[2025] 5 S.C.R. 243 : 2025 INSC 507

Adavya Projects Pvt. Ltd.
v.
M/s Vishal Structurals Pvt. Ltd. & Ors.

(Civil Appeal No. 5297 of 2025)

17 April 2025

[Pamidighantam Sri Narasimha* and Manoj Misra, JJ.]

Issue for Consideration

Whether service of a Section 21 notice and joinder in a Section 11 application are prerequisites to implead a person/entity as a party to the arbitral proceedings; What is the source of jurisdiction of an arbitral tribunal over a person/entity who is sought to be impleaded as a party to the arbitral proceedings; As a corollary, what is the relevant inquiry that the arbitral tribunal must undertake when determining its own jurisdiction under Section 16 of the Arbitration and Conciliation Act, 1996.

Headnotes†

Arbitration and Conciliation Act, 1996 – ss.11, 21 – Service of a s.21 notice and joinder in a s.11 application, if prerequisites to implead a person/entity as a party to the arbitral proceedings:

Held: A notice invoking arbitration u/s.21 is mandatory as it fixes the date of commencement of arbitration, which is essential for determining limitation periods and the applicable law, and it is a prerequisite to filing an application u/s.11 – However, merely because such a notice was not issued to certain persons who are parties to the arbitration agreement does not denude the arbitral tribunal of its jurisdiction to implead them as parties during the arbitral proceedings – The purpose of an application u/s.11 is for the court to appoint an arbitrator, so as to enable dispute resolution through arbitration when the appointment procedure in the agreement fails – The court only undertakes a limited and prima facie examination into the existence of the arbitration agreement and its parties at this stage – Hence, merely because a court does not refer a certain party to arbitration in its order does not denude the jurisdiction of the arbitral tribunal from impleading them during the arbitral proceedings as the referral court's view does not finally determine this issue. [Para 40(I), 40(II)]

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* Author

Arbitration and Conciliation Act, 1996 – ss.16, 7 – Source of the Arbitral Tribunal's jurisdiction and relevant enquiry u/s.16 – What is the source of jurisdiction of an arbitral tribunal over a person/entity sought to be impleaded as a party to the arbitral proceedings – What is the relevant inquiry that the arbitral tribunal must undertake when determining its own jurisdiction u/s.16:

Held: The source of the arbitral tribunal's jurisdiction is derived from the consent of the parties to refer disputes to arbitration – Such consent must be gathered from the arbitration agreement – Once a person consents to refer disputes to arbitration, and enters into an arbitration agreement u/s.7, he is bound by the same – The implication of being a party to the arbitration agreement is that such person has contractually undertaken to resolve any disputes referenced in the arbitration agreement through the agreed upon method of dispute resolution, i.e., arbitration – It is under this contractual obligation that a person can be impleaded as a party to the arbitral proceedings, even if he was not served with a s.21 notice and not referred to arbitration by the court u/s.11 – The relevant consideration to determine whether a person can be made a party before the arbitral tribunal is if such a person is a party to the arbitration agreement – The arbitral tribunal must determine this jurisdictional issue in an application u/s.16 by examining whether a non-signatory is a party to the arbitration agreement as per s.7 of the ACA. [Paras 22, 23, 40(III)]

Arbitration and Conciliation Act, 1996 – s.16 – Appellant and the respondent no.1-Company entered into an agreement to form LLP-respondent no.2 – Respondent no.3 was designated as CEO of the LLP – Respondent nos.2 and 3 were not signatories to the LLP Agreement that contained the arbitration agreement in Clause 40 – Whether respondent nos. 2 and 3 are parties to the arbitration agreement and whether the arbitral tribunal can implead them as parties to the arbitration proceedings exercising jurisdiction u/s.16:

