IN THE HIGH COURT AT CALCUTTA
COMMERCIAL JURISDICTION
ORIGINAL SIDE

Present: Hon'ble Justice Shampa Sarkar

AP (COM) 352 of 2024
[OLD CASE NO. AP/486/2024]

ANJANEE KUMAR LAKHOTIA
VS
SHRI MARUTI MAHESHWARI AND ORS.

For the petitioner	:	Mr. Abhrajit Mitra, Sr. Adv. Mr. Satadeep Bhattacharya, Adv. Ms. Sriparna Mitra, Adv. Ms. P. Basu, Adv. Ms. Nairanjana Ghosh, Adv. Mr. Debartha Chakraborty, Adv. Ms. Jaita Ghosh, Adv.
For the respondents	:	Mr. Sabyasachi Chowdhury, Sr. Adv. Mr. Anuj Singh, Adv. M. Aman Agarwal, Adv. Ms. Ankita Baid, Adv. Ms. Trinisha De, Adv. Ms. Rupal Singh, Adv. Ms. Ritika De, Adv.
Hearing concluded on	:	28.08.2025
Judgment on	:	19.09.2025

Shampa Sarkar, J.:-

1. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act). The petitioner prays for appointment of an arbitral tribunal under clause 13.2 of the Memorandum of Understanding dated March 17, 2013. According to the petitioner, a Memorandum of Understanding dated March 17, 2013

(hereinafter referred to as the said MOU) was executed between the petitioner and another entity M/s MBL A CAPITAL LTD, (described as Group 2) and Ram Gopal Maheswari(since deceased) and his sons, Aditya Maheshwari, Maruti Maheswari the respondent No. 1, Anuj Maheshwari the respondent No. 2 and M/s. Prabhu International Vyapaar Pvt. Ltd., the respondent No. 3 (described as Group- I). In terms thereof, the entire shareholding of the members of Group-I in MBL Infrastructure Limited (hereinafter referred to as the said company or MBL) along with rights thereunder including bonus shares, dividends etc., of each of the persons/entities forming part of Group-I, were to be transferred to the petitioner or to the companies nominated by the petitioner for an inclusive consideration of Rs. 28.50 crores.

2. Mr. Abhrajit Mitra, learned Senior Advocate representing the petitioner, referred to clauses 1, 1.4, 1.5, 1.6, 2, and 5.2 of the MOU to demonstrate what the petitioner was to get under the said MOU and urged that the MOU was substantially performed.

3. Mr. Mitra, further contended that, the respondent No. 3 was a necessary and proper party in the proceeding, as the directors of the respondent no. 3/ Company, who had controlling shares had signed the MOU on behalf of the company. Moreover, Ram Gopal Maheshwari and Aditya Maheshwari, who were the directors of the respondent No. 3, had substantially performed their obligation under the said MOU. Three out of the four directors, being the respondent No. 1, 2 and Late Ram Gopal, had also signed the said MOU, and by specific covenants had bound the respondent No.3 to the terms of the said MOU. All the shares of the

respondent No. 3 were held by the said persons and/or their nominees and relatives. Thus, the respondents and other signatories to the said MOU, had always intended to make the MOU binding on the respondent No. 3 and the respondent No. 3 was bound by the terms of the said MOU, including the arbitration clause.

4. It was contended that, against the agreed consideration of Rs. 28.50 crores, various obligations were to be discharged by the members of Group-I. Insofar as, Aditya Maheshwari was concerned, he had transferred all his shares held in the said Company in favour of the petitioner. In terms of the said MOU, the petitioner had discharged all his obligations. Sri Ram Gopal Maheshwari(since deceased)ceased to be a Director of the said company with effect from August 4, 2012.The petitioner had caused his personal guarantees to be released from all banks at his own cost. Subsequently, late Ram Gopal Maheshwari gifted his shares, to the petitioner in terms of the said MOU.

5. Mr. Mitra referred to a statement showing the various dates of release of the personal guarantees of Ram Gopal Maheshwari and the respondent No. 1, in the said company (Annexure D to this application). The petitioner submitted to have paid an aggregate sum of Rs. 24.96 crores to the members of the Group-I. Particulars of the payments were demonstrated in the form of a schedule (Annexure E to the application).Likewise, Aditya Maheshwari, one of the members of the Group-I, had transferred all his shares in the said company in terms of the said MOU in favour of the petitioner and received payment in full and final satisfaction of the due. The dispute arose when, the respondents failed to hand over all records,

documents, papers of the said company and did not relinquish, transfer, surrender all their rights, entitlements, authorities, interests, powers, etc., in relation to the said company, and/or its subsidiaries and/or its associates in Joint Venture companies, in favour of the petitioner. The allegation was that in spite of receiving Rs. 24,96,48,396/-, as would be evident from the particulars annexed to this application, the respondents had jointly and severally acted in breach of the terms of the said MOU, by failing to hand over the laptops, vehicles, documents, etc., which were in their possession and formed part of the assets of the company.

6. Mr. Mitra submitted that in terms of the said MOU, the respondents had transferred shares held in the said company, in favour of the petitioner until June 6, 2014 and received payment. The respondent No. 1 resigned from the Board of Directors of AAP Infrastructure Limited, a subsidiary of the said company and by a letter dated September 15, 2017, requested for release of the personal guarantee furnished by the respondent No. 1 in respect of AAP Infrastructure. Apart from resigning from the Board of Directors of AAP Infrastructure, the respondent No. 1 also resigned from directorship of the said company on June 14, 2014, with effect from July 1, 2014. The personal guarantee of the respondent No. 1 in AAP infrastructure was released in terms of the said MOU at the petitioner's cost, as recorded in the order of the Debt Recovery Tribunal-II Delhi dated April 7, 2021, in OA No. 1232 of 2017. The respondent No. 1 was a party to the said proceeding.

7. Further, the respondent No. 2 also resigned as vice-president from the said company on October 7, 2013. Some of the terms of the said MOU were

performed by the parties beyond the time stipulated therein. Both the parties had given a go-by to the time stipulated for performance of the said MOU i.e. July 31, 2013. Allegations were that, the respondents failed and neglected to vacate and handover physical and vacant possession of the office space along with furniture, fixtures, computer, assets, records and documents which were available in room No. 14, 3rd floor, at 23A Netaji Subhas Road, Kolkata- 700001, that is in the office of the said company. The respondents also failed to handover and surrender and or relinquish the assets such as laptop, vehicles, etc. When the petitioner filed an application under Section 9 of the said Act for interim protection, the respondent relied upon a MOU dated October 30, 2013, entered between MBL A Capital Limited (MBL A) and the respondent No. 3, to contend that the subject MOU had been superseded by the subsequent MOU of October 30, 2013.

