In the High Court at Calcutta
Commercial Division
Original Side

The Hon'ble Mr. Justice Sabyasachi Bhattacharyya

IA No. GA-COM 1 of 2025
in
AP-COM 824 of 2024

SPML Infra Limited
Vs.
Navkar Urbanstructure Limited
(formerly known as Navkar Builders Ltd)

With

IA No. GA-COM 2 of 2025
In
AP-COM 824 of 2024

SPML Infra Limited
Vs.
Navkar Urbanstructure Limited
(formerly known as Navkar Builders Ltd)

For the SPML Infra Ltd	:	Mr. Swatarup Banerjee., Mr. Prithwish Roy Chowdhury, Mr. Aritra Deb, Advs.
For the respondent	:	Mr. Krishnaraj Thaker Sr. Adv, Mr. Varun Kedia, Mr. Avee Jaiswal, Advs.
Heard on	:	18.09.2024, 17.01.2025 18.07.2025, 29.08.2025 & 12.09.2025
Reserved on	:	12.09.2025
Judgment on	:	19.09.2025

Sabyasachi Bhattacharyya, J.:-

1. Although initially, vide order dated July 18, 2025, affidavits-in-opposition and reply were directed to be filed, subsequently it was recorded in the order dated August 29, 2025 that the respondent does not want to used affidavits and would argue on the basis of the pleadings in the applications, on which premises it was recorded that the matter would be heard without affidavits.

In Re: GA-COM 1 of 2025

2. Since in the absence of affidavit-in-opposition, the averments made in the application for condonation of delay stand uncontroverted, the court takes up the said application on the premise that the averments made therein are correct on facts and proceeds on such premise.

3. The recall applicant cites the prolonged illness and the demise of Shri Ramesh Chandra Shah on August 28, 2024, the patriarch of the family and contends that the applicant-Company is a closely held family-Company. Due to said bereavement in the family, the promoter who managed the affairs of the Company, namely Shri Dakshesh Shah, a son of the said deceased, was not in a position to take appropriate steps for contesting the main application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act") and for filing the subsequent recall application. As such, it is submitted that the respondent/recall applicant could not appear or be

represented before this Court on the relevant date when the order under recall was passed on September 18, 2024 and even thereafter could not take any legal step to challenge the same.

4. Taking a liberal view appropriate to applications for condonation of delay, since no mala fides can be attributed to the appellant, and in view of the facts alleged in the condonation application being uncontroverted, by applying the doctrine of non-traverse, this Court is of the opinion that sufficient explanation for the delay in filing the recall application has been furnished.

5. As such, GA COM 1 of 2025 is allowed, thereby condoning the delay in filing GA COM 2 of 2025.

6. There will be no order as to costs.

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7. Learned senior counsel appearing for the recall applicant submits that since the applicant, being the respondent in the parent application under Section 11 of the 1996 Act was not represented on the date when the said application was allowed, the correct position as it stood on that date could not be pointed out and the order dated September 18, 2024 was passed erroneously.

8. It is argued that Section 11 (6) of the 1996 Act contemplates a thirty days' waiting period from the date of receipt of the request to appoint arbitrator, by one party to the arbitration agreement to the other, before

the filing of an application under the said provision. In the present case, admittedly an email was sent on June 26, 2024, communicating such request, by the present respondent (petitioner in the Section 11 application) and the application under Section 11 of the 1996 Act was filed on July 23, 2024, that is, prior to the expiry of thirty days from the date of receipt of the request.

9. It is argued that the email dated June 26, 2024, itself reveals that a purported earlier communication dated May 21, 2024, (which the recall applicant denies having been served with) could not be served on the recall applicant, which is evident from the postal endorsements mentioned in the email dated June 26, 2024. Thus, in view of the contravention of the mandatory thirty days' waiting period before filing the Section 11 application, the court did not have the jurisdiction to pass an order appointing an arbitrator under the said provision.

10. Learned senior counsel further points out that initially the application was filed under the Ordinary Original Jurisdiction of this Court and was numbered as AP No.140 of 2024. Subsequently, upon a leave being granted on September 2, 2024 by the court, the self-same application was renumbered as AP COM No.824 of 2024.