Held: Clause 40 of the LLP Agreement is expansive in its wording – The arbitration agreement covers the present disputes arising out of reconciliation of accounts in relation to the ITF Project, as this directly affects the rights and liabilities of the partners, the appellant and respondent no.1– Arbitration agreement itself includes within its

scope disputes that may arise between the partners and the LLP-respondent no. 2, and the partners and the administrators of the LLP-respondent no. 3 as he is the CEO of the LLP and responsible for its administration under the LLP Agreement – Furthermore, Respondent no.2 was created under the LLP Agreement and the scope of its activities and the management of its business are set out in the LLP Agreement – It is pursuant to the objectives, purpose, and terms of the LLP Agreement that respondent no.2 undertook the ITF Project, for which a Supplementary LLP Agreement and an MoU were also signed by the partners – Respondent no. 2 was carrying out its business and entering into contracts and dealings with third parties, such as undertaking the ITF Project, based on the terms of the LLP Agreement – Thus, by way of its conduct, respondent no. 2 has undertaken to be bound by the LLP Agreement and it is therefore bound by the arbitration clause contained therein – Respondent no. 3, who is the CEO of the LLP and is responsible for its administration and looking after its business derives his position and duties from Clause 8 of the LLP Agreement – Therefore, respondent no.3 is also bound by the arbitration clause contained in the LLP Agreement, not in his individual capacity but as the CEO of the LLP – Respondent nos.2 and 3, through their conduct, have consented to perform contractual obligations under the LLP Agreement, hence they have also agreed to be bound by the arbitration agreement contained in Clause 40 therein – Since they are parties to the underlying contract and the arbitration agreement, the arbitral tribunal has the power to implead them as parties to the arbitration proceedings while exercising its jurisdiction u/s.16 and as per the kompetenz-kompetenz principle i.e., the arbitral tribunal can determine its own jurisdiction. [Paras 37-39]

Arbitration and Conciliation Act, 1996 – s.16 – Doctrine of kompetenz-kompetenz – Discussed. [Paras 24-26]

Arbitration and Conciliation Act, 1996 – ss.21, 11, 16 – Appellant and the respondent no.1 entered into a contract to form LLP-respondent no. 2 – Respondent no.3 was designated as CEO of LLP – Disputes arose – Appellant issued notice u/s.21 for invocation of arbitration to respondent no.1 only – Further, in s.11 application also only the respondent no.1 was impleaded as a party – However, in statement of claims, the appellant impleaded the respondent no.2 and 3 – Application u/s.16 filed

by respondent nos.1-3 raising objection that the arbitration was not maintainable against respondent nos.2 and 3 as they were neither sent the notice invoking arbitration u/s.21 nor were parties in the s.11 application for appointment of arbitrator – Arbitral Tribunal allowed the application u/s.16 – High Court dismissed the appeal thereagainst – Correctness:

Held: While allowing the s.16 application, the arbitral tribunal proceeded only on the basis that respondent nos. 2 and 3 were not served with the s.21 notice and were not parties in the s.11 application – It did not go into whether these respondents were parties to the arbitration agreement, and whether its jurisdiction extends to them – Arbitral tribunal did not exercise its jurisdiction in accordance with the principle of kompetenz-kompetenz and rather held that such issue does not at all arise at the present stage – Even the High Court, while exercising appellate jurisdiction u/s.37 proceeded on a similar basis – This was an incorrect approach – Rather, the arbitral tribunal should have inquired into whether respondent nos. 2 and 3 are parties to the arbitration agreement to determine whether they could have been impleaded in the statement of claim – Not being served with a s.21 notice and not being made a party in the s.11 application are not sufficient grounds to hold that a person cannot be made party to arbitral proceedings – Impugned judgment set aside – Respondent nos. 2 and 3 be impleaded as parties before the arbitral tribunal, and the proceedings must be continued from the stage of arbitral tribunal's order dated 15.02.2024. [Paras 21, 27, 28, 41]

Arbitration and Conciliation Act, 1996 – s.21 – Notice under – Purpose and Object – Discussed. [Paras 10.1-10.3, 30.2]

Case Law Cited

Cox and Kings Ltd. v. SAP India (P) Ltd. **[2023] 15 SCR 621 : (2024) 4 SCC 1 – followed.**

State of Goa v. Praveen Enterprises **[2011] 10 SCR 1026 : (2012) 12 SCC 581 – relied on.**

