2024 INSC 710

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. 19 OF 2024

AJAY MADHUSUDAN PATEL & ORS. …PETITIONERS

VERSUS

JYOTRINDRA S. PATEL & ORS. …RESPONDENTS

J U D G M E N T

J. B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided in the following parts:

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1. The present petition has been filed under Section 11(6) read with Section 11(9) of the Arbitration and Conciliation Act, 1996 (hereinafter, "**the Act, 1996**") seeking appointment of a Sole Arbitrator to adjudicate the disputes between the Petitioners and the Respondents in terms of Clauses 7.2 and 7.3 respectively of the Family Arrangement Agreement dated 28.02.2020

(hereinafter, "**the FAA**") read with the Amendment Agreement dated 15.05.2020 (hereinafter, "**Amendment to the FAA**") entered into between the petitioner AMP Group and respondent JRS Group.

2. Since the Petitioner No. 13 i.e., Silvercity Management Ltd. is a company incorporated outside India having its office at 17, Bond Street, St. Helier, Jersey, JE2, 3NP, an island in the English Channel, northwest of France and the Petitioner No. 14 i.e., Hiral Ashit Patel is an individual, who is a citizen and resident of Canada, the dispute between the Parties falls within the definition of an international commercial arbitration under Section 2(1)(f) of the Act, 1996.

A. FACTUAL MATRIX

3. For convenience, the Parties involved in the present petition and the respective groups of which they form a part of are tabulated below:

S.NO	NAME	PETITIONER/ RESPONDENT	GROUP
1.	Ajay Madhusudan Patel	Petitioner No. 1	AMP
2.	Apoorva Madhusudan Patel	Petitioner No. 2	AMP
3.	Meeta Ajay Patel	Petitioner No. 3	AMP
4.	Sonal Apoorva Patel	Petitioner No. 4	AMP

5.	Bhavik Ajay Patel	Petitioner No. 5	AMP
6.	Jinal Ajay Patel	Petitioner No. 6	AMP
7.	Kaushal Apoorva Patel	Petitioner No. 7	AMP
8.	Nishkal Apoorva Patel	Petitioner No. 8	AMP
9.	Apoorva M. Patel (HUF)	Petitioner No. 9	AMP
10.	Spectrum Ingredients Pvt. Ltd. *Rep.* by its Director	Petitioner No. 10	AMP
11.	Sai Fragrances & Flavours Pvt. Ltd. *Rep.* by its Director	Petitioner No. 11	AMP
12.	Zest Aromas Pvt. Ltd. *Rep.* by its Director	Petitioner No. 12	AMP
13.	Silvercity Management Ltd. *Rep.* by its Chairman	Petitioner No. 13	AMP
14.	Hiral Ashit Patel	Petitioner No. 14	AMP
15.	Jyotrindra S. Patel	Respondent No. 1	JRS
16.	Rajesh C. Patel HUF	Respondent No. 2	JRS
17.	Sanjay S. Patel	Respondent No. 3	JRS
18.	Finhelp Investments and Consultants (Mumbai) Pvt. Ltd. *Rep.* by its Director	Respondent No. 4	JRS
19.	Greenbiz Holdings and Consultants Pvt. Ltd. *Rep.* by its Director	Respondent No. 5	JRS

20.	Jyotrindra S. Patel and Sanjay S. Patel (Holding for and on behalf of J&S Associate – AOP) *Rep.* by its Member	Respondent No. 6	JRS
21.	Millenium Estates Pvt. Ltd. *Rep.* by its Director	Respondent No. 7	SRG
22.	Deegee Software Pvt. Ltd. *Rep.* by its Director	Respondent No. 8	SRG
23.	Samarjitsinh R. Gaekwad (Shareholder & Director of Millenium Estates Pvt. Ltd. and Deegee Software Pvt. Ltd.)	Respondent No. 9	SRG
24.	Radhikaraje S. Gaekwad (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 10	SRG
25.	Subhaginiraje R. Gaekwad (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 11	SRG
26.	Gaekwad Services Ltd. now known as Gaekwad Enterprise Pvt. Ltd. *Rep.* by its Managing Director (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 12	SRG

27.	Samarjitsinh Gaekwad HUF (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 13	SRG
28.	Rajesh C. Patel (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 14	JRS
29.	Shilpa R. Patel (Shareholder of Deegee Software Pvt. Ltd.)	Respondent No. 15	JRS
30.	Aditya Patel (Director of Deegee Software Pvt. Ltd.)	Respondent No. 16	SRG
31.	Nitin Shripadbhai Pujari (Director of Deegee Software Pvt. Ltd.)	Respondent No. 17	SRG

4. The Petitioners herein are collectively referred to as the "AMP Group". The Petitioner Nos. 1 to 9 & 14 respectively are individuals and family members of Mr. Ashit Patel, who are a part of the AMP Group in the FAA. The Petitioner Nos. 10 to 13 respectively are companies described as a part of the AMP Group in the FAA. The Petitioner No. 13 is a company incorporated outside India and the Petitioner No. 14 is a resident of a foreign country.

5. The Respondents are divided into two groups i.e., "JRS Group" consisting of Respondents 1 to 6, 14 & 15 and "SRG Group" consisting of

Respondents 7 to 13, 16 & 17. The Millenium Estates Pvt. Ltd. (hereinafter, "**Millenium**") and Deegee Software Pvt. Ltd. (hereinafter, "**Deegee**") are Respondent 7 and 8 companies respectively. The Respondents 9 to 17 are all either Directors or Shareholders of Respondent 7 and 8 companies. Therefore, the Respondents comprise of individuals, Companies and Shareholders and Directors of the respective companies dealt with under the FAA.

6. Apart from the Petitioners and Respondents aforementioned, a few other individuals find a repeated mention in the facts of the present petition. First, Mr. Ashit M. Patel who is the Power of Attorney Holder of Petitioner Nos. 1 to 9 and 14 of the AMP Group. He is the co-brother of Respondent No.1. Secondly, Mr. Kalpesh Parmar, a Chartered Accountant who represented the interests of the JRS Group during the negotiations leading up to the FAA, the implementation of the FAA and the first round of mediation. He is alleged to have also represented the interests of the SRG Group during the same. In the last, Mr. Pankaj Agarwal, an employee of Deegee.

7. Mr. Ashit Patel representing the AMP Group and Mr. Jyotrindra S. Patel (Respondent No.1) of the JRS Group are co-brothers and married in the same family. The two groups were jointly engaged in various businesses and co-owned several entities. Subsequently, the SRG Group had joined

hands with the AMP Group and JRS Group in two entities i.e. Millenium and Deegee. SRG Group presently holds 40% equity shares in Millenium.

8. It is the case of the Petitioners that between 2013 & 2019, various disputes arose between the AMP Group on one side and the JRS and SRG Groups on the other which led to the filing of several proceedings before various forums including the National Company Law Tribunal (hereinafter, "**NCLT**") at New Delhi, Mumbai and Ahmedabad by the AMP Group. The same are still pending before the respective forums. It is pertinent to note that, of the aforesaid disputes, the respondent No.9 of the SRG Group is one of the respondents in CP/383/2017 pertaining to Deegee, filed by the AMP Group before the NCLT at Mumbai.

9. The Best Value Chem. Ltd. (hereinafter, "**BVC**") is an entity involved in the business of manufacturing aroma chemicals co-owned by the AMP and JRS Groups. The Premji Group had initiated a proposal to buyout BVC and indicated that the deal could only go through if the litigations filed against BVC were withdrawn. Therefore, the parties thought it fit to resolve all the issues between them once and for all with the understanding that the AMP Group would completely takeover various entities and that the JRS and SRG Groups would co-own other entities.

10. During negotiations that preceded the execution of the FAA, the following events/communications took place;

- Vide emails dated 12.12.2019 and 02.01.2020, several internal documents required for the valuation of Millenium and Deegee were shared by Mr. Pankaj Agarwal with the AMP Group wherein a copy was marked to Mr. Kalpesh Parmar.
- Vide email dated 14.01.2020 sent to the AMP Group, Mr. Kalpesh Parmar confirmed that the matters pertaining to Millenium and Deegee even after its valuation may have to be discussed with Mr. Samarjitsinh (hereinafter, "**Respondent No. 9**") of the SRG Group before finalisation. The said excerpt from the contents of the email are reproduced hereinbelow:

> *"…The pending details from Pankaj, if I correctly understand then it is related to documents of Millenium and Deegee, Even if we consider both of it to be treated separately, it can be done because even after valuation, the matter needs to be discussed out with Samarjitsinh before finalising. Therefore, in the binding agreement you can put necessary points covering both the properties and till it is not resolved we can work out some alternate solution so that both the groups are covered properly…."*
>
> (Emphasis supplied)

- A joint meeting was arranged by Mr. Kalpesh Parmar and attended by Mr. Ashit Patel of the AMP Group and Respondent No.9 of the SRG Group.
- Vide email dated 25.01.2020 sent to the AMP Group, Mr. Kalpesh Parmar suggested that the valuation of Millenium be finalized in consultation with

the Respondent No.9 of the SRG Group. The said excerpt from the contents of the email are reproduced hereinbelow:

> *"...In view of releasing above deadlock situation, I am suggesting that we include in FAA binding methodology to resolve it. For Chandan Sanjaybhai, Jagdishbhai & AMP can sit and decide the value within __ days from execution of FAA, Similarly for Millenium Sanjaybhai, Samarjitsinh & AMP can sit and close it along with issue of residential flats. This can also be done within __ days from execution of FAA. In the meantime, whatever valuation/s so far JRS has given on Chandan & Millenium will stand withdrawn, so nothing is there on table from JRS side on the value of Chandan & Millenium. Therefore, we can proceed to close on FAA & Escrow agreement on Monday. If you can flip this suggestion with AMP, I can try to convince Sanjaybhai too..."*
>
> (Emphasis supplied)

11. Subsequently, the FAA dated 28.02.2020 was entered into between the AMP Group and JRS Group. The terms of the FAA impose several obligations on the AMP and JRS Groups in pursuance of the settlement contemplated therein.