8. According to Mr. Mitra, the MOU of October 30, 2013, neither modified nor superseded the subject MOU. The parties were different. The MOU dated October 30, 2013, was allowed to expire by non-performance thereof. Rather, the respondent No. 3 had, in fact, acted as per the MOU dated March 17, 2013, by transferring certain shares upon receipt of consideration. Disputes cropped up when the respondents continued to be in possession of the property and assets of the said company. It was submitted that 38, 58, 632 numbers of equity shares of the said company held by the respondents, had been transferred either in favour of the petitioner or his nominee. On such transfer, the respondents received payment of Rs. 24.96 crores. On the date of the filing of this application, 17,04,158 shares of the said company, which were held by the respondent

No. 3, were due for transfer against the balance consideration of Rs.3.58 crores under the MOU. On July 15, 2015, the management of the said company allotted bonus shares in the ratio of 1:1 to all the shareholders, including the petitioner. In terms of clause 5.2 of the MOU, 17,04,158, bonus shares issued in the ratio of 1:1 against the remaining 17,04,158 shares of the said company, held by respondent No. 3, were also required to be transferred in favour of the petitioner. Therefore, a total number of 34,08,316 equity shares of the company held by the respondent No. 3, were still to be transferred to the petitioner in terms of the MOU, against the balance consideration. The personal guarantee of the respondent No. 1 having been released sometime in 2021, there could not be any impediment in transferring the balance shares in favour of the petitioner in terms of the said MOU. All the respondents were bound by the MOU. There could not be any objection to transfer the equity shares. The petitioner claimed to be ready and willing to make payment of the balance consideration of Rs. 3.54 crores

9. Further contention of Mr. Mitra was that, the respondents were required to de-pledge 5 lakh equity shares held in the said company, which were pledged without the petitioner's approval, although a sum of Rs. 24,96,48,394/- had been received. The petitioner was all along willing to settle the dispute amicably. By a letter dated December 26, 2022, the petitioner requested the respondents for settlement. The respondent Nos.1 and 2, jointly and the respondent No. 3 individually, by letters dated January 12, 2023, refused to act in terms of the said MOU, and denied the existence of any dispute between the parties. Rather, various allegations

were made against the petitioner in those letters. Mr. Mitra contended that the reference to the MOU dated October 30, 2013, by the respondent No. 3 was totally misplaced. The MOU was between MBL A, and the respondent No. 3, in relation to certain shares of the said company. The same did not have any connection with the MOU dated March 17, 2013. MBL A, had filed a separate suit, being CS number 54 of 2015, in the High Court at Calcutta, in respect of the MOU dated October 30, 2013, which was subsequently withdrawn.

10. By the stand taken by the respondents in the aforementioned letters, there was no possibility for an amicable settlement. Hence, the petitioner invoked arbitration by a letter dated March 28, 2023, and an addendum dated April 3, 2023, which were issued in terms of clause 13.2 of the MOU, read with section 21 of the Arbitration and Conciliation Act, 1996. The petitioner had nominated Mr. Abhijit Chatterjee, learned Senior Advocate, to act as the arbitrator on his behalf, and called upon the respondent to nominate their arbitrator, so that the nominee arbitrators, in terms of the arbitration clause, could nominate the third arbitrator, and an arbitral tribunal could be constituted.

11. The respondents did not take any steps, and as such, the mechanism provided under clause 13.2 of the MOU, failed. According to Mr. Mitra, the respondent No. 3 was named in the agreement, and the agreement was signed by the directors and principal shareholders of the respondent No. 3. The absence of the official stamp of the respondent No. 3,should not be a reason for the referral court to hold at this stage, that the respondent No. 3 was neither a necessary nor a proper party to the proceeding.

12. The MOU dated March 17, 2013, was executed between two groups. The petitioner's group consisted of two named entities/persons, and the respondent's group consisted of five named persons/entities, including the respondent No. 3. The petitioner signed on behalf of the petitioner's group and the respondent No. 1, 2, Aditya, as also their late father, signed on behalf of the respondent's group.

13. Reference was made to a letter dated October 7, 2013, in support of the contention that, the respondent No. 2 had admitted that the respondent No. 3 was a party to the MOU dated March 17, 2013. Further contention was that the respondent No. 2 had sufficiently performed the MOU by transferring 14,56,132 number of shares to the petitioner company. Not a single share had been transferred by the respondent No. 3 in terms of the MOU dated October 30, 2013 and at the rate mentioned therein. Thus, the respondent No. 3, which was a part of the group 1, was intrinsically connected with the performance of the obligations under the said MOU and the terms and conditions thereof.

14. Mr. Mitra relied on the following decisions in support of his contention that, the question whether a non-signatory could be referred to arbitration, must be decided by the tribunal and the referral court should only rule, prima facie, whether the non-signatory was a veritable party to the arbitration agreement, or was intrinsically connected with the underlying performance of the agreement.

(a) ***Ajay Madhusudan Patel and Ors. vsJyotindra S. Patel and Ors.*** reported in ***2024 SCC Online SC 2597,***

(b) ***Cox and Kings Ltd. vs SAP India (P) Ltd.*** reported in ***(2024) 4 SCC 1***,

(c) ***KKH Finvest Private Limited and Anr. vs Jonas Haggard and ors***. reported in ***2024 SCC Online Del 7254***

(d) ***Niranjan Lal Todi and Anr. vsNand Lal Todi and Ors.*** reported in ***2011 (1) CHN 762***

(e) ***ASF Buildtech Private Limited vs ShapoorjiPalonji and Company Private Limited*** reported in ***2025 SCC Online SC 1016***

15. Mr. Mitra, contended that, the question whether the MOU of October 30, 2013 had either been superseded or modified the subject MOU of March 17, 2013, must also be decided by the Arbitral Tribunal. Reference was made to the decision of ***Sanjeev Prakash Vs. Seema Kukreja and Ors.*** reported in ***(2021) 9 SCC 732***. Reference was further made to ***Indian Oil Corporation Limited (through its senior manager) vs Shree Ganesh Petroleum Rajgurunagar (through its proprietor Laxman DagduThite)*** reported in ***2022 4 SCC 463***.

16. It was also contended that in ***CS 54 of 2015*** between ***MBL A Vs. Prabhu International***, the specific contention of the respondents was that, the MOU dated October 30, 2013 was hit by the Securities Contracts Regulation Act, 1956, as it was unstamped, inadmissible in evidence and therefore, unenforceable.

17. Thus, it was alleged that, the respondents could not approbate and reprobate. Reliance was placed on the decision of ***Karam Kapahi and Ors. vs Lal Chand Public Charitable Trust and Anr.*** reported in ***(2010) 4 SCC 753*** and ***Sushil Kumar Vs. Rakesh Kumar*** reported in ***(2003) 8 SCC 673***.