Milkfood Ltd. v. GMC Ice Cream (P) Ltd. **[2004] 3 SCR 854 : (2004) 7 SCC 288;** *Geo-Miller & Co (P) Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd* **[2019] 11 SCR 1108 : (2020) 14 SCC 643;** *BCCI v. Kochi Cricket (P) Ltd.* **[2018] 2 SCR 829 : (2018) 6 SCC 287;** *BSNL v. Nortel Networks (India) (P) Ltd.* **[2021] 2 SCR**

644 : (2021) 5 SCC 738; *SBI General Insurance Co. Ltd. v. Krish Spinning* **2024 SCC OnLine SC 1754;** *Ajay Madhusudan Patel v. Jyotrindra S. Patel* **[2024] 9 SCR 894 : (2025) 2 SCC 147;** *Bharat Petroleum Corporation Ltd. v. Go Airlines (India) Ltd.* **[2019] 13 SCR 1044 : (2019) 10 SCC 250;** *Govind Rubber Ltd. v. Louids Dreyfus Commodities Asia (P) Ltd.* **[2014] 12 SCR 488 : (2015) 13 SCC 477;** *ONGC Ltd. v. Afcons Gunanusa JV* **[2022] 10 SCR 660 : (2024) 4 SCC 481;** *Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.* **[2019] 14 SCR 999 : (2020) 2 SCC 455 – referred to.**

Alupro Building Systems Pvt Ltd. v. Ozone Overseas Pvt Ltd., **2017 SCC OnLine Del 7228;** *De Lage Landen Financial Services India (P) Ltd. v. Parhit Diagnostic (P) Limited,* **2021 SCC OnLine Del 4160;** *Arupri Logistics (P) Ltd. v. Vilas Gupta,* **2023 SCC OnLine Del 4297;** *Cardinal Energy & Infra Structure (P) Ltd. v. Subramanya Construction & Development Co. Ltd.,* **2024 SCC OnLine Bom 964;** *ONGC Ltd. v. Discovery Enterprises (P) Ltd.* **[2022] 4 SCR 926 : (2022) 8 SCC 42 – clarified.**

Books and Periodicals Cited

Gary Born, International Commercial Arbitration, vol 2 (3rd edn, Kluwer Law International 2021) 2777; Redfern and Hunter on International Arbitration (5th edn, Oxford University Press 2009); David St John Sutton, Judith Gill and Matthew Gearing, Russell on Arbitration (23rd edn, Sweet and Maxwell 2009) **– referred to.**

List of Acts

Arbitration and Conciliation Act, 1996; Limitation Act, 1963; Arbitration Act, 1940; Foreign Awards (Recognition and Enforcement) Act, 1961.

List of Keywords

Section 21, 11 of the Arbitration and Conciliation Act, 1996; Notice under Section 21, Arbitration and Conciliation Act, 1996 not served; Notice invoking arbitration; Not a party in the Section 11 application; Purpose of an application under Section 11, Arbitration and Conciliation Act, 1996; Appointment of arbitrator; Arbitral tribunal's jurisdiction; Implead non-signatories; Non-service of notice; Kompetenz-kompetenz principle; Arbitral proceedings; LLP agreement; Arbitration agreement; Oil and gas sector projects; ITF

projects; Principles of natural justice; Limitation period; Appointment procedure; Notice raising counter-claims; Section 7 Arbitration and Conciliation Act, 1996; Arbitration clause; Reconciliation of accounts; Contractual obligation; Dispute resolution; International commercial arbitration; Joinder of parties; Claims are time-barred, barred by law, or untenable; Objections regarding limitation and maintainability; Source of jurisdiction of an arbitral tribunal.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5297 of 2025

From the Judgment and Order dated 08.07.2024 of the High Court of Delhi at New Delhi in ARB.A.(COMM.) No. 24 of 2024

Appearances for Parties

Advs. for the Appellant:
Gaurav Agrawal, Sr. Adv., Debmalya Banerjee, Ms. Simran Brar, Ms. Kiran Devrani, Nitish Dham, Ms. Apurva, Ms. Liza Vohra, M/S. Karanjawala & Co..