12. It is pertinent to observe that the present petition relates primarily to the dispute arising from specific clauses wherein the SRG Group is also required to undertake certain steps and actions specified *viz*, (a) Clause 2.1.4 read with Schedule 7 on Millenium Exit (presently AMP Group holds 36% while SRG Group holds 40%) where AMP Group is required to exit and SRG Group is required to purchase additional shares; (b) Clause 2.1.5 requiring Amendment of Lease Deed executed between Millenium, the

Lessor and Aurosagar Estates Pvt. Ltd. (hereinafter, "**Aurosagar**"), the Lessee and; (c) Clause 2.1.6 read with Schedule 8 on Deegee Exit where JRS and SRG Groups are required to completely exit and AMP Group would purchase the shares. The relevant clauses of the FAA are reproduced hereinbelow:

> ***"2.1.4 Exit of AMP Group from Millenium***
>
> *(a) Within 30 (thirty) days from the Trigger Date("Millenium Transfer Date"), Parties shall execute duly stamped agreement(s) with SRG to record and finalize their understanding with respect to exit of AMP Group from Millenium by way of transfer/ buy back of all Class A equity shares in Millenium ("Millenium Exit") in the manner set out in Schedule 7. The Parties agree that the valuation of Millenium for the purposes of the Millenium Exit shall be INR 130,00,00,000 (Rupees One Hundred Thirty Crores). It is hereby clarified that AMP Group will continue to hold Class B equity shares in Millenium in accordance with the provisions set out in the articles of association of Millenium.*
>
> *(b) Notwithstanding anything contained herein, Parties shall endeavour to simultaneously undertake the Millenium Exit and Deegee Exit on the same day in accordance with Clause 2.1.4 and Clause 2.1.6, respectively.*
>
> *(c) Parties shall co-operate with each other for any actions required to be undertaken or documents required to be executed in order to give effect to the actions contemplated under this Clause, including but not limited to passing exercising their voting rights to provide necessary board or shareholders' approval, execution and stamping of share transfer forms, endorsement of share certificates, filing forms with the registrar of companies, making entries in statutory registers, providing all necessary information and documents necessary for preparing necessary documents, etc required to be complied by Millenium under Applicable Law.*

2.1.5 Amendment of Aurosagar Lease Deed

(a) On the Millenium Transfer Date, Aurosagar and Millenium shall execute a duly stamped amendment deed to the Aurosagar Lease Deed in the format set out in Annexure 1.

(b) Parties shall co-operate with each other for any and all such actions required to be undertaken and execute all such documents as may be necessary in order to give effect to this Clause (Including registration of the amendment deed), including but not limited to exercising their voting rights to provide necessary board or shareholders' approval, attending office of registrar of assurance for admitting the amendment deed, providing all necessary information and documents necessary for preparing necessary documents, etc.

(c) All costs and expenses for amendment of the Aurosagar Lease Deed in accordance herewith, including without limitation, fee charged by attorneys and other advisors/consultants, stamp duty and registration charges shall be borne by AMP Group.

2.1.6 Exit of JRS Group and SRG from Deegee Software

(a)Within 30 (thirty) days from the Trigger Date ("Deegee Transfer Date"), Parties shall and shall ensure that SRG executes duly stamped agreement(s) to record their understanding with regards to exit of JRS Group and SRG from Deegee Software, including (i) transfer of all shares held by JRS Group and SRG in Deegee Software ("AMP Deegee Transfer"); (ii) resignation of directors appointed by JRS Group/SRG from the board of directors of Deegee Software; and (iii) repayment of loan by Deegee Software to its lenders including the interest accrued thereon in the manner set out in Schedule 8 ((i), (ii) and (iii) are collectively referred as "Deegee Exit")

(b) AMP Group shall complete due diligence of Deegee Software within 20 (twenty) Business Days from the Execution Date, in the event, there are any findings requiring

indemnity by AMP Group from JRS Group and/or SRG the same will be mutually agreed between the parties.

(c) Parties shall co-operate with each other for any actions required to be undertaken or documents required to be executed for giving effect to the actions contemplated under this Clause, including but not limited to exercising their voting rights to provide necessary board or shareholders' approval, execution and stamping of share transfer forms, endorsement of share certificates, filing forms with the registrar of companies and the Reserve Bank of India, making entries in statutory registers, providing all necessary information and documents necessary for preparing necessary documents, etc required to be complied by Deegee Software under Applicable law. AMP Group shall be responsible for all compliances/filings under foreign exchange laws of India in relation to the AMP Deegee Transfer.

xxx xxx xxx

SCHEDULE 7
MILLENIUM EXIT

In connection with Millenium Exit, the Parties have agreed the following:

1. AMP Group will exit from Millenium. The total value of Millenium has been fixed at INR 130,00,00,000 and AMP Group's share of 36% out of total value of Millenium will be INR 46,80,00,000.

2. Phase–1 - SRG will purchase approx. 11% shares of AMP Group post receipt of Balance JRS Purchase Price in the JRS Designated Bank Account. JRS Group proposes to provide necessary funding to SRG for purchasing shares held by AMP Group in Millenium.

3. Phase 2 - Millenium will buy back the balance shares of AMP Group i.e., approx. 25% from the funds to be received from Deegee Software. Any tax in relation to such buyback to be borne by AMP Group.

4. Phase 3 - within 12 months from execution of relevant documents in respect of Millenium Exit, Millenium will separate out the Class "B" shares being residential flat owners in a separate co-operative society.

5. Until co-operative society is not formed, Millenium will provide no objection letter to AMP Group for transfer of their flats.

SCHEDULE 8
DEEGEE EXIT

In connection with Deegee Exit, the Parties have agreed the following:

1. JRS Group and SRG will exit from Deegee Software. AMP Group will discuss with Jabalpur Group and finalise on their exit. The total value of the property owned by Deegee Software is fixed at INR 141,00,00,000, which shall be used to pay off loans with proportionate interest to all lenders of Deegee Software.

2. The sale proceeds received by AMP Group from sale of shares as per Phase 1 of Millenium Exit, will be brought in Deegee Software by AMP Group.

3. AMP Group will bring further funds in Deegee Software to pay off entire loan provided by Millenium to Deegee Software along with interest at the rate of 14.50% p.a. compounded annually.

4. Simultaneously, with repayment of loans to Millenium as per paragraph 3 above, (i) Deegee Software to pay off entire loan provided by JRS Group and SRG along with interest at the rate of 14.50% p.a. compounded annually; and (ii) shares of Deegee Software held by JRS Group and SRG shall also be transferred to AMP Group.

5. The above exercise to be completed within 12 months from the execution of relevant documents in this regard."

(Emphasis supplied)

13. Post the execution of the FAA and in pursuance of the implementation thereof, the following communications were exchanged:

- Vide emails dated 12.03.2020 and 13.03.2020 sent to the AMP Group, Mr. Pankaj Agarwal shared documents required for the due diligence of Deegee which were marked to Mr. Kalpesh Parmar and the latter email was additionally marked to the respondent No.9 of SRG Group.
- Vide emails dated 24.04.2020 and 04.05.2020 sent to the AMP Group, the JRS Group lawyers shared the FAA Closing Tracker reflecting the status of implementation of the FAA which included the pending transfer of Deegee and Millenium. The same were marked to Mr. Kalpesh Parmar.
- Vide email dated 08.05.2020 sent to a shareholder of BVC, Mr. Kalpesh Parmar acted as the representative of the SRG Group on discussions pertaining to the amendment of the Aurosagar lease deed. The said excerpt from the contents of the email are reproduced hereinbelow:

> *"....On Aurosagar point, this email I am sending to put forward views of Samarjitsinh (SRG) and not JRS. SRG is clear that Millenium can give POA to AMP and his immediate family and as agreed in FAA draft, PL can work on language without disturbing the construct / concept. SRG is not going to honour any POA which is beyond what is stated in the draft of POA shared with him even though you find any logical point in AMP's arguments. As per him AMP is neither trustworthy nor a reliable person, so he is not interested in dealing any further with him. He already had a very bad experience of similar nature when he had sealed a deal with TATAs, that time also after signing the minutes, AMP took extreme U-turn just for SRG to become a laughing stock not only in front of all partners and HDFC Realty but also in front of TATAs. That's enough for him.*

Please appreciate, though SRG is not a signatory to FAA, he is ready to honour what was agreed with him over phone call but on other side there is a person though has signed a document is now not ready to stick to it. Real mockery.