18. On the issue of limitation, it was contended that even though the said MOU was to be performed within July 31, 2013, it was a matter of record that the MOU was performed at the behest of the parties even as late as on August 4, 2021.Thus, the parties had given a go-by to the original timeline and continued to perform the obligations under the MOU. Mr. Mitra urged the referral court not conduct an intricate evidentiary enquiry into the question of limitation and submitted that the issue of limitation should be left to the adjudication of the arbitral tribunal. Reference was made to decisions of:-

(a) SBI General Insurance Co. Ltd. vs Krish Spinning reported in ***2024 SCC Online SC 1754***

(b) Bharat Sanchar Nigam Limited and Anr. vs Nortel Networks India Private Limited reported in ***(2021) 5 SCC 738,***

(c) Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd. and Anr.,reported in***(2025) 1 SCC 502,***

19. On the limited scope of enquiry by the referral court, Mr. Mitra referred to ***Goqi Technologies Private Limited vs Sokrati Technologies Private Limited*** reported in ***2024 SCC Online SC 3189, SBI General Insurance Co. Ltd. versus Krish Spinning*** reported in ***2024 SCC Online SC 1754***and **the** ***Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1.***

20. Mr. Sabyasachi Choudhury, learned senior Advocate for the respondents, submitted that the application should be dismissed on various grounds, namely, suppression of material facts, limitation and novation of

the MOU dated March 17, 2013. It was contended by Mr. Choudhury that, the dispute should not be referred to arbitration as the claim was deadwood. The learned Advocate submitted that, the referral court was empowered to weed out dead and non-arbitrable claims. The petitioner had notice of refusal by the respondents to perform the obligations under the said MOU, as soon as the respondents started selling their shares in MBL Infrastructure Limited in the open market, at higher rates than what was stipulated in the MOU. The petitioner failed and neglected to initiate any arbitral proceeding within three years from the date of such notice. As the petitioner was claiming specific performance of the said MOU, Article 54 of the Limitation Act would be applicable in computing the period of limitation.

21. As per law, the period of limitation for specific performance was three years from the date fixed for performance, or, if no such date was fixed, three years from the notice of refusal to perform. The clauses of the MOU, i.e, 1, 1.1, 1.2, 1.3, 5.1 and 5.2, would indicate that the respondents along with Ram Gopal Maheshwari (since deceased), Aditya Maheshwari and Sweta Maheshwari, were obliged to transfer their entire shareholding in the said company in favour of the petitioner and MBL A (referred to as the Group 2), within July 31, 2013. The said Group 2 was obligated to release the personal guarantees given by Group 1 within June 2013 or within 60 days of resignation from MBL Infrastructures Limited, whichever was earlier. Therefore, the date of performance of the MOU was fixed up to July 31, 2013. Under such circumstances, if the first limb of Article 54 of the Limitation Act was applied, the period of three years should be calculated from the date fixed for performance.

22. Therefore, the arbitral proceeding should have begun within three years from July 31, 2013 and the period of limitation expired on July 31, 2016. Although, the specific case of the petitioner was that the parties had given a go-by to the timeline contained in the MOU by making inter-promoter transfers and gifts beyond July 31, 2013 and by releasing the personal guarantee on April 2021, those transfers and release of guarantee were not in compliance of the obligations arising out of the MOU.

23. On many occasions during 2013 and 2014, the members of the Group – I had begun selling their shares in the said company in the open market at the prevailing market rate to third parties and to members of Group 2, through the stock exchange at higher rates than what was stipulated under clause 1.2 of the MOU. The respondents had not sold any share pursuant to the purported MOU.

24. The statutory disclosures made under the Regulations 10 (1)(a) 5, 6 and 7 of SEBI (Substantial Acquisition of Shares And Takeovers) Regulations 2011, enclosed by the petitioner in the affidavit in reply to the affidavit in opposition of the respondents 1 and 2, clearly indicated that the petitioner had accepted inter-promoter transfer of shares at higher rates. From the statutory disclosures, it was clear that between 2013 and 2014, Group 1 had sold 4,43,655 shares of the said company (MBL) in the open market to third parties as well, for a total consideration of Rs 3,37,65,347/-. The total shares purchased by the petitioner and MBL A from the respondents and members of the Group 1 as per the chart, came to 34,14,977. The said figure was confirmed by MBL A, in the application being

GA 845 of 2015, which was filed in CS 54 of 2015. Both the groups had acted contrary to the MOU dated March 17, 2013, since September 2013. Thus, even if the first limb of Article 54 of the Limitation Act was not applied, the second limb of Article 54 would have to be applied in view of the refusal to perform and limitation would be calculated from 2013, when shares were transferred to third parties. The petitioner failed to bring any action against the respondents within the period of limitation. Reference was made to the decision of ***Sabbir (Dead) through LRs. Vs Anjuman (since deceased) through LRs*** reported in***2023 SCC Online SC 1292.***

25. It was next contended that, the respondent No. 3 had a total of 31,60,290 shares in the said Company. As the MOU had become infructuous due to non-performance and non-compliance by the parties, another MOU was executed on October 30, 2013 between MBL A and Respondent No. 3. Under the October 2013 MOU, the respondent No. 3 agreed to transfer 17,00,000 shares held in the said Company (MBL Infrastructures Limited) at the rate of Rs. 63.75 per share. Under the October MOU, MBL A also had an option of acquiring further shares at market rate under clause 3.4 thereof. The petitioner had signed the said MOU in his capacity as the director of MBL A and since execution of the said MOU, the petitioner had written several letters to the respondent No. 3, calling upon the respondent No. 3 to act in terms thereof.

26. As disputes arose between the parties and MBL A filed a suit being C.S. 54 of 2015 along with an interlocutory application being G.A. 845 of 2015, before the High Court. By orders dated March 23, 2015, and May 6, 2015, the High Court was pleased to allow the prayer made in the said

application, restraining the respondent No. 3 from dealing with the aforementioned 17,00,000 lakh shares of the said company (MBL).The said order of injunction continued up to March, 2023, and on March 28, 2023, the suit was withdrawn at the instance of MBL A. Upon withdrawal of the suit, the petitioner filed the present application for reference of the dispute, because the petitioner was conscious that the reliefs claimed in the suit would not be effective and efficacious. The petitioner was actually misleading the court into believing that the said MOU, which had outlived its utility and validity, was still alive. The facts narrated were inaccurate representation of what had actually transpired between the parties. Moreover, the respondent No. 3 was not a signatory to the said MOU dated March 17, 2013 and the proceeding was not maintainable against the respondent No. 3**.** Reference was made to ***Ajay Mudhusudhan (supra),*** and ***Cox and Kings (supra).*** According to Mr. Choudhury, participation of a non-signatory in the performance of the contract was a determining factor for the referral court. This court would not find a single document which would demonstrate that the respondent No. 3 was either a veritable party or was intrinsically connected with the said MOU of March 17, 2013. The petitioner had willfully entered into the MOU of October 30, 2013, with the respondent No. 3, not only in his capacity as a director of MBL A, but also for himself and the said agreement was for acquisition of 17,00,000 shares held by the respondent No. 3 in MBL, at the rate of 63.75/- per share. Thus, as soon as the respondent No. 3 entered into the MOU of October 30, 2013, and agreed to transfer 17,00,000 shares held by it in the said company

(MBL), the respondent No. 3 and or its directors in effect, reneged from the MOU of March 17, 2013.