Advs. for the Respondents:
Susheel Joseph Cyriac, Nirnimesh Dube, Ankur S. Kulkarni, Varun Kanwal, M/S. Lex Regis Law Offices.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

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* * Ed. Note: Pagination as per the original Judgment.

1. Leave granted.

2. The issues arising in the present appeal are whether the service of notice invoking arbitration under Section 21 of the Arbitration and Conciliation Act, 1996[1] on a person and joinder of such person in the application under Section 11 for appointment of arbitrator are prerequisites for an arbitral tribunal to exercise jurisdiction over him, and further, when can an arbitral tribunal implead a person to the arbitration proceedings. In the present case, the arbitral tribunal, while determining its own jurisdiction under Section 16, took the view that service of a Section 21 notice and being made party to the Section 11 application are mandatory requirements for a person/entity to be made party to the arbitral proceedings. By the impugned order, the High Court has affirmed and upheld this reasoning in exercise of its appellate jurisdiction under Section 37, from which the present appeal arises. Upon consideration of the purpose and scope of a Section 21 notice and Section 11 application, as well as the source of the arbitral tribunal's jurisdiction being the arbitration agreement and the principle of *kompetenz-kompetenz* under Section 16 of the ACA, we have allowed the present appeal by answering

1 Hereinafter "the ACA".

the issues as follows: *First*, while a notice invoking arbitration under Section 21 is mandatory and fulfils various purposes by fixing the date of commencement of arbitral proceedings, non-service of such notice on a person does not preclude his impleadment in the arbitral proceedings. *Second*, the purpose of an application under Section 11 is simply the constitution of the arbitral tribunal, which is pursuant to a limited and prima facie examination by the referral court. The order appointing the arbitrator does not limit the arbitral tribunal's terms of reference or scope of jurisdiction. *Third*, the arbitral tribunal's jurisdiction over a person/entity is derived from their consent to the arbitration agreement. Hence, the proper inquiry in an application under Section 16 is whether such person is a party to the arbitration agreement. *Fourth*, in the facts of the present case, an arbitration agreement exists between the appellant and respondent nos. 2 and 3, and hence they can be impleaded as parties to the arbitral proceedings.

3. *Facts*: The facts that are relevant for our purpose are as follows. The appellant and respondent no. 1 entered into an agreement dated 01.06.2012 to form a Limited Liability Partnership[2] by the name of Vishal Capricorn Energy Services LLP, which is respondent no. 2 herein, to carry out various oil and gas sector projects. It is relevant to note at this stage that only the appellant and respondent no. 1 are signatories to the LLP Agreement. Clause 8 of the LLP Agreement provides that Mr. Kishore Krishnamoorthy, who is respondent no. 3 herein, shall be designated as the Chief Executive Officer of the LLP and will be responsible for administration of business and looking after the execution of contracts. It is relevant that respondent no. 3 is also a director of respondent no. 1 company. Further, Clause 40 of the LLP Agreement provides for dispute resolution through arbitration in the following terms:

> "*40. Disputes or differences, if any, that may arise between partners inter se and/ or between the partner(s) and LLP hereto or their affiliates, assigns, successors, attorneys, administrators and all those claiming through it touching these presents or the construction thereof or any clause or*

2 Hereinafter "LLP".

thing herein contained or otherwise or in any way relating to or concerning these presents or the rights, duties or liabilities of any of the partners hereto in connection therewith the matters in such dispute or difference shall be referred to the arbitration in accordance with and subject to the provisions of Arbitration and Conciliation Act, 1996 or to any statutory modification or reenactment thereof for the time being in force. The venue of the Arbitration shall be decided by the Arbitrator so appointed by mutual consent of both partners."

3.1 By letter of award dated 31.12.2012, Oil India Ltd. awarded a contract for augmentation of storage capacity at ITF, Tenughat, Assam to a consortium, of which respondent no. 1 was a member. By agreement dated 08.01.2013, the consortium sub-contracted the ITF Project to respondent no. 1. Pursuantly, the appellant and respondent no. 1 entered into a Supplementary Agreement and a Memorandum of Understanding[3], both dated 29.01.2013, for execution of the ITF Project through respondent no. 2. The appellant infused funds of Rs. 1.1 crores for the execution of this Project.