I would suggest that seriously you should take this with Sanjaybhai & Shaju before approaching PI. My hands are tied on this since I have to safeguard interest of SRG…."

(Emphasis supplied)

- Vide email dated 11.05.2020 sent to the AMP Group on discussions pertaining to the Aurosagar Lease deed, Mr. Kalpesh Parmar indicated that Respondent No.9 is the only decision maker in Millenium and JRS is at best the facilitator if needed. The said excerpt from the contents of the email are reproduced hereinbelow:

".....The newly inserted points mentioned in the lease deed vide clause nos. 2.8, 2.9 (including 2.9.1 to 2.9.4), 2.10 and 2.11 cannot be considered as part of the draft of lease deed for following reasons:....

...4. While your newly inserted points suggest that they are having a futuristic impact so this can very well be taken up in due course with Millenium when Samarjitsinh is the only decision maker and JRS is at best the facilitator if needed..."

(Emphasis supplied)

14. An Amendment to the FAA was executed between the AMP Group and JRS Group on 15.05.2020. The clauses relevant to the present dispute are reproduced hereinbelow:

"5. Clause 2.1.5(a) stands deleted in its entirety and is substituted with the following:

On the Millenium Transfer Date, Aurosagar and Millenium shall simultaneously execute the following: (i) duly stamped amendment deed to the Aurosagar Lease Deed in the format set out in Annexure 1; (ii) duly stamped irrevocable special power of attorney in favour of Aurosagar in the format set out in Annexure 1A; and (iii) duly stamped deed of indemnity in the format set out in Annexure 1B.

6. Clause 2.1.6(b) stands deleted in its entirety and is substituted with the following:

AMP Group shall complete due diligence of Deegee Software on or before June 30, 2020. In the event, there are any findings requiring indemnity by AMP Group from JRS Group and/or SRG the same will be mutually agreed between the parties in writing.

xxx xxx xxx

12. Paragraph 27 in Schedule 4 stands deleted in its entirety and is substituted with the following:

"Transaction Documents" means this Agreement, the Settlement Escrow Agreement and any and every document executed in connection with the transaction contemplated under or in connection with this Agreement."

(Emphasis supplied)

15. In continuation of the implementation of the FAA, the following communications were exchanged;

- Emails dated 01.07.2020, 10.04.2021 and 15.04.2021 were exchanged between the AMP Group and Mr. Kalpesh Parmar pertaining to the due diligence of Deegee.
- Vide email dated 09.10.2020 sent to the AMP Group, the JRS lawyers shared drafts of the Share Purchase Agreements (hereinafter, "**SPAs**")

pertaining to Millenium and Deegee and a copy was marked to Mr. Kalpesh Parmar.

- Vide email dated 27.11.2020 and a reminder email dated 03.04.2021, Mr. Kalpesh Parmar sent the drafts of these SPAs (with AMP Group comments) to the SRG lawyers with a copy marked to Respondent No.9 in order to seek their comments.
- Vide email dated 26.03.2021 sent to the AMP Group with a copy marked to the Respondent No.9, Mr. Kalpesh Parmar clarified that though the SPAs related to Deegee was stuck up with a non-JRS Group, yet the JRS Group was ready to hand over the affairs of Deegee w.e.f. 01.04.2021 and requested the AMP Group to withdraw all litigations before the concerned forums.
- Vide email dated 03.04.2021 sent to the JRS Group with a copy marked to the Respondent No.9, the AMP Group requested the JRS Group to undertake steps for restoring the original shareholding of the AMP Group in Deegee.

16. Several items under the FAA were pending implementation including the finalisation and execution of SPAs for Millenium and Deegee at the end of the SRG Group. Therefore, vide email dated 20.12.2021 sent to the JRS Group, the AMP Group nominated Mr. Upen Shah as the AMP Group's representative in compliance with clause 7.1.2 of the FAA for amicable

resolution of the issues arising out of the FAA between the AMP and JRS Groups. Vide reply email dated 26.12.2021, the JRS Group named Mr. Sanket Jain and/or Mr. Kalpesh Parmar as their representative. Clause 7.1.2 is reproduced hereinbelow:

> "*7.1.1 The Parties agree to use all reasonable efforts to resolve any dispute, controversy, claim or disagreement of any kind whatsoever between or amongst any of the Parties in connection with or arising out of this Agreement or the Transaction Document/s executed in connection with the transaction contemplated under or in connection with this Agreement, including any question regarding its existence, validity or termination ("**Dispute**"), expediently and amicably to achieve timely and full performance of the terms of this Agreement or the Transaction Document/s.*
>
> *7.1.2 Any Party which claims that a Dispute has arisen must give notice thereof to the other Parties as soon as practicable after the occurrence of the event, matter or thing which is the subject of such Dispute and in such notice, such Party shall provide particulars of the circumstances and nature of such Dispute and of its claim(s) in relation thereto and shall designate a Person as its representative for negotiations relating to the Dispute, which Person shall have authority to settle the Dispute. The other Parties shall, within 7 (seven) days of such notice, each specify in writing its position in relation to the Dispute and designate as their representative in negotiations relating to the Dispute, a Person with similar authority*."

17. The first round of mediation was held between the representatives of the AMP and JRS Groups on 19.01.2022. However, the discussions on the issues did not lead to any conclusion. While the minutes of the same were shared with Mr. Kalpesh Parmar, he denied its contents and stated that the

draft minutes do not correctly record the events which occurred at the meeting.

18. For the purpose of initiating the second round of mediation, an email dated 06.05.2022 was sent by the JRS Group to the AMP Group invoking Clause 7.1.2 and they nominated Mr. Anuj Trivedi or Mr. Kalpesh Parmar to act as their representatives. In response to the same, on 23.05.2022, the AMP Group nominated Mr. Keyur Gandhi and/or Mr. Upen Shah and/or Mr. Nihar Mehta as their representatives. The first mediation meeting was convened on 13.06.2022. The second mediation meeting was convened on 23.07.2022 wherein it was stated by the petitioners that the AMP and JRS Groups were agreeable to hold a joint meeting with SRG for the purpose of resolving the major issues pertaining to Millenium and Deegee.

19. In the midst of mediation, on 17.10.2022, the JRS Group sent a WhatsApp message to the AMP Group stating that (a) the JRS Group had a meeting with the SRG Group, (b) SRG and Millenium were ready to purchase the stake of AMP Group in Millenium at the price agreed in the FAA, (c) SRG would exit from Deegee subject to a payment of Rs. 25 crore as compensation considering its contribution to the growth of Deegee. The contents of the message are reproduced hereinbelow:

" Dear Keyurbhai.

My clients had a meeting with SRG and the following points have been suggested by SRG:

(1) Millennium:

(a) SRG and Millennium would be ready to purchase the stake of AMP in Millennium at the price already agreed AMP and JRS

(b) The said purchase would be made from the compensation that SRG receives from AMP for handling, taking care of and making Deegee prosperous over the last 20 years. The said compensation would be used for purchasing 11% of the 36% stake of AMP in Millennium.

(c) The balance 25% would be "buy back" by Millennium of AMP shares. This would be subject to the receipt of loan and interest by Millennium & SRG from Degee

(2) Amendment to AoA: Millennium and SRG are of the opinion that AoA does not need to be amended

(3) Aurosagar Lease Deed: the lease of Millennium and Aurosagar is as per the plans sanctioned by the Municipal Corporation. The draft lease deed provided is in contradiction to the said sanctioned plans.

(4) Aurosagar Special Power of Attorney: Millennium and SRG are of the opinion that there is no required of a Special Power of Attorney.

(5) Deegee

(a) SRG will exit from Deegee, however, the same has been formed and promoted by SRG, SRG has also given its name in order to avoid the conflict of interest of AMP with Firmenich. SRG has taken care of the company for the last 20 years and has provided services without any renumeration. In view thereof, for exiting Deegee, SRG is expecting compensation of Rs.25 crores

(b) Millennium and SRG are also expecting interest 14.50% till repayment of the amount lent to AMP

JRS Group has suggested that we may have another meeting and try to take it forward".

(Emphasis supplied)

20. Further on 21.11.2022, the JRS Group sent another WhatsApp message to the AMP Group stating that it had spoken to the SRG Group and that if the AMP Group was not ready to recognise SRG's contribution in the growth of Deegee, it would be difficult for them to agree with the AMP Group on any point. The contents of the message are reproduced hereinbelow:

> *"Talked with SRG and here is the response-*
> *As he understands from me that AMP group is looking forward for meeting with SRG to discuss the points forwarded by SRG, however AMP Grp would not like to give any compensation for Deegee to SRG. As per SRG, if AMP Grp is not even ready to recognize his contribution in growth of Deegee, then it would be difficult for him to meet AMP Grp for any point and thereby the points sent by SRG shall be considered as non existent and should not be referred any time in future."*
>
> (Emphasis supplied)

21. Vide email dated 16.05.2023 sent to the AMP Group, Mr. Kalpesh Parmar conveyed that he would discuss with SRG and try to resolve all matters pertaining to Deegee and would also intimate the outcome of his discussion. It was also conveyed that Millenium can be simultaneously worked out once Deegee is settled. The contents of the email are reproduced hereinbelow:

> "*Dear Nihar,*
>
> *Based on my discussions with JRSG, following are the comments:*
> *[…]*
> *4. All Deegee points we will discuss and try to resolve with SRG and Jabalpur Group. The outcome, we will update you.*

However, we expect to complete other companies/entities as per excel chart, which is concerning only JRSG & AMPG, subject to the comments herein without putting any deadlines for Deegee.

