination and shall be returned at the time of handing over of possession of Multiplex Space by the PVR to the Imperia. If imperia fails to refund the IFRSD or any part thereof as mentioned above, Imperia shall be liable to pay interest at 18% per annum, calculated on the IFRSD, from the date on which the IFRSD or any part thereof was liable to refunded by Imperia under this Agreement/Lease Deed till the date of actual realization by PVR. However Imperia shall refund the IFRSD amount within 1 Month from the date of expiry or termination of this Agreement/Lease Deed. It is clarified that PVR shall*

> *handover the possession of the Multiplex Space back to Imperia after receiving back the IFRSD. For such period, PVR shall not be liable to pay Rent, CAM and utility charges. Deposit of IFRSD with Imperia under this Agreement/Lease Deed shall constitute complete discharge of PVR's liability to deposit IFRSD during the Lease Deed Term. The Confirming Party provides its no objection for deposit of IFRSD to Imperia."*

24. Thus, upon the failure of the respondent to repay the amounts towards the security deposit, the liabilities of the respondent under the MOU and the Agreement to Lease cannot be said to have been absolved. In the present case, the respondent has not only failed to comply with its obligations under the MOU and Agreement to Lease, but also the Release Deed. Thus, even after execution of the Release Deed any dispute arising out of the MOU and Agreement to Lease can be referred to arbitration, as the Arbitration Agreement contained in Clause 7(y) of the MOU and Clause 14 of the Agreement to Lease, will survive even if the contract comes to an end.

25. An arbitration clause relates to resolution of disputes between the parties and not performance of the contract. Therefore, in accordance with the Doctrine of Severability an arbitration agreement is deemed to be a separate and severable clause and the arbitration agreement survives even if the contract comes to an end. In this regard, Supreme Court in the case of ***National Agricultural Coop. Marketing Federation India Ltd. v. Gains Trading Ltd.*, (2007) 5 SCC 692,** has held as follows:

> ***"6.*** *The respondent contends that the contract was abrogated by mutual agreement; and when the contract*

> *came to an end, the arbitration agreement which forms part of the contract, also came to an end. Such a contention has never been accepted in law. An arbitration clause is a collateral term in the contract, which relates to resolution disputes, and not performance. Even if the performance of the contract comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. (Vide Heyman v. Darwins Ltd. [1942 AC 356 : (1942) 1 All ER 337 (HL)] , Union of India v. Kishorilal Gupta & Bros. [AIR 1959 SC 13] and Naihati Jute Mills Ltd. v. Khyaliram Jagannath [AIR 1968 SC 522] .) This position is now statutorily recognised. Sub-section (1) of Section 16 of the Act makes it clear that while considering any objection with respect to the existence or validity of the arbitration agreement, an arbitration clause which forms part of the contract, has to be treated as an agreement independent of the other terms of the contract; and a decision that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. The first contention is, therefore, liable to be rejected."*

26. Holding that an arbitration agreement embedded in a contract is always considered a separate and severable clause, this Court in the case of ***Shristi Infrastructure Development Corporation Ltd. Vs. Ircon International Limited*, 2022 SCC OnLine Del 2383**, has held as follows:

> *"16. Therefore, insofar as reference to arbitration is concerned, keeping in view the position of law as expatiated in the aforementioned rulings, this court is of the view that : firstly, an arbitration agreement embedded in a contract is always considered a separate and severable clause, with a standing of its own; by reason of which, supersession of an arbitration agreement must not be lightly inferred. Secondly, in*

> *consonance with the overarching principle viz. 'when in doubt, do refer' whereby the extant, preponderant legal view is that if there is an arbitration agreement between the parties, which is sought to be negated by a party by citing other provisions of a contract, which requires interpretation of the contract, courts must lean towards referring the matter to arbitration. And thirdly, despite reference being made by court, the arbitrator must be left free to decide on his/her own jurisdiction including the existence of the arbitration agreement, as permissible under section 16 of the A&C Act which enshrines the kompetenz-kompetenz principle."*

27. It is settled position in law that the issue whether the rights of the parties under an agreement are being superseded by a subsequent agreement or not, is itself an arbitrable issue which can be examined by the Arbitrator. Supreme Court in the case of ***Sirajuddin Kasim and Another Vs. Paramount Investment Limited.***, **(2010) 8 SCC 557** has held as follows:

> ***"26.*** *In the instant case the petitioners have alleged that there was economic duress in the matter of execution of the settlement agreement. Therefore, following the ratio of this Court in National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd. [(2009) 1 SCC 267] this Court is of the opinion whether rights of the parties under SHA have been superseded by the subsequent settlement agreement may be an arbitrable issue and that issue can be examined by the arbitrator."*