27. Moreover, the respondent No. 3 had pledged 5,00,000 shares in September 2013. Such action was contrary to the terms of the said MOU of March 2013, and thus a notice of refusal to perform. By September 2013, the petitioner was aware of such action. At best, the period of limitation would run from September 2013. The petitioner had erroneously relied upon a letter dated September 15, 2017, by which the respondent No. 1 had asked for the personal guarantee given by the said respondent, to the banker of AAP Infrastructure Limited to be released, to demonstrate that the parties were continuing to perform their obligations under the MOU of March 2013. However, as per clauses 1.1 and 1.2 of the MOU of March 17, 2013, the petitioner and MBL A, were to get the personal guarantees, including those given to the banker of AAP Limited released within or before June 2013, or within 60 days from the respondents' resignation from the said company. Here, the release was much later and not as a fulfillment of the obligation under the said MOU.

28. It was stipulated that the petitioner and MBL A, would keep the respondents indemnified in respect of the personal guarantees given by them. It was submitted that, by two separate letters dated September 22, 2017, petitioner in his personal capacity and as the director of MBL A Capital Limited, denied the contents of the letter dated September 15, 2017 and also denied the existence of the said MOU. Petitioner refused to perform its obligation to release the personal guarantee and indemnify the said respondents. The contents of the letters dated September 22, 2017, were

refusal on the part of the petitioner to comply with the MOU dated March 17, 2013 and an indication that the said MOU had no further life. Reference was made to the decision of ***Re: Interplay (supra)*** in support of the contention that, the referral court could weed out non-arbitrable and deadwood claims.

29. Mr. Choudhury contended that CS 54 of 2015, was withdrawn in order to avoid the consequences inasmuch as, a decree in favour of the plaintiff therein would potentially oblige MBL A Capital Limited, to purchase the shareholding of the respondent No. 3 in the said company at the contractual rate as per MOU dated October 30, 2013. That would not be beneficial. The invocation was thus, malafide and an afterthought and harassive.

30. Considered the rival contentions of the parties. The issue is whether in the aforementioned background and upon considering the rival contentions of the parties, the referral court should exercise jurisdiction under section 11(6) of the Arbitration and Conciliation Act, 1996. The MOU of March 2013, admittedly contains an arbitration clause. The petitioner has also invoked such clause by issuing a proper notice. The clause is set out hereunder:-

> "...13.2 The Parties shall endeavour to settle any dispute arising in connection with the interpretation or performance of these presents, or otherwise in connection with these presents, through friendly consultations and negotiations. If no settlement can be reached through consultations between the parties within 15 days of one party delivering a written notice of the dispute to the other parties, then such matter shall be finally settled by binding arbitration in India in accordance with the Arbitration Act, 1996. The arbitration shall be conducted by three (3) arbitrators. The parties of Group - 1 and the Group- 2 shall nominate one arbitrator each and the Two

(2) arbitrators shall nominate a third arbitrator. The language to be used in the arbitral proceedings shall be English."

31. The objections of the respondent are taken up one by one.

32. The first objection was that the respondent No.3 was not a signatory to the said MOU, and as such, the application was bad for mis-joinder. The proceeding was not maintainable against the respondent no. 3. To answer this question, certain provisions of the MOU are required to be discussed.

33. The respondent No. 3 was the fifth party in the MOU and member of Group-I. Sri Ram Gopal Maheshwari, (since deceased), Maruti Maheshwari, Aditya Maheshwari, Anuj Maheshwari and M/s. Prabhu International Vyapar Private Limited were collectively referred to as Group-I. The relevant portion of the MOU is quoted below:-

"MEMORANDUM OF UNDERSTANDING (MOU)

THIS MEMORANDUM OF UNDERSTANDING (MOU) (hereinafter referred to as "these presents") dated this Seventeenth Day of March 2013 made;

BY AND BETWEEN

1) SHRI RAM GOPAL MAHESHWARI, son of Late Shri Rameshwar Lal Lakhotia, aged about 66 years, resident of 8/10, Alipore Park Road, 4th Floor, Flat No. 4A, Kolkata - 700027, hereinafter referred to as the "First party of Group-1";

2) SHRI MARUTI MAHESHWARI, son of Shiri Ram Gopal Maheshwari, aged about 37 years, resident of 8/10, Alipore Park Road, 4th Floor, Flat No. 4A, Kolkata - 700027, hereinafter referred to as the "Second Party of Group-1";

3) SHRI ADITYA MAHESHWARI, son of Shri Ram Gopal Maheshwari, aged about 35 years, resident of 8/10, Alipore Park Road, 4th Floor, Flat No. 4A, Kolkata - 700027, hereinafter referred to as the "Third Party of Group-1";

4) SHRI ANUJ MAHESHWARI, son of Shri Ram Gopal Maheshwari, aged about 33 years, resident of 8/10, Alipore Park Road, 4th Floor, Flat No. 4A, Kolkata -700027, hereinafter referred to as the "Fourth Party of Group-1";

5) M/S PRABHU INTERNATIONAL VYAPAR PVT LTD, a company incorporated under Companies Act, 1956 and having its registered office at 8/10 Alipore Park Road, 4th Floor, Flat No. 4A, Kolkata - 700027, hereinafter referred to as the "Fifth Party of Group-1";

hereinafter collectively referred to as the "Group-1" (which expression shall unless repugnant to the context or meaning thereof be deemed to mean their respective heirs, executors, administrators, representatives, successors and/or assigns) OF THE FIRST PART.

AND

6) SHRI ANJANEE KUMAR LAKHOTTA, son of Late Shri Rameshwar Lal Lakhotia, aged about 49 years, and resident of B-37, Soami Nagar, 1st floor, New Delhi - 110017, hereinafter referred to as the "First Party of Group-2";

7) M/S MBL A CAPITAL LTD (Formerly SMH CAPITAL LIMITED), a company incorporated under Companies Act, 1956 and having its registered office at [•], hereinafter referred to as the "Second Party of Group-2"; ”

34. It had been mentioned specifically in the said MOU that, the fifth party of Group - I was a closely held company of the first party of Group- I and his family members. It had been further provided that, the fifth party of the Group- I, i.e. respondent number 3, was the legal and beneficial owner of 31,60,290 numbers of equity shares of Rs. 10/- each, fully paid up, of MBL, representing 18.04% of the issued equity and voting capital held in the Demat Account No.- IN30210510334829. The relevant portion is set out below:-

> “The Fifth Party of Group-1 is the legal and beneficial owner of 31,60,290 nos. of equity shares of Rs. 10/- each fully paid up of MBL representing 18.04% of its issued equity and voting capital held in the Demat Account No. IN30210510334829.”

35. The Group- I was desirous to exit from said the company by way of transfer of their shares in the said company to Group 2, in accordance with the terms and conditions stated in the MOU, for such consideration and in the manner stated below.

Name	Number of Shares
Mr. Ram Gopal Maheshwari	22,48,750
Mr. MarutiMaheshwari	24,500
Mr. Aditya Maheshwari	50,000
Mr. Anuj Maheshwari	50,000
Mrs. SwetaMaheshwari	29,250
M/s. Prabhu International Vyapar Private Limited.	31,60,290
TOTAL	55,62,790

36. It, prima facie, appears that, the respondent No. 3, being a closely held company of Ram Gopal Maheshwari and his family members, was intrinsically connected with all the transactions contemplated under the said MOU. Ram Gopal Maheshwari and his family members also signed the MOU.