5. About Millenium, once Deegee is settled. Millenium can be simultaneously worked out.

6. Escrow should be released along with the signing of consent terms of Aurosagar.

7. As informed earlier Aurosagar's SPOA & Lease Deed points can be directly dealt with SRG.

You may consider above comments and discuss. You may thereafter make necessary changes in your comments in the excel file and resend it".

(Emphasis supplied)

22. Since mediation between the parties yielded no result, the JRS Group sent an Arbitration Notice dated 11.12.2023 to the AMP Group invoking Clauses 7.2 and 7.3 respectively contained in the FAA dated 28.02.2020 read with the Amendment to the FAA dated 15.05.2020. The JRS Group, in the said notice, alleged, inter alia, that while the JRS Group had fulfilled its obligations under the FAA, the AMP Group had failed to discharge and take appropriate steps in compliance of its obligations. On account of such failure, the JRS Group was unable to fulfil its corresponding obligations and hence, disputes had arisen between the parties. They nominated Justice Kalpesh S. Jhaveri (Former Chief Justice, High Court of Orissa) to act as the sole arbitrator to resolve and adjudicate the disputes only between the

AMP Group and JRS Group, in accordance with the FAA. The arbitration clause contained in the FAA is reproduced hereinbelow:

> *"7.2 Any Dispute, if not resolved in accordance with Clause 7.1, shall be referred to and finally resolved by arbitration in accordance with the Arbitration and Conciliation Act, 1996 read with the rules framed thereunder ("Arbitration Act"). Subject to any interim reliefs/orders granted, this Agreement and the rights and obligations of the Parties contained in this Agreement shall remain in full force and effect pending issuance of the award in such arbitration proceedings, which award, if appropriate, shall determine whether and when any termination shall become effective.*
>
> *7.3 The arbitral tribunal shall consist of a sole arbitrator mutually agreed upon and appointed by the Parties. Failing such agreement, either Party shall be at liberty to seek appointment of a sole arbitrator by preferring an appropriate application in accordance with the Arbitration Act before the jurisdictional Court or arbitral institution, as the case may be, at Ahmedabad."*

23. On 12.01.2024, the AMP Group gave its reply to the aforesaid notice and sent it to both the JRS and SRG Groups. The AMP Group, while denying the contents of the Arbitration Notice, alleged, inter alia, that, it is the JRS Group that had failed to perform their part of the obligations under various pretext despite the AMP Group pursuing the same. It stated that the assertion on the part of the JRS Group that SRG Group was not bound by the terms of the FAA since it is not a signatory to the said document was completely contrary to what had been represented to AMP during the negotiations and at the time of execution of the FAA and further the same

was made only for the purpose of raising an extra monetary demand of Rs. 25 crore which was never contemplated under the FAA. It was further stated that Mr. Kalpesh Parmar and the JRS Group had represented the SRG Group at all stages including the mediation process. The appointment of Justice Akil Kureshi (Former Chief Justice, High Court of Rajasthan) was suggested as an arbitrator for adjudication of all disputes arising under the FAA between the AMP, JRS and SRG Groups.

24. On 09.02.2024 and 10.02.2024 respectively, the JRS Group and SRG Group responded to the reply to the Arbitration Notice sent by the AMP Group.

25. Upon failure to reach an agreement on the appointment of the Sole Arbitrator within 30 days, the Petitioner AMP Group has filed the present Arbitration Petition No. 19 of 2024 before this Court.

B. SUBMISSIONS ON BEHALF OF THE PETITIONER (AMP GROUP)

26. Mr. Darius Khambata, the learned senior counsel appearing on behalf of the petitioners submitted that although the SRG Group is not a signatory to the FAA dated 28.02.2020 which contains the arbitration clause, yet it is a veritable party to the arbitration agreement since they participated in the

negotiations leading up to the FAA and continued to talk with the parties on the issues pertaining to the implementation of the FAA.

27. It was submitted that the successful implementation of the FAA was contingent on the involvement and action of the SRG Group and it was the intention and understanding of all the parties, including the SRG Group, that they would adhere to, and act on the terms of the FAA. The same was submitted to be evident through the following:

- The email dated 14.01.2020 by which Mr. Kalpesh Parmar stated that the valuation of Respondent Nos. 7 and 8 respectively can be finalized only in consultation with the SRG Group;
- A joint meeting that took place between Mr. Kalpesh Parmar, Mr. Ashit Patel and Respondent No.9 during which Respondent No.9 represented that Mr. Kalpesh Parmar was also representing the interest of the SRG Group in the negotiations and that SRG would be bound by the final terms agreed with Mr. Kalpesh Parmar and JRS Group;
- The email dated 08.05.2020 by which Mr. Kalpesh Parmar asserts that SRG is ready to honour what was agreed in the FAA and that he has to safeguard the interest of SRG in the implementation of the FAA.
- Even after the execution of the FAA, important emails dated 13.03.2020, 27.11.2020, 26.03.2021 and 03.04.2021 respectively were sent by the JRS Group/Kalpesh Parmar wherein SRG (Respondent

No.9) was marked and has not objected to the contents thereof or raised any grievance.

- During the mediation process, the SRG Group had communicated through a JRS Group representative that it is ready and willing to perform its obligations under the FAA if its demand for an additional consideration of Rs. 25 Crore for exit from Respondent No. 8 company is accepted by the AMP Group.

28. The Counsel submitted that the execution of the terms of the FAA required the involvement and action of the SRG Group while also benefitting them. It was submitted that a perusal of the following clauses and schedules of the FAA would indicate that the transaction was one of separation of shareholding and businesses of the three groups *viz* AMP, JRS and SRG:

- *Clause 2.1.4 read with Schedule 7* provides that AMP Group would exit from Respondent No. 7 Company i.e. Millenium (where the SRG Group already holds 40%) and that out of the 36% shares held by the AMP Group, 11% will be purchased by the SRG Group and the remaining 25% will be bought back by Respondent No. 7 Company. The valuation of Respondent No. 7 Company is provided as Rs. 130 crore.
- *Clause 2.1.6 read with Schedule 8* provides that the JRS and SRG Groups shall exit the Respondent No. 8 Company i.e. Deegee by selling their shares to the AMP Group. Sale proceeds received by the AMP

Group on its exit from the Respondent No. 7 company will be brought into the Respondent No. 8 Company. The valuation of Respondent No. 8 Company is provided as Rs. 141 Crore.

- *Clause 2.1.7 read with Item 10 of Schedule 3* provides that the AMP Group shall withdraw CP 383/2017 filed against the Respondent No. 8 Company where Respondent No.9 is also a party.

29. The counsel submitted that the Share Purchase Agreements (SPAs) were to be executed to facilitate the implementation of Clauses 2.1.4 and 2.1.6 respectively of the FAA and the SRG Group would have been a party to the SPAs. This is evident from the draft SPAs and the same were forwarded specifically to the respondent No.9 *vide* email dated 27.11.2020. That according to the dispute resolution clause contained in Clauses 7.1 and 7.2 respectively, disputes between or amongst any of the parties in connection with or arising out of the Transaction Documents can be amicably resolved and upon its failure, be resolved by arbitration. The term "Transaction Documents" is defined as "*means this Agreement, the Escrow Agreement and any and every document executed in connection with the transaction contemplated under or in connection with this Agreement"* and also includes the SPAs to be executed *inter alia* the SRG Group, the drafts of which were forwarded to the SRG Group on 27.11.2020.

30. It was submitted that the AMP Group has conducted the due diligence of the Respondent No.8 Company i.e., Deegee as contemplated in Clause 2.1.6(b) of the FAA with the full knowledge and consent of the SRG Group. The same is evident *vide* emails dated 01.07.2020, 23.10.2020, 10.04.2021 and 15.04.2021 respectively. This demonstrated that the FAA had also been partly implemented qua the SRG Group which is in management of the said company.

31. One another submission made by the counsel was that the nomenclature of the agreement i.e., "Family Arrangement Agreement" is irrelevant. In addition to that, the description and obligation of the parties under the FAA is also irrelevant since most cases of non-signatory parties will involve agreements, the terms of which do not expressly include the non-signatory. In support of the aforesaid, the counsel placed reliance on the decision of this Court in ***Sasan Power Ltd. v. North American Coal Corporation (India) Private Ltd.*** reported in **(2016) 10 SCC 813** where it was settled that the nomenclature of an agreement is not determinative of its character.

32. The counsel submitted that while on many occasions the representatives of JRS Group were there to take care of the interests, suggestions and comments of the SRG Group, it was understood by all the parties that the SRG Group although not a signatory to the FAA yet would be a part of the execution of and compliance of the terms and conditions thereof. Therefore,

there was *commonality of subject matter* and *composite transactions*, in view of which SRG is a veritable party liable to be referred to arbitration.