28. Supreme Court has repeatedly adopted a pro-arbitration stance and has propounded that the watchword for the courts is "when in doubt, do refer". Thus, in the case of ***Intercontinental Hotels Group***

(India) Private Ltd. and Another v. Waterline Hotels Private Limited, **(2022) 7 SCC 662**, Supreme Court has observed as follows:

> ***"19.*** *At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject-matter of numerous cases before this Court as well as the High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognised as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a "prima facie" view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to "cut the deadwood". Ultimately the Court held that the watchword for the Courts is "when in doubt, do refer". This Court concluded as under: (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 156-57, para 225)*
>
> *"225. From a study of the above precedents, the following conclusion, with respect to adjudication of subject-matter arbitrability under Section 8 or 11 of the Act, are pertinent:*
>
> *225.1. In line with the categories laid down by the earlier judgment of Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] the Courts were examining "subject-matter arbitrability" at the pre-arbitral stage, prior to the 2015 Amendment.*

225.2. Post the 2015 Amendment, judicial interference at the reference stage has been substantially curtailed.

225.3. Although subject-matter arbitrability and public policy objections are provided separately under Section 34 of the Act, the Courts herein have understood the same to be interchangeable under the Act. Further, subject-matter arbitrability is interlinked with in rem rights.

225.4. There are special classes of rights and privileges, which enure to the benefit of a citizen, by virtue of constitutional or legislative instrument, which may affect the arbitrability of a subject-matter."

29. Holding that the court under Section 8 & 11 of the Act has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, Supreme Court in the case of ***Vidya Drolia and Others Vs. Durga Trading Corporation*, (2021) 2 SCC 1**, has held as follows:

"154.3. *The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.*

.....

244.3. *The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*

244.4. *The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima*

facie basis, as laid down above i.e. "when in doubt, do refer".

244.5. *The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*

244.5.1. *Whether the arbitration agreement was in writing? Or*

244.5.2. *Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*

244.5.3. *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

244.5.4. *On rare occasions, whether the subject-matter of dispute is arbitrable?"*

30. It is no longer *res integra* that an Arbitral Tribunal is empowered and competent to rule on its own jurisdiction including the existence or validity of the arbitration agreement, on the Doctrine of "kompetenz-kompetenz", also referred to as "competence-competence". Thus, in the case of ***Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited,*** **(2020) 2 SCC 455**, Supreme Court has held as follows:

"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"."

31. Similarly, the question whether an agreement containing an arbitration clause has been novated by another agreement, cannot be adjudicated at the time of considering a Section 11 petition. Reference may be made to judgment in the case of ***Sanjiv Prakash v. Seema Kukreja and Others*, (2021) 9 SCC 732**, wherein Supreme Court has held as follows:

***"22.** Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12-*

> *4-1996 requires a detailed consideration of the clauses of the two agreements, together with the surrounding circumstances in which these agreements were entered into, and a full consideration of the law on the subject. None of this can be done given the limited jurisdiction of a court under Section 11 of the 1996 Act. As has been held in para 148 of Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , detailed arguments on whether an agreement which contains an arbitration clause has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Also, this case does not fall within the category of cases which ousts arbitration altogether, such as matters which are in rem proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract. There is nothing vexatious or frivolous in the plea taken by the appellant. On the contrary, a Section 11 court would refer the matter when contentions relating to non-arbitrability are plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the Arbitral Tribunal."*

32. In the present case, Clause 7(y) of the MOU and Clause 14 of the Agreement to Lease between the parties contain a valid arbitration agreement. The validity and existence of the arbitration clause as aforesaid has not been disputed by the respondent.

33. Considering the aforesaid discussion and bearing in mind the principles of law as laid down by Supreme Court, the present petition is allowed. Accordingly, Mr. Amrit Pal Singh Gambhir, Advocate, M. No. : 9810082347, is appointed as Sole Arbitrator to adjudicate the disputes between the parties.

34. The parties are directed to seek requisite disclosures under Section 12 of the Act from the ld. Sole arbitrator before commencement of arbitration proceedings.

35. The ld. Sole Arbitrator shall be entitled to fee as stipulated in the Fourth Schedule of the Act or as may be agreed to by the parties with the ld. Sole arbitrator.

36 It is clarified that nothing contained in this judgment may be construed as an expression on merits of the disputes and objections raised by the parties. All rights and contentions of the parties are left open for consideration by the ld. Sole arbitrator.

37. A copy of this order shall be sent to the Ld. Arbitrator.

MINI PUSHKARNA
(JUDGE)

NOVEMBER 23, 2022
PB/au