11. Thus, the filing date of the application remained July 23, 2024, and it cannot be construed that the fresh numbering would *per se* tantamount to a fresh filing of the application.

12. Learned senior counsel appearing for the recall applicant cites *Vidya Drolia and others v. Durga Trading Corporation*, reported at *(2021) 2 SCC 1*, for the proposition that if there is a serious allegation of forgery, the Arbitral Tribunal does not have jurisdiction to hear the same. Certain tests were laid down in the said report to ascertain whether the allegations are of a serious nature or not, one of which is whether the forgery permeates the entire contract and above all the arbitration agreement, rendering the arbitration agreement itself void, and whether the allegations touch merely upon internal affairs of the parties or whether those have implications in the public domain.

13. Learned senior counsel next cites *Rashid Raza v. Sadaf Akhtar* reported at *(2019) 8 SCC 710*, where the concept of simple and serious allegations of forgery/fabrication was first propounded. In continuation of the same argument, learned senior counsel cites *Avitel Post Studioz Limited vs. HSBC Pi Holdings (Mauritius) Ltd.* reported at (*2021) 4 SCC 713*, where all the previous judgments governing the field were taken note of and reiterated.

14. Learned senior counsel further cites *Managing Director Bihar State Food and Civil supply Corporation Ltd. and Anr. Vs. Sanjay Kumar* reported at *(2025) 2 SCC OnLine SC 1604*, where the objection as to non-arbitrability of a dispute, due to allegations of criminality being involved, were considered. It was held therein that in the teeth of the

allegations of criminality involved in the dispute, the matter is rendered non-arbitrable.

15. Learned senior counsel further argues that the scope of adjudication at the pre-referral stage, either under Section 8 or under Section 11 of the 1996 Act, pertains primarily to the existence and validity of an arbitration agreement. The primary inquiry is about the existence and validity, and the secondary inquiry that may arise is with respect to non-arbitrability of the dispute. Such inquiries were held in *Magic Eye Developers Pvt. Ltd. vs Green Edge Infrastructure Pvt. Ltd and Ors.*, reported at *(2023) 8 SCC 50*, to be different and distinct, which judgment is also cited by learned senior counsel for the recall applicant. In the said report, it was further laid down that the court, at a pre-referral stage, while examining the jurisdiction under Section 11(6), may even consider *prima facie* examining the arbitrability of the claims. More importantly, the Referral Court has to decide any dispute, if raised, regarding the existence and validity of an arbitration agreement conclusively and finally and should not leave the said issue to be determined by the Arbitral Tribunal, the reason being that the issue with respect to the existence and validity of an arbitration agreement goes to the root of the matter.

16. Learned senior counsel contends that since the arbitrator derives jurisdiction from the agreement between the parties, which itself is vitiated by the arbitration agreement or the contract containing the

same being tainted by forgery/fabrication, the court, under Section 11 of the 1996 Act, has to decide such issue prior to referring the matter to arbitration.

17. Learned counsel appearing for the respondent (petitioner in the Section 11 application), contends that the recall applicant has already appeared before the arbitrator who was appointed by the order under recall by filing a preliminary reply to the Statement of Claim and thereafter a detailed counter-reply to the Statement of Claim, respectively on June 23, 2025 and August 29, 2025. After filing such preliminary reply, the application for recall has been filed on July 18, 2025.

18. Learned counsel relies on Section 16(2) of the 1996 Act which provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the Statement of Defence and that a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator.

19. Sub-section (1) of Section 16, it is submitted, provides that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for such purpose, an Arbitration Clause which forms a part of the contract shall be treated as an agreement independent of the other terms of the contract and a decision by the Arbitral Tribunal that

the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

20. It is submitted further that the recall applicant raised the objection as to lack of jurisdiction of the arbitrator, including on the ground that the agreement containing the Arbitration Clause was a forged document, in both the preliminary reply and the subsequent detailed counter-reply to the statement of claims, filed before the learned arbitrator. Hence, the present recall application ought not to be entertained at all.

21. Learned counsel further argues that there is no scope of recall of a final adjudication on the application under Section 11 of the 1996 Act, since the recall applicant, despite notice, chose not to appear on the date the order under recall was passed.