33. By placing a strong reliance on the decision of this Court in ***Cox and Kings Ltd. v. SAP India Pvt. Ltd.*** reported in **(2024) 4 SCC 1,** the counsel submitted that the settled position is that the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. He submitted that the Delhi and Bombay High Courts have consistently taken a view to refer the parties, including the non-signatories to arbitration in ***DLF Ltd. v. PNB Housing Finance Ltd.*** reported in **(2024) SCC OnLine Del 2165**, ***Moneywise Financial Services (P) Ltd. v. Dilip Jain*** reported in **(2024) SCC OnLine Del 1896** and ***Cardinal Energy and Infra Structure Pvt. Ltd. v. Subramanya Construction & Development Co. Ltd.*** reported in **(2024) SCC OnLine Bom 964** by relying on this Court's decision in ***Cox and Kings (supra)***.

34. The counsel finally submitted that it is critical to refer even the non-signatory to arbitration since otherwise there is a risk that the non-signatory may not appear before the Arbitral Tribunal and disregard its award as beyond jurisdiction. In any event, the arbitrability of disputes qua the SRG Group can always be considered by the Arbitral Tribunal

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT (JRS GROUP)

35. Ms. Anushree Prashit Kapadia the learned counsel appearing on behalf of the Respondent JRS Group submitted that while the JRS Group has no objection to the adjudication of disputes with the AMP Group by arbitral proceedings presided by the Sole arbitrator nominated by the AMP Group, the SRG Group cannot be a part of the arbitration proceedings as they are not party to the FAA. It was also submitted that the FAA contained the definition of "Parties" and the SRG Group is not defined in the FAA. The AMP Group and JRS Group are family members, whereas, the SRG Group is not part of the family.

36. The counsel submitted that the various clauses of the FAA indicate that the FAA binds only the AMP and JRS Groups. Clauses 2.1.4 and 2.1.6 respectively wherein the SRG Group is mentioned do not cast any obligations on the SRG Group since it merely states that "*Parties shall execute…*" & "*Parties shall ensure...*". There is also no exchange of consideration with the SRG Group in the FAA.

37. The counsel submitted that neither the JRS Group nor the chartered accountant, Mr. Kalpesh Parmar have ever represented the SRG Group,

acted on their behalf or received any authority or power from the SRG Group. There is no evidence on record or otherwise to the contrary.

38. The counsel submitted that Clause 8.1 of the FAA on "Entire Agreement" categorically states that the FAA superseded any and all prior oral and written agreements. Therefore, the case of the AMP Group that SRG Group was effectively a part of the negotiations and is privy to the transactions is inconsequential.

39. The counsel finally submitted that the AMP Group and JRS Group have fulfilled part of their respective obligations under the FAA and are in a position to fully execute the FAA without the presence or role of the SRG Group. Clause 8.7 dealing with Partial Validity empowers the severance of invalid or unenforceable provisions of the FAA.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENT (SRG GROUP)

40. Mr. Huzefa Ahmadi, the learned senior counsel appearing on behalf of the Respondent SRG Group submitted that the present petition is merely a device to embroil strangers into an agreement entered into between two groups of the same family since the SRG Group is admittedly neither a party nor signatory or confirming party to the FAA or the alleged arbitration

agreement contained therein. The AMP and JRS Groups who are signatories thereto are *ad idem* about the terms of the FAA, including their mutual intention to refer the disputes arising from it to arbitration. Had the SRG Group been involved in the negotiations leading to the signing of the FAA, or participated therein, or expressed its inclination to be bound by the arbitration agreement, the same would have been recorded in the FAA.

41. The counsel submitted that the fact that the FAA had always been intended to operate *inter se* the AMP and JRS Groups is borne from a bare perusal of the clauses of the FAA itself which only confers rights or fastens obligations upon the said Groups.

- Recital F specifically records that the AMP and JRS Groups "*after mutual discussions and negotiations have agreed to settle all disputes/issues that have arisen amongst the parties over last several years …. on the terms and conditions as mutually agreed to*".
- Clauses 2.1.4 and 2.1.6 read with Schedules 7 and 8 which relate to the exit of AMP Group from Millenium and the exit of JRS and SRG Groups from Deegee contain a mere reference to the SRG Group wherein the foremost words used read as "*In connection with the … Exit, <u>the Parties</u> agree…*" – thereby placing the obligation to exit and/or ensure such exit solely upon the AMP or JRS Groups, as the case may be. None of these clauses indicate either the consent or agreement of the SRG Group in this regard.

- Further, in Clause 2.1.7, the FAA places an obligation to unconditionally withdraw all litigations solely on the AMP and JRS Groups.

42. The counsel submitted that the arbitration clause contained in the FAA by itself makes a reference only to the parties to the FAA inasmuch as it sets out the negotiation or dispute resolution mechanism or appointment procedure to be followed by the parties alone, and importantly, the factum that the AMP and JRS Groups shall continue to perform their respective obligations under the FAA, subject to the termination of the FAA. At no point does the arbitration agreement make any reference to the SRG Group nor does it fasten any obligations to be performed by it.

43. It was further submitted that there is no *defined legal relationship* between the SRG Group and the petitioners to justify the application of Section 7(1) of the Act, 1996. In other words, there is no 'arbitration agreement' between them either in the form of an arbitration clause in a contract or in the form of a separate agreement in terms of sub-sections (2) to (5) of section 7 of the Act, 1996. In fact, there is no contract at all between them and consequently, there is no privity of contract between the Petitioners and SRG Group in any manner whatsoever.

44. It was also submitted that bringing non-signatories within the scope of the arbitration agreement is an exception and not the rule. In support of this, the

counsel relied on the decision of this Court in ***Cox & Kings (supra).*** Further, it was submitted that a dual test has to be satisfied to compel the SRG Group to be a party to the present arbitration proceedings i.e., (a) SRG Group should be shown to have agreed to the underlying contract and (b) SRG Group should also be shown to have agreed to be bound by the arbitration agreement. Both the conditions are not satisfied. A vague awareness of the JRS and AMP Groups being in negotiations or the mere marking of emails relating thereto to a member of the SRG Group cannot imply consent. It was submitted that the SRG Group is neither a consensual or non-consensual participant in the arbitration proceedings arising out of the FAA nor have any of the aforementioned consensual or non-consensual theories been invoked by the petitioners. To compel a party to arbitration in respect of a family arrangement despite the fact that they are not a member of the family would sound the death knell to the concept of party autonomy and freedom of contract.

45. The counsel submitted that apart from co-ownership or common shareholding in Millenium and Deegee, the SRG Group has no business relationship or dealings or common interest with either of the other groups. Since the subject-matter in question is with respect to the *implementation* of the FAA, there is no doubt that the same can be effectively implemented without the participation of the SRG Group in the arbitration proceedings.

Without prejudice to the above, the counsel submitted that severing the only two sub-clauses that merely make a reference to the SRG Group, without placing any obligation thereupon i.e., Clauses 2.1.4 and 2.1.6 would in no way impact the implementation of the FAA.

46. It was submitted that the negotiations leading to the signing of the FAA were initiated at the behest of one Premji Group in the BVC deal that took place between the Premji Group, the JRS Group and other shareholders. Surprisingly, despite disputes having arisen regarding a similar exit of the JRS Group from BVC, neither BVC nor the Premji Group have been roped in as participants in the FAA. However, the AMP Group, for reasons best known to itself, has sought participation of the SRG Group on the feeble pretext of ensuring exits from Millenium and Deegee.

47. The counsel also submitted that the SRG Group was not a party to the mediation proceedings since *vide* email dated 20.12.2021, the AMP Group invoked mediation as per clause 7.1.2 of the FAA only against the JRS Group for resolving disputes between themselves. It has been admitted in the same email that the AMP Group had no contact with the SRG Group regarding any SPAs for Millenium and Deegee or otherwise and the AMP Group even castigated the JRS Group for pushing pending obligations *inter se* the parties on the SRG Group when "*the SRG group is not even a party*

to the FAA". The minutes of the 1st mediation meeting dated 19.01.2022 also reflect that the same was not attended by the members or representatives of the SRG Group. The counsel further submitted that when the negotiations were resumed for the second time *vide* email dated 23.05.2022, the SRG Group neither attended nor was represented in the same.

48. The counsel submitted that the SRG Group at no point of time, appointed, engaged or authorised, either the JRS Group or Mr. Kalpesh Parmar to undertake any actions or make any representations on its behalf or bind it to any agreement that has been entered into by and between the AMP and JRS Groups either expressly or impliedly. It was submitted that even as per the petitioners' own case, the so called joint meeting dated 14.01.2020 that was arranged by Mr. Kalpesh Parmar was done so by him representing the JRS Group and "*was attended by Mr. Ashit Patel for AMP Group and Respondent No.9 of the SRG Group*". Therefore, the petitioners cannot blow hot and cold and allege that Mr. Parmar also attended in the capacity of a representative of the SRG Group. Further, the JRS Group itself nominated Mr. Kalpesh Parmar as its representative for mediation *vide* email dated 26.12.2021 and therefore, it is not proper for the petitioners to contend that the SRG Group was represented by Mr. Kalpesh Parmar or the JRS Group.

49. The counsel submitted that the Notice invoking arbitration sent by the JRS Group on 11.12.2023 was not addressed to the SRG Group. Only in the Reply to the Arbitration Notice issued by the AMP Group on 12.01.2024, the SRG Group was marked and this is the first instance that the AMP Group alluded to the SRG Group as a participant in the FAA and that to after a span of almost 4 years. This, according to him, was clearly an afterthought.