37. The MOU segregated the parties/signatories into two Groups, Group 1 and Group 2. The respondent No. 3 was an integral part of Group 1. The respondent No. 2 and their late father, signed the MOU. Only because the rubber stamp of the respondent No. 3 was missing, it would not be proper for the referral court to hold that the respondent No. 3 was neither a necessary nor a proper party to the proceeding, and had been wrongly impleaded. Reference is made to the following decisions of the Apex Court in this regard.

38. In the decision of ***Ajay Madhusudhan (supra),*** the Hon'ble Apex Court held as follows:-

> "**64.** The relevant observations are extracted hereinbelow : (DuroFelguera, S.A. case [DuroFelguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , SCC pp. 759 & 765, paras 48 & 59)
>
> > "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.

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59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618 : (2005) 128 Comp Cas 465] 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)

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68. Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] 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 : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 161, para 239)

"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)

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80. The relevant observations made in Cox & Kings [Cox & Kings Ltd. v. SAP India (P) Ltd., (2024) 4 SCC 1 : (2024) 2 SCC (Civ) 1 : (2024) 251 Comp Cas 680] are extracted hereinbelow : (SCC pp. 60-61 & 90-91, paras 83-84 & 170)

"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.]

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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;”

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(emphasis supplied)

39. In the decision of ***Cox and Kings (supra),*** the Hon'ble Apex Court held as follows:-

> "**96.** An arbitration agreement encapsulates the commercial understanding of business entities as regards to the mode and manner of settlement of disputes that may arise between them in respect of their legal relationship. In most situations, the language of the contract is only suggestive of the intention of the signatories to such contract and not the non-signatories. However, there may arise situations where a person or entity may not sign an arbitration agreement, yet give the appearance of being a veritable party to such arbitration agreement due to their legal relationship with the signatory parties and involvement in the performance of the underlying contract. Especially in cases involving complex transactions involving multiple parties and contracts, a non-signatory may be substantially involved in the negotiation or performance of the contractual obligations without formally consenting to be bound by the ensuing burdens, including arbitration.
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> **123.** The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the Courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. 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:
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> (a) preliminary negotiations between the parties;
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> (b) practices which the parties have established between themselves;
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> (c) the conduct of the parties subsequent to the conclusion of the contract;
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> (d) the nature and purpose of the contract;
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> (e) the meaning commonly given to terms and expressions in the trade concerned; and
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> (f) usages.
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> (v) Threshold standard
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127. In Cox & Kings [Cox & Kings Ltd. v. SAP India (P) Ltd., (2022) 8 SCC 1 : (2022) 4 SCC (Civ) 45] , Surya Kant, J. observed that Reckitt Benckiser [Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd., (2019) 7 SCC 62 : (2019) 3 SCC (Civ) 453] fixed a higher threshold of evidence for the application of the Group of Companies doctrine as compared to earlier decisions of this Court. This Court's approach is Reckitt Benckiser [Reckitt Benckiser (India) (P) Ltd. v. Reynders Label Printing (India) (P) Ltd., (2019) 7 SCC 62 : (2019) 3 SCC (Civ) 453] is indicative of the fact that the mere presence of a group of companies is not the sole or determinative factor to bind a non-signatory to an arbitration agreement. Rather, the Courts or tribunals should closely evaluate the overall conduct and involvement of the non-signatory party in the performance of the contract. 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.

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132. We are of the opinion that there is a need to seek a balance between the consensual nature of arbitration and the modern commercial reality where a non-signatory becomes implicated in a commercial transaction in a number of different ways. Such a balance can be adequately achieved if the factors laid down under Discovery Enterprises [ONGC Ltd. v. Discovery Enterprises (P) Ltd., (2022) 8 SCC 42 : (2022) 4 SCC (Civ) 80] are applied holistically. For instance, the involvement of the non-signatory in the performance of the underlying contract in a manner that suggests that it intended to be bound by the contract containing the arbitration agreement is an important aspect. Other factors such as the composite nature of transaction and commonality of subject-matter would suggest that the claims against the non-signatory were strongly interlinked with the subject-matter of the tribunal's jurisdiction. Looking at the factors holistically, it could be inferred that the non-signatories, by virtue of their relationship with the signatory parties and active involvement in the performance of commercial obligations which are intricately linked to the subject-matter, are not actually strangers to the dispute between the signatory parties.

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40. The law is well settled. In the event the contract disclosed that a non-signatory was either connected with the signatory parties or was involved in either the execution or the fulfilment of the obligations under the contract, or was linked with the transactions in some manner, the said non-signatory would be bound by the arbitration clause. The issue of mis-joinder and/or non-joinder of a party to an arbitration proceeding, should be best left for a decision by the learned arbitrator. It was urged that, the respondent No. 3 had also performed the obligations under the MOU, by transferring 14,56,132 number of shares to the petitioner's group. The respondent No. 3 had performed part of its obligations under the contract, as, is prima facie, available from the records. The conduct of the non-signatory party is an indicator of its willingness to be bound by the arbitration agreement.

41. In the decision of ***ASF Buildtech (supra),***the Hon'ble Apex Court held as follows:-

> "**112.** However, with the advent of Cox and Kings (I) (supra), the legal foundation for the application of the 'Group of Companies' doctrine, or any analogous principles designed to determine mutual consent was clarified to exist in the definition of "party" under Section 2(1)(h) read with the meaning of "arbitration agreement" under Section 7 of the Act, 1996. Unlike Section(s) 8 and 45 of the Act, 1996, the provisions of Section(s) 2(1)(h) and 7 are not confined in their applicability to only judicial forums or courts, and rather extend equally to both courts and arbitral tribunals, as these provisions form the bedrock of the framework of arbitration under the Act, 1996. The logical sequitur of this is that arbitral tribunals, too, are vested with the requisite authority to engage with and apply principles, such as the 'Group of Companies' doctrine, when determining whether a non-signatory may be bound by an arbitration agreement.
>
> **113.** It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in Cox and Kings (I) (supra) nor in Ajay Madhusudhan (supra), this Court has said that it is only the reference courts that are empowered to

> determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both 'courts and tribunals' are fully empowered to decide the issues of impleadment of a non-signatory and Arbitral Tribunals have been held to be preferred forum for the adjudication of the same.
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> **115.** The case of Ajay Madhusudhan (supra) also recognizes that the legal relationship between the signatory and non-signatory assumes significance in determining whether the non-signatory can be taken to be bound by the Arbitration Agreement. This Court also issued a caveat that the 'courts and tribunals should not adopt a conservative approach to exclude all persons or entities who are otherwise 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, the 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'."