22. Even subsequently, there was an amendment to the order insofar as the name of the learned arbitrator is concerned, on which occasion also the recall applicant did not appear before this Court.

23. On the issue of thirty days' mandatory period, learned counsel for the respondent submits that since leave was granted by this Court, vide order dated September 2, 2024, to take back the original Section 11 application, which was wrongly filed under the Ordinary Original jurisdiction of this court, and file it in the Commercial Division of this Court, the subsequent filing is to be treated as the date of filing of the application-in-question under Section 11 of the 1996 Act. Since the subsequent renumbering is to be construed as the fresh filing in terms

of the leave of this Court, which was much after the period of thirty days' from the email dated June 26, 2024, it is argued that in any event the said objection is not sustainable.

24. Learned counsel, while submitting so, also insinuates that there were previous notices requesting appointment of arbitrator as well. However, since no affidavit-in-operation has been filed to disclose such documents, learned counsel is does not elaborate on the same.

25. As to the other objection raised by the recall applicant, learned counsel for the respondent submits that the recall applicant chose not to appear before the Section 11 court and raise the objection of forgery in respect of the agreement containing the arbitration clause. Thus, there was no occasion for this court, while appointing an arbitrator under Section 11 (6) of the 1996 Act, to take note of such dispute at all. Hence, the question of conclusive adjudication on the issue of forgery, which was never raised at all before this Court, does not arise.

26. Secondly, it is submitted that in the case of *Sanjay Kumar (supra)*[1], there were pending criminal proceedings and scope of initiation of criminal proceedings, which was the context of the judgment. However, in paragraph no. 21, clause III, it was categorically reiterated by the Hon'ble Supreme Court that the same set of facts may lead to civil and criminal proceedings and the mere fact that a criminal proceeding can

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*1. **Managing Director Bihar State Food and Civil supply Corporation Ltd. and Anr. Vs. Sanjay Kumar**, reported at (2025) 2 SCC OnLine SC 1604*

or has been instituted in respect of the same incident would not *per se* lead to the conclusion that the dispute which is otherwise arbitrable ceases to be so.

27. In the present case, there is no allegation that there was a single complaint regarding the alleged forgery and as such, the said ground is being invented by the recall applicant for the purpose of derailing the arbitral process.

28. Upon hearing learned counsel for the parties, the following three issues fall for consideration:

i) Whether the recall application is maintainable;

ii) Whether the order dated September 18, 2024 passed in AP COM No. 824 of 2024 was without jurisdiction, in view of thirty days subsequent to receipt by the petitioner of the request for appointment of arbitration having not yet expired when the application under Section 11 was filed;

iii) Whether, in view of the objection as to the contract containing the Arbitration Clause being allegedly vitiated by forgery/fraud, the court, at the pre-referral stage, was duty-bound to conclusively determine such issue before referring the matter to arbitration.

29. The above issues are decided as follows:

i) <u>Whether the recall application is maintainable</u>

30. Under normal circumstances, there is no provision for recall of an order disposing of proceedings finally. For all practical purposes, the

application under Section 11 of the 1996 Act was an independent proceeding which was finally disposed of by the order dated September 18, 2024.

31. We are also required to take into consideration Section 5 of the 1996 Act, which provides that notwithstanding anything contained in any other law for the time being in force, in matters governed by Part I of the 1996 Act, no judicial authority shall intervene except where so provided in the said Part. Section 11 also comes under Part I and, as such, the rigour of Section 5 operates to adjudications under Section 11 as well. The *non obstante* clause preceding Section 5 excludes the jurisdiction of the civil court to recall its own order under Order XLVII of the Code of Civil Procedure.

32. Section 19 of the 1996 Act precludes the applicability of the Code of Civil Procedure in arbitral proceedings. However, such non-applicability is not attracted *per se* to an application under Section 11, which the Supreme Court or the High Court, and not the arbitrator, is required to adjudicate.

33. Yet, all said and done, in the event a constitutional court, which is also a court of records, comes to a finding that it committed some palpable error on the face of the records, the said court, be it the Supreme Court or the High Court, is not precluded from correcting such error.