50. The counsel in the last submitted that, in the facts of the present case, even the *prima facie* threshold required to be met to warrant joinder of non-parties to arbitral proceedings, either by the referral court or by an arbitral tribunal, has not been met.

E. ANALYSIS

51. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the SRG Group, being a non-signatory to the FAA, should also be referred to arbitration along with the AMP and JRS Groups?

i. Scope of jurisdiction of the referral court under Section 11(6) of the Act, 1996

52. A plethora of decisions have deliberated upon the scope of the Court's jurisdiction and the role to be played by the referral court in the appointment of an arbitrator. The position on this question was starkly different prior to and post the 2015 Amendment to the 1996, Act.

53. A seven-Judge Bench of this Court in ***SBP & Co. v. Patel Engg. Ltd.*** reported in **(2005) 8 SCC 618,** held that the power under Section 11 of the Act, 1996 was not an administrative but a judicial power. Therefore, it was opined that the Chief Justice or his designate under Section 11(6) had the right to decide preliminary issues including his own jurisdiction, to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or arbitrators. The relevant observations are reproduced hereinbelow:

> *"47. We, therefore, sum up our conclusions as follows:*
>
> *(i) The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power.*
>
> *xxx xxx xxx*
>
> *(iv) <u>The Chief Justice or the designated Judge will have the right to decide the preliminary aspects as indicated in the earlier part of this judgment. These will be his own jurisdiction to entertain the request, the existence of a valid arbitration agreement, the existence or otherwise of a live claim, the existence of the condition for the exercise of his power and on the qualifications of the arbitrator or</u>*

arbitrators. The Chief Justice or the designated Judge would be entitled to seek the opinion of an institution in the matter of nominating an arbitrator qualified in terms of Section 11(8) of the Act if the need arises but the order appointing the arbitrator could only be that of the Chief Justice or the designated Judge.

xxx *xxx* *xxx*

(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.

xxx *xxx* *xxx*

(xii) ... The decision in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. *[(2002) 2 SCC 388] is overruled.*

(Emphasis supplied)

54. While further reinforcing the view taken in ***SBP & Co.*** *(supra)*, this Court in ***National Insurance Company Limited v. Boghara Polyfab Private Ltd*** reported in **(2009) 1 SCC 267** identified and segregated the three categories of preliminary issues that may arise for consideration in an application under Section 11 as follows:

*"**22.** Where the intervention of the court is sought for appointment of an Arbitral Tribunal under Section 11, the duty of the Chief Justice or his designate is defined in SBP & Co. [(2005) 8 SCC 618] This Court identified and segregated the preliminary issues that may arise for consideration in an application under Section 11 of the Act into three categories, that is, (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide.*

> ***22.1.*** *The issues (first category) which the Chief Justice/his designate will have to decide are:*
>
> *(a) Whether the party making the application has approached the appropriate High Court.*
> *(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.*
>
> ***22.2.*** *The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:*
>
> *(a) Whether the claim is a dead (long-barred) claim or a live claim.*
> *(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.*
>
> ***22.3.*** *The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:*
>
> *(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).*
> *(ii) Merits or any claim involved in the arbitration.*
>
> (Emphasis supplied)

55. On a closer look at the categories delineated in the aforesaid decision, it can be seen that the issues in the first category have to be mandatorily decided by the Chief Justice or his designate under Section 11 of the Act, 1996. This included the question whether there is an arbitration agreement and whether

the party that has applied under Section 11 is also a party to such an agreement.

56. Later, on the suggestion of the 246th Report of the Law Commission of India, Section 11(6A) was inserted through the 2015 Amendment to the Act, 1996. The wide jurisdiction afforded to the referral courts by the decisions in ***SBP & Co*** *(supra)* and ***Boghara Polyfab*** *(supra)* was legislatively overruled by virtue of the *non-obstante* clause incorporated in Section 11(6A). Although the 2019 Amendment to the Act, 1996 omitted Section 11(6A), such an omission was not notified and therefore Section 11(6A) still remains in force and reads thus:

> *"(6A) 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)

57. The crucial question that arose for consideration by this Court in ***Duro Felguera S.A. v. Gangavaram Port Limited*** reported in **(2017) 9 SCC 729** was the effect of the change introduced by the 2015 Amendment to the Act, 1996 which inserted Section 11(6A). The Court held that all that needs to be looked into is whether the agreement contained a Clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement i.e., the existence of the arbitration agreement,

nothing more, nothing less. The relevant observations are extracted hereinbelow:

> *"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.*
>
> *xxx xxx xxx*
>
> ***59.** The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP and Co. [SBP and 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] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected.*
>
> (Emphasis supplied)

58. A two Judge-Bench of this Court in ***Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.*** reported in **(2019) 9 SCC 209** considered the effect of Section 11(6A) which confined the jurisdiction of the Court to examine the "existence of an arbitration agreement" on an arbitration agreement contained in an unstamped document or contract. The Court was of the opinion that its enquiry as to whether a compulsorily

stampable document, which contains the arbitration clause, is duly stamped or not, is only an enquiry into whether such an arbitration agreement *exists* in law and this does not in any manner amount to deciding "preliminary question(s)" that arise between the parties. However, in deciding so, the Court maintained that a referral court must confine itself to the question of existence of the arbitration agreement and observed as thus:

> *"14. A reading of the Law Commission Report, together with the Statement of Objects and Reasons, shows that the Law Commission felt that the judgments in SBP & Co. [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] required a relook, as a result of which, so far as Section 11 is concerned, the Supreme Court or, as the case may be, the High Court, while considering any application under Sections 11(4) to 11(6) is to confine itself to the examination of the existence of an arbitration agreement and leave all other preliminary issues to be decided by the arbitrator. […]"*
>
> (Emphasis supplied)

59. Once again, a three-judge bench of this Court in ***Vidya Drolia and Ors. v. Durga Trading Corporation*** reported in **(2021) 2 SCC 1** held that Sections 8 and 11 respectively must be read as laying down a similar standard on the scope of the referral court's powers. It was stated that the questions as regards the existence and validity being intertwined, an arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements. The decision endorsed the application of a *prima facie* test in

examining the existence and validity of an arbitration agreement both under Sections 8 and 11. This *prima facie* examination was not a full review but a primary first review to weed out manifest and ex-facie non-existent and invalid arbitration agreements and non-arbitrable disputes. However, it was clarified that the Court should not get lost in thickets and decide debatable questions of fact. The relevant extract is reproduced hereinbelow:

> *"**153.** Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability."*
>
> (Emphasis Supplied)

60. ***Vidya Drolia*** *(supra)* while speaking in the context of Section 8 also pointed out that jurisdictional issues like whether certain parties are bound by the arbitration agreement must be left to the arbitral tribunal since they involve complicated factual questions and observed as thus:

> *"239. […] Jurisdictional issues concerning whether certain parties are bound by a particular arbitration, under group-company doctrine or good faith, etc., in a multi-party arbitration raises complicated factual questions, which are best left for the tribunal to handle.[…]"*
>
> (Emphasis supplied)

61. A Constitution Bench of this Court in ***In Re: Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899*** reported in **(2024) 6 SCC 1**, stated that an arbitration agreement contained in an unstamped or insufficiently stamped contract would not be non-existent in law as stated in ***Garware Wall Ropes*** *(supra)*. It also clarified the position taken in ***Vidya Drolia*** *(supra)* and stated that the parameters for judicial review under Sections 8 and 11 respectively were different. The scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996. Similarly, the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Substantive objections pertaining to existence and validity on the basis of evidence must therefore be left to the arbitral tribunal. Moreover, it was stated that the expression "examination" under Section 11 does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provides that the arbitral tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. It was also stated that any *prima facie* opinion rendered by the Court under Section 11 need not bind the arbitral tribunal. The relevant observations are extracted hereinbelow:

> *"**164.** The 2015 Amendment Act has laid down different parameters for judicial review under Section 8 and Section 11. Where Section 8 requires the Referral Court to look into*

the prima facie existence of a valid arbitration agreement, Section 11 confines the Court's jurisdiction to the examination of the existence of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the Referral Courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an Arbitral Tribunal refusing to refer the parties to arbitration under Section 8, but not from Section 11. Thus, the 2015 Amendment Act has legislatively overruled the dictum of Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] 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.

165. *The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn.,*

(2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in the context of Section 8 and Section 11 of the Arbitration Act.

166. *The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.*

167. *Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, The Law Lexicon (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement.[…]*

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169. *When the Referral Court renders a prima facie opinion, neither the Arbitral Tribunal, nor the Court enforcing the arbitral award will be bound by such a prima facie view. If a prima facie view as to the existence of an arbitration agreement is taken by the Referral Court, it still allows the*

Arbitral Tribunal to examine the issue in depth. Such a legal approach will help the Referral Court in weeding out prima facie non-existent arbitration agreements. It will also protect the jurisdictional competence of the Arbitral Tribunals to decide on issues pertaining to the existence and validity of an arbitration agreement."