42. The first objection is decided against the respondents, leaving it open to be raised before the learned tribunal.

43. The next objection was that the MOU of March 17, 2013 had lost its force, upon the execution of another MOU dated October 30, 2013. The petitioner had relied upon several documents to show that shares were transferred between September 16, 2013 and June 6, 2014, in terms of clause 1.2 of the MOU dated March 17, 2013, by a mix of inter-promoter sale of shares and gift of shares. As per Annexure E, altogether 38,58,632 numbers of shares out of 55,62,790 shares in the said company (MBL), had been transferred on different dates. The relevant clauses of the MOU indicate that those transfers which were beyond July 31, 2013, could have well been in continuation of the said MOU, and beyond the period within which the MOU was supposed to be performed. Clause 1.2 is quoted below:-

> "**1.2** The Group-2 shall arrange for (i) release of the personal guarantees of parties of Group- 1 by or before June 2013 or within 60 days of resignation from MBL whichever is later, (ii) pay and/or cause to be paid to the Group-1 and all inclusive consideration of Rs. 28.50 Crores for the shares as set out in clause 1 above.
> The parties of Group-1 shall ensure necessary transfer of shares by way of deeds, documents including transfer deed/gift deed etc., to ensure that the total shares as per clause no.1 are transferred for a total consideration of Rs. 28.50 Crores.
> The consideration may be shared/distributed between parties of Group- 1 proportionately or otherwise as mutually agreed, subject however that the net aggregate consideration amount shall not be higher or lower than Rs. 28.50 crores.
> Group-2 shall keep Group-1 indemnified by MBL so that no liability shall accrue or arise to the First and Second Parties of Group-1 for the personal guarantees given by them."

44. The second clause, hereinabove indicates that, transfer of shares by gift deeds was permitted in the said MOU, in order to ensure that the total consideration of Rs. 28. 50 cores was maintained. Although, it had been contended by the respondents that those transfers were made in the open market and the declarations in the required forms were only in compliance with the regulations of SEBI, it is not possible for this court to hold at this stage that, such gift deeds had not been executed in furtherance to the said MOU of March 17, 2013. Clause 2, which is quoted below provided that the second party of the Group- I shall resign as director from MBL and MSP infrastructures Limited. Clause 2 & 3 is quoted below:-

> "**2.** The Second Party of Group-1 shall resign as director from MBL and MSP Infrastructure Limited – an associate Company of MBL immediately upon receipt of Rs.15.00 Crores out of the total consideration of Rs. 28.50 Crores as recorded in Clause 1.2
> **3.** The Third and Fourth Party of Group-1 shall resign as Vice-President (s) of the Company MBL immediately upon receipt of Rs. 15.00 Crores out of the total consideration of Rs. 28.50 Crores as recorded in Clause 1.2"

45. The third clause provided that, the third and the fourth party would resign as vice-president of the said company (MBL) immediately upon

receipt of 15 crores out of the total consideration of 28.50 crores. The specific contentions of the petitioner were that, the respondents and their father had substantially discharged their obligations under the MOU and Aditya Maheshwari had transferred all his shares held by him in the said Company, in favour of the petitioner.

46. The averments are that, the petitioner got the personal guarantees released from the banks, at his own cost. The petitioner had paid an aggregate amount of Rs. 24.96 crores to the members of the Group- I company, particulars of which have been annexed in the form of a schedule and marked with the letter E to the application. The respondent No. 1 resigned from the Board of Directors of AAP infrastructure limited. The respondent No. 1 resigned as a director of the said company (MBL), on June 14, 2014 with effect from July 1, 2014. The respondent No. 2 resigned as vice-president of the said company on October 7, 2013. The personal guarantee of the respondent No. 1 in APP infrastructure limited was released at the petitioner's cost which was recorded in the order of the Debts Recovery Tribunal II, Delhi, dated April 7, 2021, in O.A. No. 1232 of 2017. The respondent No. 1 was a party to the said proceeding. Copy of the order has been annexed to the application with the letter I. Such acts appear to be in consonance with clauses 1.1 and 1.2 of the said MOU, which is quoted below :-

> "**1.1**The members of Group-2 agrees and acknowledges that the First and Second Party of Group-1 have given the following personal guarantees:
> (a) The Consortium of Banker of the Company for securing the fund based and non-fund based working capital facilities; and
> (b) To the banker of AAP Infrastructure Limited, a subsidiary of the Company for an amount of Rs. 50 Crores.

> **1.2** The Group-2 shall arrange for (i) release of the personal guarantees of Parties of Group – 1 by or before June, 2013 or within 60 days of resignation from MBL whichever is later, (ii) pay and/or cause to be paid to the Group -1 an all inclusive consideration of Rs. 28.50 Crores for the shares as set out in clause 1 above.
> The parties of Group -1 shall ensure necessary transfer of share by way of deeds, documents including transfer deed/gift deed etc to ensure that the total shares as per clause no. 1 are transferred for a total consideration of Rs. 28.50 Crores.
> The consideration may be shared/distributed between parties of Group-1 proportionately or otherwise as mutually agreed, subject however that the net aggregate consideration amount shall not be higher or lower than Rs. 28.50 cores.
> Group 2 shall keep Group -1 indemnified by MBL so that no liability shall accrue or arise to the First and Second Parties of Group 1 for the personal guarantees given by them."

47. Under such circumstances, this court is of the view that, there are adequate averments and documents, which, prima facie, show that the MOU of March 2017, had been acted upon beyond July 31, 2013 and the transactions which took place do not primarily appear to be in compliance of the obligations arising out of the MOU of October 30, 2013, which was executed between Prabhu International Vyapar Private Limited and MBL A Capital Limited. Some of the terms and conditions of the MOU of October 30, 2013, are set out below for convenience:-

> "(a) Seller is the owner of 17,00,000 fully paid up shares of M/s MBL Infrastructures Limited (herein referred to as 'MBL'), a listed company.
> (b)Of the said 17,00,000 shares of MBL, 5,0,000 shares have been pledged by the Intending Seller to Central Bank of India, Bhowanipore Branch, Kolkata.
> c) This MOU is subject to the terms and conditions contained herein.
> **2.Conditions for sale of Sale Shares**
> 2.1 Seller hereby offers to sell and the Buyer hereby agrees to purchase the Sale Shares including the Pledged Shares after release from pledge.
> 2.2 Buyer shall require and Seller shall give to the Buyer proof of satisfaction of the pledge of Pledged Shares.
> 2.3 Subsequent to sale of the Sale Shares, the Seller shall cause to deliver the share certificates together with the duly signed share transfer deeds in the name of the Buyer and / or transfer the dematerialized shares in the name of the Buyer.
> **3. Consideration**

3.1seller agrees to sell and Buyer agrees to purchase the Sale Shares at the prevailing market price as on the date of signing of this MOU i.e. at Rs 63.75 per share.
3.2 The consideration for the deal is the price as per para 3.1 and release of personal guarantees of the directors of Prabhu International Vyapar(P) Ltd for the fund based and non fund based working capital facilities of MBL Infrastructures Ltd which the Seller considers very essential for smooth running of its business.
3.3 The consideration for sale shall become payable by the Buyer at or before the Seller delivering the share certificates together with the duly signed share transfer deeds in the name of the Buyer and / or transferring the dematerialized shares in the name of the Buyer. However the Seller shall have the right to demand the consideration in advance from the Buyer when it is in a reasonable position to deliver the Sale Shares.
3.4 Subject to the availability with the Seller, in case the Buyer wants to purchase additional shares of MBL from the Seller, the price of such additional shares shall be the market price as on the date of actual sale of such additional shares.
4.Validity Period of this MOU
4.1This MOU shall remain valid upto 18 months from the date of entering into this MOU."