3.2 Disputes arose in 2018 when the appellant sought documents and information to audit respondent no. 2's accounts in relation to the ITF Project. The appellant then issued demand notices dated 11.10.2019 and 20.12.2019 to respondent no. 1 for payment of Rs. 7.31 crores towards reconciliation of accounts of the LLP. Subsequently, on 17.11.2020, the appellant issued a notice invoking arbitration under Clause 40 of the LLP Agreement. It is relevant that this notice was issued only to respondent no. 1 through its Director, respondent no. 3. The appellant then filed a Section 11 application for appointment of arbitrator, impleading only respondent no. 1 as a party. The High Court, by order dated 24.11.2021, appointed a sole arbitrator "*to adjudicate the disputes that are stated to have arisen between the parties out of the LLP Agreement dated 01st June, 2012 read with Supplementary LLP Agreement and MoU both dated 29th January, 2013*."

3 Hereinafter "MoU".

3.3 After the arbitrator entered reference, the appellant filed its statement of claim, wherein it also impleaded respondent nos. 2 and 3 as parties to the arbitration. However, at the time of filing, the prayer clause was restricted to respondent no. 1. Respondent nos. 1-3 then filed an application under Section 16 of the ACA, raising various objections to the arbitral tribunal's jurisdiction. The most relevant objection for our purpose is that the arbitration is not maintainable against respondent nos. 2 and 3 as they were not parties to the notice invoking arbitration under Section 21 or the application for appointment of arbitrator under Section 11. Further, it was contended that the arbitration agreement contained in Clause 40 of the LLP Agreement does not bind respondent no. 2, which is itself a creature of the LLP Agreement, and respondent no. 3 as he was not a party to the LLP Agreement in his individual capacity.

3.4 In the meanwhile, the appellant preferred an application under Section 23(3) of the ACA to amend the statement of claim in order to bring on record a detailed memo of parties and to amend the prayer clause to include respondent nos. 2 and 3 as well. The appellant's application for amendment was allowed by the arbitral tribunal's order dated 01.08.2023 on the ground that these are ministerial amendments that do not change the averments in the original statement of claim.

4. *Arbitral Tribunal's Decision on the Section 16 Application*: By order dated 15.02.2024, the arbitral tribunal allowed the application under Section 16 and held that the arbitral proceedings against respondent nos. 2 and 3 are not maintainable. The reasoning of the arbitral tribunal is that in the absence of the notice invoking arbitration being served on respondent nos. 2 and 3, as well as considering that the High Court did not refer them to arbitration while allowing the Section 11 application, the arbitral tribunal cannot exercise jurisdiction over them. The arbitral tribunal also rejected the appellant's argument regarding its own competence to implead non-signatories as necessary parties by holding that there is no finding that respondent nos. 2 and 3 are essential for effective adjudication of disputes.

5. *Impugned Order*: The appellant's appeal under Section 37(2)(a) of the ACA against the arbitral tribunal's order was dismissed by the High Court's order dated 08.07.2024, which is impugned herein. The

High Court proceeded on a similar basis and held that since the Section 21 notice and the Section 11 application do not raise any disputes against respondent nos. 2 and 3, and they are not included as parties therein, the appellant cannot be permitted to subsequently raise disputes against them in the statement of claim.

6. *Submissions*: We have heard Mr. Gaurav Agrawal, learned senior counsel for the appellant and Mr. Varun Kanwal, learned counsel for the respondents.

6.1 Mr. Agrawal has submitted that: *First*, as per the principle of *kompetenz-kompetenz* enshrined in Section 16 of the ACA, the arbitral tribunal has the power to implead parties (signatories or non-signatories) even after reference to arbitration if the disputes involving them arise from the same agreement.[4] In the present facts, respondent nos. 2 and 3 ought to be impleaded for complete adjudication of disputes, considering their intentional and consensual involvement in the performance of the LLP Agreement, Supplementary Agreement, and MoU as well as execution of the ITF Project. *Second*, they are bound by the arbitration agreement in Clause 40 of the LLP Agreement as it specifically refers to disputes between the partners and the LLP (respondent no. 2), and the partners and the administrator (respondent no. 3). Further, even Section 23(4) of the Limited Liability Partnership Act, 2008 read with Schedule I provides for arbitration between the LLP and its partners. *Third*, given the intertwined roles of the respondents, the absence of a separate notice under Section 21 being issued to them does not bar the appellant from impleading them in the arbitral claim as they had constructive notice through respondent no. 1 upon whom such notice was served.