34. Such principle is all the more applicable in case of Chartered High Courts, which derive authority under the Letters Patent creating the

same and have the inherent power to correct the records, if necessary by recalling their own orders.

35. Thus, in order to avoid manifest injustice, if any, this Court decides to entertain the application for recall and give an opportunity to the applicant to substantiate its case of the order dated September 18, 2024 being manifestly erroneous.

36. Thus, this issue is given a liberal construction and the recall application is entertained as maintainable.

ii) Whether the order dated September 18, 2024 passed in AP COM No. 824 of 2024 was without jurisdiction, in view of thirty days subsequent to receipt by the petitioner of the request for appointment of arbitration having not yet expired when the application under Section 11 was filed

37. Sub-section (6) of Section 11 of the 1996 Act makes an interesting departure from the preceding sub-sections of the said Section. Sub-section (2) of Section 11 provides that, subject to sub-section (6), the parties are free to agree to the procedure for appointing the arbitrator or arbitrators. Sub-section (3), on the other hand, provides that failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint a third arbitrator, who shall act as the presiding arbitrator.

38. Sub-section (4) contemplates a situation where the appointment procedure under sub-section (3) applies and a party fails to appoint an arbitrator or the two appointed arbitrators fail to agree on the third arbitrator. In both cases, the Supreme Court or the High Court, as applicable, have been empowered to appoint the Arbitrator Tribunal, provided the dispute is not in the nature of an international commercial arbitration.

39. However, as per sub-clause (a) and sub-clause (b) of sub-section (4) of Section 11, in both such cases, there is a thirty-day waiting period before filing an application under Section 11(4), respectively from the receipt of a request to appoint an arbitrator and from the date of the appointment of the two arbitrators.

40. Similarly, sub-section (5) of Section 11 contemplates a situation where there is no agreement under sub-section (2) regarding the procedure for appointing an arbitrator or arbitrators. In such a case also, a party can apply for appointment of an arbitrator under sub-section (5) only upon thirty days having elapsed from the receipt of a request by one party to the other to agree on the arbitrator.

41. Sub-section (6) deals with situations where, despite there being an appointment procedure agreed upon by the parties, a party fails to act as required under that procedure, or the parties or the two appointed arbitrators fail to reach an agreement expected of them under that procedure, or a person fails to perform any function entrusted to him or

it under that procedure. In such cases, the Supreme Court or the High Court, as the case may be, may take necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment.

42. Conspicuously, however, sub-section (6) does not stipulate a mandatory waiting period of thirty days from any of the three situations which prompt a Court appointment - either the party failing to act as required under the procedure or the parties or the appointed arbitrators failing to reach an agreement or the failure of a person to perform a function entrusted under the procedure. Hence, *stricto sensu*, there is no waiting period before filing an application under Section 11, sub-section (6) of the 1996 Act, under which the application-in-question was apparently filed.

43. However, even if we borrow the thirty-day period from sub-section (4) of Section 11, the recall applicant has failed to substantiate its case on the count of the application being filed earlier than thirty days; this is because of the order of this Court dated September 2, 2024, passed in connection with AP No. 140 of 2024.

44. The application under Section 11 was first presented in the Ordinary Original jurisdiction of this Court on July 23, 2024, that is, three days before the expiry of the thirty days' moratorium from the email request dated June 26, 2024. However, by an order dated September 2, 2024, this Court had granted leave to the petitioner (the present respondent)

"to take back the application and file it in the Commercial Division of this Court". Thus, although at the ground level only a new number was allotted and noted by the concerned department of this Court, in its Commercial Division, on the self-same application, read in the context of the order dated September 2, 2024, the date of re-numbering has to be construed as a fresh filing date upon the new number being AP COM No. 824 of 2024 being allocated, since it should be construed as re-filing after taking back the original application.