48. It does not appear that any of the shares of the respondent No. 3 had been transferred at the rate mentioned in the MOU of October 2013. The MOU of October 2013, does not indicate that the intention of the parties was to either supersede or modify, or negate the said MOU. At this stage, without trial, it cannot be construed that the MOU of March 17, 2013, was either novated, superseded or modified by the MOU of October, 2013. Interpretation of the terms of the contract and determination of the issue of supersession or novation etc. are within the domain of the learned arbitral tribunal.

49. Reference is made to the decision of ***Sanjiv Prakash vs Seema Kukreja and Ors.*** reported in ***(2021) 9 SCC 732.*** The relevant paragraph is quoted below :-

"**22.** Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12-4-1996 requires a detailed

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

50. With regard to the next objection of Mr. Choudhury that the disputes and claims sought to be referred to were deadwood and barred by the laws of limitation, reference is made to Article 54 of The limitation Act, which is quoted below:-

Description of suit	Period of Limitation	Time from which period begins to run
54. For specific performance of a contract.	Three years.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

51. According to learned Senior Advocate, the period of limitation for specific performance of the MOU dated March 17, 2013 would be three years from the date fixed for performance.

52. The date for performance according to Mr. Choudhury was July 31, 2013. He submitted that, even assuming that the timeline was given a go-by, the first refusal towards performance of the clauses by Group-1 would be when the Group-1 started selling their shares to third parties. The case

made out by Mr. Choudhury before this court was that, the chart disclosed under Annexure E to this application, would show that the respondents had sold their respective shares in the said company, i.e., MBL Infrastructures Limited in the open market to third parties, at the prevailing market rate, and not at the rate as per the said MOU.

53. According to Mr. Choudhury, Group-1 had sold 4,43,655 shares of MBL Infrastructures Limited in the open market to third parties for a total consideration of 3,37,65,347 and those transfers were not in favour of the petitioner. The total shares purchased by the petitioner and MBL A Capital Limited from the members of the Group-1 was 34,14,977. Such figure would be available in the application of MBL A, being GA 845 of 2015, filed in CS 54 of 2015. Thus, even if, the dates of the transfer of the shares to the third parties in the year 2014, were taken into account for the purpose of computation of the period of limitation, the period of three years from the date of refusal would expire sometime in 2017, but under no circumstances, the letter dated January 12, 2023 could be taken as the date of refusal to perform the obligation under the MOU of March 17, 2013. Moreover, the pledge of 5,00,000 shares was also a breach of the alleged MOU of March 17, 2013 and also indicative of refusal to perform.

54. Per contra, to demonstrate that the dispute was not barred the petitioner relied upon a letter dated September 15, 2017, by which the respondent No. 1 had requested the petitioner to release the personal guarantee given to the banker of AAP Infrastructures. As per clauses 1.1 and 1.2 of the MOU, the Group-1 company was to get the personal

guarantees released on or before June 2013 or within 60 days from resignation from MBL Infrastructure Limited.

55. By two letters, both dated September 22, 2017, the petitioner denied the obligation under the MOU of March 17, 2013, but several documents have been produced before this court which indicate that the guarantees given by the respondent No. 1 to the banker of AAP Infrastructure Limited for a sum of 50 crores was released on April 7, 2021, upon a request in writing on September 15, 2017. Clauses 1.1 and 1.2 of the MOU dated March 17, 2013 is quoted below:-

> **"1.1**The members of Group-2 agrees and acknowledges that the First and Second Party of Group-1 have given the following personal guarantees:
>
> (a) The Consortium of Banker of the Company for securing the fund based and non-fund based working capital facilities; and"
>
> (b) To the banker of AAP Infrastructure Limited, a subsidiary of the Company for an amount of Rs. 50 Crores.
>
> **1.2** The Group-2 shall arrange for (i) release of the personal guarantees of Parties of Group – 1 by or before June, 2013 or within 60 days of resignation from MBL whichever is later, (ii) pay and/or cause to be paid to the Group -1 an all inclusive consideration of Rs. 28.50 Crores for the shares as set out in clause 1 above.
>
> The parties of Group -1 shall ensure necessary transfer of share by way of deeds, documents including transfer deed/gift deed etc to ensure that the total shares as per clause no. 1 are transferred for a total consideration of Rs. 28.50 Crores.
>
> The consideration may be shared/distributed between parties of Group-1 proportionately or otherwise as mutually agreed, subject however that the net aggregate consideration amount shall not be higher or lower than Rs. 28.50 cores.
>
> Group 2 shall keep Group -1 indemnified by MBL so that no liability shall accrue or arise to the First and Second Parties of Group 1 for the personal guarantees given by them."

56. The order of the DRT is quoted below :-

> "This hearing has been held through video conferencing.

> The ld counsels for the borrower/defendant submit that the matter has been settled and No Due Certificate issued by the applicant bank.
> The Ld counsel for the applicant bank submits that matter is settled.
> In view of the statement made by the ld counsel for both the parties, the present OA is disposed of as settled and withdrawn.
> Registry is directed to return the court fee as per rules and return the original title deed/documents, if it is on record of the Tribunal within a week from today, on substitution.
> All the pending IAs stand disposed of.
> File be consigned to records."

57. It, prima facie, appears that the release was in compliance of the above quoted clauses. The title deeds of the respondent No. 1, which were mortgaged, were released on August 4, 2021. Other guarantees given by the respondent No. 1 and late Ram Gopal Maheshwari to secure loans, had been released on different dates between 2013 and 2014.

58. Thus, it is not possible for this court to convincingly hold that the claims and/or disputes are deadwood, when the documents of release of the personal guarantees are available in the records. For the court to arrive at a conclusion that the release of guarantee in 2021 was not connected to the performance of the MOU dated March 17, 2013, an evidential enquiry will be required. This is not permitted in law.

59. The issues whether the court should accept such action of release of the personal guarantee as a discharge of obligation of the petitioner under the MOU of March 17, 2013 or whether the same should be considered as a part of a separate transaction, independent of MOU of 2013, are triable issues.

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60. The denial of the petitioner's obligation by letter dated September 22, 2017, cannot be held to be concrete proof of the fact that, the personal guarantee was not released as a part of the obligation under the MOU of March 2013. Maruti Maheshwari received the title deeds and other security documents sometime on August 4, 2021, as per the document annexed to the convenience compilation, i.e., the letter of the Bank of Baroda dated August 4, 2021, the letter of Prakash Sharma, Director for AAP Infrastructures dated April 14, 2021, addressed to the Assistant General Manager, Zonal Office Stressed Assets Recovery Branch, Bank of Baroda, 'no due certificate' dated January 12, 2021 issued by the Bank of Baroda etc. It cannot be conclusively held that the above mentioned documents which have been referred to were part of any other transaction or agreement and not in discharge and satisfaction of the obligations of the petitioner in the MOU of March 17, 2013.