6.2 Mr. Kanwal, on the other hand, has submitted that the issue for consideration is not the arbitral tribunal's jurisdiction to implead a non-signatory. Rather, it is whether a person/entity that has not been served with a notice under Section 21, and has not been referred to arbitration by the court under Section 11 of the ACA, can be made a party to the arbitral proceedings. His

4 Relied on *Cox and Kings Ltd. v. SAP India (P) Ltd.*, (2024) 4 SCC 1.

submissions are as follows: *First*, this Court's decision in *Cox and Kings* (supra) is not applicable to the facts of the case, and has rightly been distinguished as neither the arbitral tribunal nor the High Court have found that respondent nos. 2 and 3 are necessary parties for effective adjudication of disputes. *Second*, that respondent nos. 2 and 3 are not bound by the arbitration agreement as they are not parties to the same. *Third*, that the proceedings against respondent nos. 2 and 3 are contrary to principles of natural justice as they were not served with any notice or impleaded in the Section 11 application.

7. *Issues*: Given the factual background and submissions of the parties, there are two questions of law that can be framed for our consideration:

I. Whether service of a Section 21 notice and joinder in a Section 11 application are prerequisites to implead a person/entity as a party to the arbitral proceedings?

II. What is the source of jurisdiction of an arbitral tribunal over a person/entity who is sought to be impleaded as a party to the arbitral proceedings? As a corollary, what is the relevant inquiry that the arbitral tribunal must undertake when determining its own jurisdiction under Section 16 of the ACA?

7.1 After analysing and answering these legal issues, we will examine the facts and the material on record in the present case to determine whether respondent nos. 2 and 3 can be made parties to the arbitral proceedings.

8. *Notice Invoking Arbitration under Section 21 of the ACA*: Section 21 falls under Part I, Chapter V of the ACA, which deals with "Conduct of arbitral proceedings". The provision is extracted hereinbelow for reference:

> "***21. Commencement of arbitral proceedings.—****Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.*"

9. A plain reading of the provision shows that in the absence of an agreement between the parties, arbitral proceedings are deemed to

have commenced when the respondent receives a request to refer disputes to arbitration. It is clear that Section 21 does not expressly mandate the claimant to send a notice invoking arbitration to the respondents. However, the provision necessarily mandates such notice as its receipt by the respondent is required to commence arbitral proceedings, unless the parties have mutually agreed on another date/event for determining when the arbitral proceedings have commenced.

10. This Court has expounded the purpose and object underlying the notice referenced in Section 21 in several judgments, which can be stated as follows:

10.1 *First*, the notice is necessary to determine whether claims are within the period of limitation or are time-barred. Section 43(1) of the ACA stipulates that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Further, Section 43(2) provides that for the purpose of the Limitation Act, an arbitration shall be deemed to have commenced on the date referred to in Section 21. Hence, the date of receipt of the Section 21 notice is used to determine whether a dispute has been raised within the limitation period as specified in the Schedule to the Limitation Act, as held by this Court in *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*[5] and *State of Goa v. Praveen Enterprises.*[6]

10.2 *Second*, the date of receipt of notice is also relevant to determine the applicable law to the arbitral proceedings. This can be understood in two senses: (i) When the arbitral proceedings are governed by a law that is different from the proper law of the contract, the governing law applies only after the arbitral proceedings have commenced, as held in *Milkfood Ltd* (supra).[7] And, (ii) Section 85(2)(a) of the ACA provides that the Arbitration Act, 1940 and Foreign Awards (Recognition and Enforcement) Act, 1961 will apply to arbitral proceedings that commenced prior to the ACA coming into force, unless otherwise agreed by the parties. Hence, the date of invoking arbitration is necessary

5 (2004) 7 SCC 288, paras 26, 29

6 (2012) 12 SCC 581, paras 16, 18.