45. It is to be noted that in Commercial Arbitration matters, the Ordinary Original Side of this Court does not have jurisdiction at all to take up applications relating to commercial arbitration matters within the contemplation of the Commercial Courts Act, 2015. Thus, where there is inherent lack of initial jurisdiction, the same cannot be regularised by converting the same application by treating it to have been filed in the Commercial Division. As such, the premise of the order dated September 2, 2024 was not to convert the application intra-Division (Ordinary and Commercial) but to grant liberty to the petitioner to take back the original application bearing AP No. 140 of 2024 altogether and file it afresh in the Commercial Division of this Court. Hence, for all practical purposes, the filing of the application in its new Avatar, before the Commercial Division, which happened long after the expiry of thirty days from the email request dated June 26, 2024, was well beyond the statutory moratorium of thirty days from the request.

46. Thus, even if we construe the order being passed under Section 11(4)(a) of the 1996 Act, since a request was made by one party to the other, the thirty days' bar is not applicable to the present case at all.

47. Hence, this issue is decided against the recall applicant.

iii) Whether, in view of the objection as to the contract containing the Arbitration Clause being allegedly vitiated by forgery/fraud, the court, at the pre-referral stage, was duty-bound to conclusively determine such issue before referring the matter to arbitration.

48. Going by the proposition laid down in *Magic Eye Developers (supra)*[2], the Referral Code has to decide an issue regarding the existence and validity of an arbitration agreement conclusively at the stage of Section 11 of the 1996 Act itself.

49. Moreover, from the records, it is substantiated that the affidavit-of-service filed by the petitioner in the Section 11 application clearly showed that service had been effected on the respondent/recall applicant prior to moving the application under Section 11 before this Court. Despite such service, the respondent/recall applicant deliberately chose to abstain from the hearing. Thus, no "dispute" regarding the existence and validity of the arbitration agreement, or

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2. Magic Eye Developers Pvt. Ltd. vs Green Edge Infrastructure Pvt. Ltd and Ors. reported at (2023) 8 SCC 50

otherwise, was at all raised by the recall applicant before this Court while dismissing the application under Section 11 of the 1996 Act. Thus, none of the judgments cited by the recall applicant are attracted in the present context at all.

50. Another aspect of the matter has to be considered. The recall applicant, before filing the present recall application, had filed a preliminary objection, inter alia raising the objection as to jurisdiction before the Arbitrator on the ground of alleged forgery/fraud of the arbitration agreement. Thereafter, before moving the recall application before this Court, a comprehensive statement of defence was filed, raising the same objection along with others. However, such facts were not pointed out by learned senior counsel for the recall applicant at the time of moving the recall application; it is only learned counsel for the respondent (petitioner in the Section 11 application) who brought such developments to the notice of the Court.

51. Even giving the widest latitude to the recall applicant, to ascertain whether there was any error on the part of this Court, this Court cannot but take note of the fact that there is a clear overlap between Section 11 and Section 16 of the 1996 Act insofar as an objection regarding the existence and validity of agreement is concerned.

52. Under sub-section (6-A) of Section 11, the Supreme Court or the High Court, as the case may be, while considering any application under sub-section (4), (5) or (6), shall confine its enquiry to the examination of

the existence of an arbitration agreement. The said expression "existence of an arbitration agreement" has been interpreted consistently by the Supreme Court in the context of Section 11 in *Rashid (supra)*[3]*, Vidya Drolia (supra)*[4] and *Managing Director Bihar State Food and Civil supply Corporation Ltd (supra)*[5]. The common refrain in all the said judgments is that while deciding an application under Section 11 of the 1996 Act, the Referral Court has to enquire into the question of existence of an arbitration agreement and its validity, in the context of any objection as to the agreement being tainted by forgery/fraud.

53. In *Magic Eye Developers (supra)*[6], the Supreme Court has categorically laid down that if any dispute with respect to existence and validity of the arbitration agreement is raised at a pre-referral stage, the Referral Court has to decided the said issue conclusively and finally and should not leave the said issue to be determined by the Arbitral Tribunal, as it goes to the root of the jurisdiction of the Arbitral Tribunal.