61. It also appears that the other guarantees which are quoted below, were released after July 31, 2013.

"

Lender Bank	Name of Guarantor	Date of release of Guarantees	Amount (Rs. In Crores)
Yes Bank Limited, Nyaya Marg, Chanakyapuri Branch, New Delhi.	Mr. Ram Gopal Maheshwari	10.12.2013	30.00
Punjab National Bank, Mid Corporate Branch, Noida	Mr. Ram Gopal Maheshwari Mr. MarutiMaheshwari	03.02.2014	67.50
State Bank of	Mr. Ram Gopal	24.02.2014	42.50

Bikaner & Jaipur, Barakhamba Road Branch, New Delhi	Maheshwari Mr. MarutiMaheshwari		
State Bank of Patiala Commercial Branch, Janpath, New Delhi	Mr. Ram Gopal Maheshwari Mr. MarutiMaheshwari	04.03.2014	105.00
Oriental Bank of Commerce, Overseas Branch, Panchkulan Branch, New Delhi	Mr. Ram Gopal Maheshwari Mr. MarutiMaheshwari	26.05.2014	50.00
Allahabad Bank, International Branch, New Delhi	Mr. Ram Gopal Maheshwari Mr. MarutiMaheshwari	04.06.2014	115.00
Bank of India, Kolkata Large Corporate Bank, (W.B.)	Mr. Ram Gopal Maheshwari Mr. MarutiMaheshwari	22.12.2014	37.50

62. Under such circumstances, limitation is a mixed question of law and fact, which has to be decided by the learned arbitral tribunal. In ***Panchanan Dhara & Ors. Vs. Monmatha Nath Maity (dead)*** reported in ***(2006) 5 SCC 340***, the Hon'ble Apex Court held as follows:-

> "22. A bare perusal of Article 54 of the Limitation Act would show that the period of limitation begins to run from the date on which the contract was to be specifically performed. In terms of Article 54 of the Limitation Act, the period prescribed therein shall begin from the date fixed for the performance of the contract. The contract is to be performed by both the parties to the agreement.
> In this case, the first respondent was to offer the balance amount to Company, which would be subject to its showing that it had a perfect title over the property. We have noticed hereinbefore that the courts below arrived at a finding of fact that the period of performance of the agreement has been extended. Extension of (sic time of performance of a) contract is not necessarily to be inferred from written document. It

could be implied also. The conduct of the parties in this behalf is relevant. Once a finding of fact has been arrived at, that the time for performance of the said contract had been extended by the parties, the time to file a suit shall be deemed to start running only when the plaintiff had notice that performance had been refused. Performance of the said contract was refused by the Company only on 21-8-1985. The suit was filed soon thereafter."

63. In ***SBI General Insurance (supra),*** the Hon'ble Apex Court held as follows:-

"**128.** On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

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133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra)."

64. In ***Bharat Sanchar Nigam Limited (supra),***the Hon'ble Apex Court held as follows:-

"**38.** Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is,

however, a distinction between jurisdictional and admissibility issues. An issue of "jurisdiction" pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

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44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

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47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

65. In ***Aslam Ismail Khan (supra),*** the Hon'ble Apex Court held as follows:-

"33. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether we should decline to make a reference under Section 11(6) of the 1996 Act, by examining whether the substantive claims of the petitioner are ex facie and hopelessly time-barred?

34. A three-Judge Bench of this Court in Vidya Drolia v. Durga Trading Corpn. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] while dealing with the scope of powers of the referral Court under Sections 8 and 11, respectively, endorsed the prima facie test and opined that courts at the referral stage can interfere only in rare cases where it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Such a restricted and limited review was considered necessary to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood.

35. The relevant observations in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] are

reproduced herein below : (Vidya Drolia case [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 119 & 121, paras 148 & 154)

> "148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.
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> 154. ... 154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."
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> (emphasis supplied)

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51. It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists — nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either ex facie time-barred claims or claims which have been discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought, etc.

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

66. In the ***Re: Interplay (supra),*** the Hon'ble Apex Court held as follows:-

"**134.** In Iffco Ltd. v. Bhadra Products [Iffco Ltd. v. Bhadra Products, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] , one of the issues before this Court was whether a decision on the issue of limitation would go to the root of the jurisdiction of the Arbitral Tribunal, and therefore be covered by Section 16 of the Arbitration Act. This Court referred to Section 16(1) to observe that : (SCC p. 547, para 18)

"18. … the Arbitral Tribunal may rule on its own jurisdiction, which makes it clear that it refers to whether the Arbitral Tribunal may embark upon an inquiry into the issues raised by the parties to the dispute."

(emphasis in original)

In Bhadra Products [Iffco Ltd. v. Bhadra Products, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] , it was held that the issue of limitation concerns the jurisdiction of the tribunal which tries the proceedings.

135. In Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd. [UttarakhandPurvSainikKalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] the issue before this Court was whether a Referral Court at the stage of appointment of arbitrators would be required to decide the issue of limitation or leave it to the Arbitral Tribunal. A Bench of two Judges of this Court held that the doctrine of competence-competence is "intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the

parties." Moreover, this Court held that Section 16 is an inclusive provision of very wide ambit : (SCC p. 462, para 7)

"7. … 7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."

67. Having discussed the facts involved and the judicial authorities cited by the parties, I am of the view that refusal to refer the dispute will cause injustice to the petitioner. The facts do not warrant dismissal of the application for reference at the very threshold. Frivolity in the claim can also be decided by the learned tribunal and the learned tribunal also has the jurisdiction to award costs by compensating the party who in its opinion had been unnecessarily dragged into a prolonged and malafide litigation.

68. Thus, when the respondents can be compensated by award of costs, if it is found by the tribunal that they had been unnecessarily embroiled into a time-consuming and mala fide litigation, justice demands that the reference of the dispute for adjudication by the appropriate forum should be allowed. The claim of the petitioner should not be denied even before the petitioner has a chance to put forward his case. When the referral court is in doubt, the dispute must be referred.

69. The case and counter case of the parties with regard to inter-promoter transfer and the purport of the declarations given under the Regulations of

SEBI, will require this court to delve deeper into the facts. This will entail a mini-trial, which is beyond the jurisdiction of the referral court.

70. Under such circumstances, the application is allowed, leaving the objections raised by Mr. Choudhury, including the questions of limitation, arbitrability, jurisdiction of the learned tribunal, novation of the MOU, etc. open for decision by the tribunal. The observations made in this order are, prima facie and not on the merits of the claims.

71. Accordingly, Mr. Abhijit Chatterjee, learned senior Advocate shall act as the nominee of the petitioner. Mr. Surajit Nath Mitra, learned senior Advocate shall act as the nominee of the respondents and Hon'ble Justice Subhro Kamal Mukherjee, former Chief Justice of Karnataka High Court, will act as the presiding Arbitrator.

72. This order is subject to compliance of section 12 of the Arbitration and Conciliation Act, 1996.

73. The learned Tribunal shall fix the remuneration as per the Schedule of the Act.

74. No order is passed as to costs.

75. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfilment of requisite formalities.

(Shampa Sarkar, J.)