(Emphasis supplied)

62. This very Bench in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** reported in **(2024) SCC OnLine SC 1754** dealt with the scope and standard of judicial scrutiny in an application made under Section 11(6) of the Act, 1996 specifically when a plea of "accord and satisfaction" is taken by the defendant. It was observed that in a scenario where the Courts delve into the domain of the arbitral tribunal at the Section 11 stage and reject the application, there is a risk of leaving the claimant forum-less for the adjudication of its claims. It was stated that a detailed examination at this stage would also be counterproductive to the objective of expediency in deciding a Section 11 application and simplification of pleadings. It was also stated that even if *ex-facie* frivolity is made out by the referral court, the arbitral tribunal has the benefit of extensive pleadings and evidentiary material and therefore, it would be incorrect to doubt that the arbitral tribunal would not be able to arrive at a similar conclusion. The relevant observations are reproduced hereinbelow:

*"**123.** The power available to the referral courts has to be construed in the light of the fact that no right to appeal is available against any order passed by the referral court under Section 11 for either appointing or refusing to appoint*

an arbitrator. Thus, by delving into the domain of the arbitral tribunal at the nascent stage of Section 11, the referral courts also run the risk of leaving the claimant in a situation wherein it does not have any forum to approach for the adjudication of its claims, if it Section 11 application is rejected.

124. *Section 11 also envisages a time-bound and expeditious disposal of the application for appointment of arbitrator. One of the reasons for this is also the fact that unlike Section 8, once an application under Section 11 is filed, arbitration cannot commence until the arbitral tribunal is constituted by the referral court. This Court, on various occasions, has given directions to the High Courts for expeditious disposal of pending Section 11 applications. It has also directed the litigating parties to refrain from filing bulky pleadings in matters pertaining to Section 11. Seen thus, if the referral courts go into the details of issues pertaining to "accord and satisfaction" and the like, then it would become rather difficult to achieve the objective of expediency and simplification of pleadings.*

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

(Emphasis supplied)

63. The recent Constitution Bench decision of this Court in ***Cox and Kings Limited v. SAP India Private Limited and Another*** reported in **(2024) 4 SCC 1,** specifically dealt with the question of impleading a non-signatory

as a party in the arbitration proceedings and the corresponding scope of enquiry at the referral stage. It was held therein that Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the arbitral tribunal and the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal. The relevant observations are reproduced hereinbelow:

> ***163.*** *Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.*
>
> *xxx xxx xxx*
>
> ***169.*** *In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement*

on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.

170. In view of the discussion above, we arrive at the following conclusions:

xxx xxx xxx

(170.12) At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement […]"

(Emphasis supplied)

64. Therefore, on the pivotal issue whether the non-signatories can be referred to arbitration, this Court took the view that the referral court is required to *prima facie* rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement. However, recognising the complexity of such a determination, the arbitral tribunal was considered the proper forum since it can decide whether the non-signatory is a party to the arbitration agreement on the basis of factual evidence and application of legal doctrine. In this process, the non-signatory must also be given an opportunity to raise objections regarding

the jurisdiction of the arbitral tribunal in accordance with the principles of natural justice.

65. The position of law that emerges from the aforesaid discussion can be summarized as follows;

- ***SBP & Co.*** *(supra)* expanded the scope of the Court's power under Section 11 while empowering the referral courts to decide several preliminary issues. ***Boghara Polyfab*** *(supra)* went to the extent of identifying three categories of preliminary issues that may arise for consideration in an application under Section 11. Of these, in the first category which had to be mandatorily decided by the referral Court, the question whether there was an arbitration agreement and whether the party who has applied under Section 11 of the Act, 1996 is a party to such an agreement, was also included.
- The insertion of Section 11(6A) through the 2015 Amendment to the Act, 1996 stipulated that the Courts under Section 11 shall confine their examination to the 'existence' of an arbitration agreement. It legislatively overruled the decisions in ***SBP & Co.*** *(supra)* and ***Boghara Polyfab*** *(supra)* by virtue of its *non-obstante* clause.
- ***Duro Felguera*** *(supra)*, in clear terms, clarified the effect of the change brought in by Section 11(6A) and stated that all that the Courts need to

see is whether an arbitration agreement exists - nothing more, nothing less.

- ***Vidya Drolia*** *(supra)* endorsed the *prima facie* test in examining the existence and validity of an arbitration agreement both under Sections 8 and 11 respectively. However, it was clarified that in cases of debatable and disputable facts and reasonably good arguable case, etc. the Court may refer the parties to arbitration since the arbitral tribunal has the authority to decide disputes including the question of jurisdiction. It was further stated that jurisdictional issues concerning whether certain parties are bound by a particular arbitration under the group-company doctrine etc. in a multi-party arbitration raise complicated questions of fact which are best left to the tribunal to decide.
- In ***In Re: Interplay*** *(supra)* the position taken in ***Vidya Drolia*** *(supra)* was clarified to state that the scope of examination under Section 11(6) should be confined to the "existence of the arbitration agreement" under Section 7 of the Act, 1996 and the "validity of an arbitration agreement" must be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. Therefore, substantive objections pertaining to existence and validity on the basis of evidence must be left to the arbitral tribunal since it can "rule" on its own jurisdiction.

- ***Krish Spinning*** *(supra)* cautioned that the Courts delving into the domain of the arbitral tribunal at the Section 11 stage run the risk of leaving the claimant remediless if the Section 11 application is rejected. Further, it was stated that a detailed examination by the courts at the Section 11 stage would be counterproductive to the objective of expeditious disposal of Section 11 application and simplification of pleadings at that stage.
- ***Cox and Kings*** *(supra)* specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings. While saying that the referral court would be required to *prima facie* rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the arbitral tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the arbitral tribunal and can be decided under its jurisdiction under Section 16.

ii. Whether on a *prima facie* view, the SRG Group being a non-signatory to the FAA, can be referred to arbitration?

66. It is well settled that an arbitration agreement, in order to qualify as a valid agreement, has to satisfy the requirements stipulated under Section 7 of the Act, 1996 along with the principles of law under the Indian Contract Act, 1872. Having regard to the submissions of both the Respondent Groups i.e., JRS and SRG, it can be said that they have raised manifold objections to the present petition, however, none of those objections question or deny the existence of the arbitration agreement under which the arbitration has been invoked by the Petitioner AMP Group. In fact, the JRS Group has no objection to resolve the disputes with the AMP Group by way of arbitration. Their primary objection is only that the SRG Group cannot be a part of the arbitration proceedings. Therefore, the requirement of *prima facie* existence of an arbitration agreement, as stated under Section 11 of the Act, 1996 is satisfied.

67. However, the core issue that falls for our consideration is whether the SRG Group, being a non-signatory to the FAA can also be referred to arbitration and whether they are "veritable" parties to the arbitration agreement.

68. This Court in ***Cox and Kings*** (supra) held that the definition of "parties" under Section 2(1)(h) read with Section 7 of the Act, 1996 includes both the signatory as well as non-signatory parties. Persons or entities who have not formally signed the arbitration agreement or the underlying contract containing the arbitration agreement may also intend to be bound by the

terms of the agreement. Further, the requirement of a written agreement under Section 7 of the Act, 1996 does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties. Therefore, the issue as to who is a "party" to an arbitration agreement is primarily an issue of consent. Actions or conduct could be an indicator of the consent of a party to be bound by the arbitration agreement. This aspect is also evident from a reading of Section 7(4)(b) which emphasises on the manifestation of the consent of persons or entities through actions of exchanging documents. The relevant observations made in ***Cox and Kings*** *(supra)* are extracted hereinbelow:

> *"**83.** Reading Section 7 of the Arbitration Act in view of the above discussion gives rise to the following conclusions : first, arbitration agreements arise out of a legal relationship between or among persons or entities which may be contractual or otherwise; second, in situations where the legal relationship is contractual in nature, the nature of relationship can be determined on the basis of general contract law principles; third, it is not necessary for the persons or entities to be signatories to the arbitration agreement to be bound by it; fourth, in case of non-signatory parties, the important determination for the Courts is whether the persons or entities intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct; fifth, the requirement of a written arbitration agreement has to be adhered to strictly, but the form in which such agreement is recorded is irrelevant; sixth, the requirement of a written arbitration agreement does not exclude the possibility of binding non-signatory parties if there is a defined legal relationship between the signatory and non-signatory parties; and seventh, once the validity of an arbitration agreement is*

established, the Court or tribunal can determine the issue of which parties are bound by such agreement."

84. *It is presumed that the formal signatories to an arbitration agreement are parties who will be bound by it. However, in exceptional cases persons or entities who have not signed or formally assented to a written arbitration agreement or the underlying contract containing the arbitration agreement may be held to be bound by such agreement. As mentioned in the preceding paragraphs, the doctrine of privity limits the imposition of rights and liabilities on third parties to a contract. Generally, only the parties to an arbitration agreement can be subject to the full effects of the agreement in terms of the reliefs and remedies because they consented to be bound by the arbitration agreement. Therefore, the decisive question before the Courts or tribunals is whether a non-signatory consented to be bound by the arbitration agreement. To determine whether a non-signatory is bound by an arbitration agreement, the Courts and tribunals apply typical principles of contract law and corporate law. The legal doctrines provide a framework for evaluating the specific contractual language and the factual settings to determine the intentions of the parties to be bound by the arbitration agreement. [Gary Born, International Arbitration Law and Practice, (3rd Edn., 2021) at p. 1531.]*

xxx xxx xxx

170. *In view of the discussion above, we arrive at the following conclusions:*

170.1. *The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;*

170.2. *Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;*

170.3. *The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;[…]"*

(Emphasis supplied)

69. The fact that a non-signatory did not put pen to paper may be an indicator of its intention to not assume any rights, responsibilities or obligations under the arbitration agreement. However, the courts and tribunals should not adopt a conservative approach to exclude all persons or entities who intended to be bound by the underlying contract containing the arbitration agreement through their conduct and their relationship with the signatory parties. The mutual intent of the parties, relationship of a non-signatory with a signatory, commonality of the subject matter, composite nature of the transactions and performance of the contract are all factors that signify the intention of the non-signatory to be bound by the arbitration agreement.