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3. Rashid Raza v. Sadaf Akhtar reported at (2019) 8 SCC 710,

4. Vidya Drolia and others v. Durga Trading Corporation, reported at (2021) 2 SCC 1

5. Managing Director Bihar State Food and Civil supply Corporation Ltd. and Anr. Vs. Sanjay Kumar reported at (2025) 2 SCC OnLine SC 1604

6. Magic Eye Developers Pvt. Ltd. vs Green Edge Infrastructure Pvt. Ltd and Ors. reported at (2023) 8 SCC 50

54. However, the interplay between Section 11 (6-A) and Section 16 (1) of the 1996 Act did not fall for consideration or was adjudicated upon by the Hon'ble Supreme Court in any of the above cases.

55. Section 16 (1) vests the Arbitral Tribunal with the power to rule on its own jurisdiction, including ruling on any objection with respect to the existence or validity of the arbitration agreement. In fact, read in context, such power is wider than that conferred on the Referral Court under sub-section (6-A) of Section 11, since the sub-section (6-A) merely confines the examination to the "existence" of an arbitration agreement whereas Section 16(1) contemplates a broader sweep, including "validity" of the agreement along with its "existence'.

56. In the present case, the conduct of the recall applicant is deplorable. It filed a preliminary reply to the Statement of Claims before the learned arbitrator appointed by the order under recall on June 23, 2025, that is prior to filing the present recall application. In paragraphs 1, 2, 4 and 6 thereof, it has been categorically alleged that the entire agreement is an outcome of fraud and forgery. It was alleged that the signature of one Mr. Harsh Shah, allegedly the Director/Authorised representative of the recall applicant, was forged and the recall applicant has sought to rely on a forensic report in such context. The same objection was subsequently repeated in the pleadings filed by the recall applicant before the learned arbitrator on August 29, 2025, which is a comprehensive and detailed counter-reply to the Statement of Claims,

where Clause 4 deals with the allegation of alleged fraud at length, thereby assailing the jurisdiction of the learned arbitrator to entertain the matter.

57. Even after doing so, the recall applicant has proceeded with the present application for recall. In the recall application, that is, GA COM No. 2 of 2025, in paragraph no.13 it has been pleaded that an objection was raised by the respondent/recall applicant before the arbitrator and that a copy of the minutes of the meeting dated March 3, 2025 is annexed thereto, respectively being marked with the letters "I" and "J". However, annexure "I" to the application is not the preliminary reply used by the recall applicant before the Tribunal but is a mere communication on the part of the recall applicant to the learned arbitrator, primarily highlighting that the recall application was being contemplated to be filed before this Court. Although it was stated therein that the order under recall was passed by misleading this Court and fraud was committed on the recall applicant, the stress in the letter was that there was no prior notice of the proceedings. Even the minutes of the arbitrator dated March 3, 2025 does not disclose that the specific allegation, that the agreement containing the arbitration clause was vitiated by forgery/fraud, was raised before the learned arbitrator.

58. The learned arbitrator, in the minutes of the meeting dated March 3, 2025, recorded that in the same morning, a soft copy of the letter was sent to him where it was *inter alia* alleged that the arbitral proceeding is

the "outcome of systematic fraud committed by the claimant" and that the arbitrator was requested not to be a party to such fraud. However, there is no specific allegation recorded in the said minutes as to any objection regarding forgery of the agreement being raised.

59. Even in the minutes dated March 20, 2025, which is Annexure "K" to the recall application, there is no mention of any such specific allegation on the part of the recall applicant.

60. The recall applicant has not disclosed within the four corners of the recall application, or during its arguments, even a whisper regarding it having filed not only a preliminary reply on June 23, 2025 but also a comprehensive and detailed counter-reply on August 29, 2025. Although the detailed reply was not yet filed on July 18, 2025, the preliminary reply, categorically alleging forgery in respect of the agreement and non-existence of agreement was already before the Arbitral Tribunal. However, the fact of filing of the preliminary reply was completely suppressed in the subsequently filed recall application.

61. Even during arguments, the recall applicant never mentioned the filing of the detailed counter-reply on August 29, 2025, although the same had already been filed in the meantime. Of course, it might very well have been that the said fact was not known to learned senior counsel appearing for the recall applicant. However, that does not absolve the suppression of such facts by the recall applicant. Be that as it may, fact remains that unless the preliminary reply and the detailed counter-

reply, both categorically containing objections regarding the agreement containing the Arbitration Clause being tainted by fraud, were disclosed by the petitioner in the Section 11 application/respondent herein and copies thereof were handed over in court, which are kept on record, there would be no occasion for this Court to know about the said replies having been filed by the recall applicant before the learned arbitrator himself, specifically challenging the jurisdiction of the arbitrator on the ground of existence and validity of the arbitration agreement.

62. Such suppression itself is sufficient to dismiss the recall application on the ground of suppression of material facts in an attempt to mislead the court, even on the date of the arguments, when both the preliminary reply and the detailed counter-claim were already filed before the learned arbitrator.

63. Since the jurisdictions of the Arbitral Tribunal and the Referral Court overlap on the issue of existence of the arbitration agreement, the former's power being wider, even encompassing questions of the validity of the agreement, and in view of the recall applicant having already raised such objection before the arbitrator by participating in the said proceeding, it is best left to the learned arbitrator, in consonance with the scheme of the 1996 Act, to decide such issue on merits.

64. It is unfortunate that the recall applicant has resorted to forum-shopping, approaching the arbitrator and simultaneously not only filing

but proceeding with the hearing of the recall application on the self-same issue before this court.

65. It is obvious that the scope of adjudication of a recall application is much limited than that of the learned arbitrator for the purpose of deciding the said question, since the application under Section 11 was finally decided by the order under recall, when no objection as to the existence or validity of the agreement was taken by the recall applicant despite having notice of the pendency of the Section 11 application. As such, there is no occasion for this Court to recall the said order and/or even the review the same, since the recall applicant has utterly failed to substantiate any palpable error, either apparent on the face of the record or even otherwise, in the order appointing the learned arbitrator.

66. In any event, whereas the Referral Court merely decides such issue of existence of the arbitration agreement *prima facie* in cases where such issue can be decided on the basis of the application under Section 11 and affidavits, if any, filed by the parties, if a detailed factual enquiry is required, which necessitates evidence to be taken at length, it would be beyond the scope of the jurisdiction of the Section 11 Court to decide such issue. The ratio laid down in *Magic Eye (supra)*[7] has to be read in such context.

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*7. **Magic Eye Developers Pvt. Ltd. vs Green Edge Infrastructure Pvt. Ltd and Ors. reported at (2023) 8 SCC 50***

67. Moreover, since in the present case, it is not the initial Section 11 application which is being decided, but a subsequent recall application without any valid ground for recall, there is no question on adjudicating on the issue of forgery by this Court at this stage.

68. That apart, as observed above, the recall applicant, pursuant to the appointment of the arbitrator by the order dated September 18, 2024, has already filed its preliminary reply and subsequent comprehensive reply to the counter-statement before the learned arbitrator, raising therein the question which has been raised in the present recall application, it is the arbitrator who has exclusive domain now to decide the issue, as contemplated in Section 16 of the 1996 Act. In fact, the Arbitral Tribunal, under sub-section (5) of Section 16, shall not only decide on such a plea but where it takes a decision rejecting the plea of lack of jurisdiction, including the question of existence of validity of the arbitration agreement, it is mandated by law to continue with the arbitral proceeding and make an arbitral award. The aggrieved party does not have a remedy to challenge such refusal of the objection at that stage but, as per the scheme under sub-section (6) of Section 16, has to wait to file an application after setting aside the arbitral award in accordance with Section 34, only upon such award being finally passed.

69. Such legislative scheme has been sought to be frustrated by the recall applicant by preferring the present application, bypassing the avenue

available to in law under Section 16 (6) of the 1996 Act, apparently because there would be no scope of challenge if the objection as to validity or existence of the agreement is turned down by the learned arbitrator, at this stage. Such forum-shopping by the recall applicant is strongly deprecated.

70. Due to the harassment caused to the petitioner in the Section 11 application/respondent herein, and the *mala fide* intent of the recall applicant in forum-shopping, the respondent in the recall application is required to be compensated by costs.

71. Accordingly, GA COM No. 2 of 2025, filed in connection with AP COM No. 824 of 2024, is dismissed on contest with costs of Rs. 50,000/-, to be paid by the recall applicant to the respondent in the recall application within thirty days from date.

72. Urgent certified copies, if applied for, be supplied to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)