70. An important factor to be considered by the Courts and Tribunals is the participation of the non-signatory in the performance of the underlying contract. In this regard, it was observed in ***Cox and Kings*** *(supra)* as follows:

> *"**123.** […] The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 2016 [UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:*
>
> *(a) preliminary negotiations between the parties;*

(b) practices which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned; and
(f) usages.

xxx *xxx* *xxx*

126. *Evaluating the involvement of the non-signatory party in the negotiation, performance, or termination of a contract is an important factor for a number of reasons. First, by being actively involved in the performance of a contract, a non-signatory may create an appearance that it is a veritable party to the contract containing the arbitration agreement; second, the conduct of the non-signatory may be in harmony with the conduct of the other members of the group, leading the other party to legitimately believe that the non-signatory was a veritable party to the contract; and third, the other party has legitimate reasons to rely on the appearance created by the non-signatory party so as to bind it to the arbitration agreement.*

xxx *xxx* *xxx*

127. *[…] The nature or standard of involvement of the non-signatory in the performance of the contract should be such that the non-signatory has actively assumed obligations or performance upon itself under the contract. In other words, the test is to determine whether the non-signatory has a positive, direct, and substantial involvement in the negotiation, performance, or termination of the contract. Mere incidental involvement in the negotiation or performance of the contract is not sufficient to infer the consent of the non-signatory to be bound by the underlying contract or its arbitration agreement. The burden is on the party seeking joinder of the non-signatory to the arbitration agreement to prove a conscious and deliberate conduct of involvement of the non-signatory based on objective evidence."*

(Emphasis supplied)

71. It is evident that the intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such an agreement. Further, when the conduct of the non-signatory is in harmony with the conduct of the others, it might lead the other party or parties to legitimately believe that the non-signatory was a veritable party to the contract containing the arbitration agreement. However, in order to infer consent of the non-signatory party, their involvement in the negotiation or performance of the contract must be positive, direct and substantial and not be merely incidental. Thus, the conduct of the non-signatory party along with the other attending circumstances may lead the referral court to draw a legitimate inference that it is a veritable party to the arbitration agreement.

72. Of the several entities pertaining to which settlement is contemplated under the FAA dated 28.02.2020 executed between the AMP Group and JRS Group, clauses 2.1.4 and 2.1.6 relate to Millenium and Deegee which are Respondent Nos. 7 and 8 companies respectively. It is an undisputed fact that Respondent Nos. 7 and 8 companies are themselves a part of the SRG Group. Therefore, *prima facie* without the joinder of the SRG Group, which includes Millenium and Deegee, there may not be a complete and effective

resolution of the disputes arising out of the FAA between the AMP and JRS Groups.

73. Clause 2.1.4 read with Schedule 7 of the FAA *prima facie* indicates that the petitioners i.e., the AMP Group has to exit from the Respondent No.7 company i.e. Millenium where they hold Class A equity shares amounting to 36%. According to the procedure contemplated therein, during Phase 1 of the Millenium exit, the SRG Group (which already holds 40% shares in Millenium) is supposed to additionally purchase approx. 11% of the shares in Millenium held by the AMP Group. It is stated therein that the JRS Group would provide the necessary funding to SRG Group to purchase the aforementioned shares. In Phase 2, Millenium would buy back the balance shares of the AMP Group i.e., approx. 25% from the funds to be received from Respondent No. 8 company i.e. Deegee.

74. Clause 2.1.6 read with Schedule 8 *prima facie* indicates that the JRS Group and SRG Group would completely exit from the Respondent No. 8 Company i.e., Deegee. The proceeds received by the AMP Group from the sale of its shares in Millenium as per Phase 1 of the Millenium exit would be brought into Deegee by the AMP Group. AMP Group is also required to bring further funds into Deegee to pay off the entire loan provided by Millenium to Deegee along with interest at the rate of 14.5% compounded annually. Simultaneously with the repayment of loans to Millenium as

aforesaid, Deegee is also required to pay off the entire loan provided by the JRS Group and SRG Group with interest at the rate of 14.5% compounded annually. Subsequently, the shares of Deegee held by the JRS Group and SRG Group would be transferred completely to the AMP Group.

75. In short, while the AMP Group is supposed to exit from Millenium and acquire shares in Deegee, the JRS and SRG Groups are supposed to exit from Deegee and, the SRG Group would acquire shares in Millenium. It is also provided that agreements are to be executed with or by the SRG Group to record and finalize the understanding with respect to the exit of AMP Group from Millenium and the exit of JRS and SRG Groups from Deegee. Recognising the interdependent nature of the transactions contemplated with respect to Millenium and Deegee, clause 2.1.4(a) also states that the exit of Millenium and Deegee should be endeavoured to be undertaken simultaneously on the same day.

76. Further Clause 2.1.7 requires the AMP Group to irrevocably and unconditionally withdraw all litigations including CP/383/2017 filed in connection with Deegee by the AMP Group before the NCLT at Mumbai wherein Respondent No.9 of the SRG Group is one of the respondents.

77. All that has been stated aforesaid gives an impression, though *prima facie*, that the SRG Group may be connected to the FAA and forms part of the

settlement contemplated therein. However, this aspect should be looked into more closely by the Arbitral Tribunal.

78. Moreover, on the question whether the non-signatory party i.e., the SRG Group intended or consented to be bound by the arbitration agreement or the underlying contract containing the arbitration agreement through their acts or conduct, elaborate submissions have been made on behalf of all three groups, by placing reliance on the terms of the agreement, several email exchanges etc. On bare perusal of the email exchanges produced by the petitioner, it appears *prima facie* that several contested questions of fact, including but not limited to those hereinbelow, need to be first resolved:

- Whether Mr. Kalpesh Parmar or the JRS Group can be said to have represented the interests of the SRG Group during the negotiations leading up to the FAA, its implementation and during the mediation process;
- Whether the marking of several emails to the Respondent No.9 of the SRG Group and the absence of any protest on his part can imply consent of the SRG Group to be bound by the underlying contract and/or the arbitration agreement;
- Whether the documents required for the valuation and due diligence of Millenium and Deegee could have been shared by an employee of Deegee without the knowledge or consent of the SRG Group; and

- Whether the demand of an additional Rs. 25 crore made by the SRG Group through the JRS Group as a condition for exit from Deegee indicates their intention to be bound by the underlying contract and/or the arbitration agreement?

79. A detailed examination of numerous disputed questions of fact are imperative in deciding whether the SRG Group participated in the negotiation and performance of the underlying contract and can be bound by the arbitration agreement. At the cost of repetition, we may state that under our limited jurisdiction afforded under Section 11(6) of the Act, 1996 we should not conduct a mini trial and delve into contested or disputed questions of fact. This has been categorically laid down in several decisions of this Court including ***Vidya Drolia*** *(supra)* and ***Krish Spinning*** *(supra).* Further, it is also the case of the SRG Group that a dual test needs to be satisfied before it is compelled to be a party to the present arbitration proceedings i.e., (a) SRG Group should be shown to have agreed to the underlying contract and (b) SRG Group should also be shown to have agreed to be bound by the arbitration agreement. We are of the considered view that the same requires a much more detailed examination of the evidence that may be adduced by the parties which can only be gone into by the Arbitral Tribunal.

80. Therefore, considering the complexity involved in the determination of the question whether the SRG Group is a veritable party to the arbitration agreement or not, we are of the view that it would be appropriate for the arbitral tribunal to take a call on the question after taking into consideration the evidence that may be adduced by the parties before it and the application of the legal doctrine as elaborated in the decision in ***Cox and Kings*** *(supra).*

81. We also *prima facie* find force in the contention of the petitioner AMP Group that the nomenclature of the agreement is not determinative of its character as held by this Court in ***Sasan Power Ltd.*** *(supra)*. Therefore, the fact that the underlying contract is called the "Family Arrangement Agreement" by itself may not preclude the impleadment of the SRG Group in arbitration.

82. Once the arbitral tribunal is constituted, it shall be open for the respondents to raise all the available objections in law, and it is only after (and if) the preliminary objections are rejected that the tribunal shall proceed to adjudicate the claims of the Petitioners.

F. CONCLUSION

83. In view of the aforesaid, the present petition is allowed. We appoint Mr. Akil Kureshi (Former Chief Justice, High Court of Rajasthan) to act as the

sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

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

85. Pending application(s), if any, shall stand disposed of.

…….CJI.
(Dr. Dhananjaya Y. Chandrachud)

……J.
(J.B. Pardiwala)

……J.
(Manoj Misra)

New Delhi;
September 20, 2024.