7 *Milkfood Ltd* (supra), para 31.

to determine which arbitration law applies to the proceedings as per the decisions in *Milkfood Ltd* (supra)[8] and *Geo-Miller & Co (P) Ltd. v. Chairman, Rajasthan Vidyut Utpadan Nigam Ltd.*[9] Similarly, the applicability of amendments to the ACA to arbitral proceedings is determined by reference to the date on which such proceedings commenced as per Section 21.[10]

10.3 *Third*, an application before the High Court or this Court under Section 11(6) of the ACA for appointment of arbitrator can be filed only after the respondent has failed to act as per the appointment procedure in the arbitration agreement. Hence, invocation of arbitration as provided in Section 21, and the subsequent failure of the respondent to appoint its arbitrator or agree to the appointment of a sole arbitrator as provided in Sections 11(4) and 11(5), are necessary for invoking the court's jurisdiction under Section 11. This is as per the decision of this Court in *BSNL v. Nortel Networks (India) (P) Ltd.*[11] Further, the limitation period within which the Section 11 application must be filed is also calculated with reference to the date on which the appointment procedure under the arbitration agreement fails.[12]

11. It is clear that by fixing the date of commencement of arbitral proceedings by anchoring the same to a notice invoking arbitration, Section 21 of the ACA fulfils various objects that are time-related. The receipt of such notice is determinative of the limitation period for substantive disputes as well as the Section 11 application, and also the law applicable to the arbitration proceedings.

12. In this case, a Section 21 notice was undisputedly issued by the appellant under Clause 40 of the LLP Agreement on 17.11.2020; but the problem arises because this notice was issued only to respondent no. 1. However, there is nothing in the wording of the provision or the scheme of the ACA to indicate that merely because such notice was not served on respondent nos. 2 and 3, they cannot

8 ibid, paras 46, 49, 70.

9 (2020) 14 SCC 643, para 10.

10 For example, the applicability of the Arbitration and Conciliation (Amendment) Act, 2015 to arbitral proceedings depends on whether the notice invoking arbitration was issued before or after the amendment came into force. See *BCCI v. Kochi Cricket (P) Ltd.*, (2018) 6 SCC 287, paras 38-39.

11 (2021) 5 SCC 738, para 15.

12 ibid, para 16.

be impleaded as parties to the arbitral proceedings. The relevant considerations for joining them as parties to the arbitration will be discussed at a later stage.

13. At this point, it is important to note this Court's decision in *State of Goa v. Praveen Enterprises* (supra) wherein it was held that the claims and disputes raised in the notice under Section 21 do not restrict and limit the claims that can be raised before the arbitral tribunal. The consequence of not raising a claim in the notice is only that the limitation period for such claim that is raised before the arbitral tribunal for the first time will be calculated differently vis-a-vis claims raised in the notice. However, non-inclusion of certain disputes in the Section 21 notice does not preclude a claimant from raising them during the arbitration, as long as they are covered under the arbitration agreement. Further, merely because a respondent did not issue a notice raising counter-claims, he is not precluded from raising the same before the arbitral tribunal, as long as such counter-claims fall within the scope of the arbitration agreement.[13]

14. A similar rationale may be adopted in this case as well, especially considering the clear purpose served by a Section 21 notice. Extending this logic, non-service of the notice under Section 21 and the absence of disputes being raised against respondent nos. 2 and 3 in the appellant's notice dated 17.11.2020 do not automatically bar their impleadment as parties to the arbitration proceedings.

15. *Appointment of Arbitrator by the Court under Section 11*: The other reason provided by the arbitral tribunal and the High Court in this case is that respondent nos. 2 and 3 were not made parties in the appellant's Section 11 application. Consequently, the High Court order appointing the arbitrator only refers the appellant and respondent no. 1 to arbitration, and the arbitration is maintainable only qua both of them. We find that this line of reasoning must also be rejected in light of the purpose of a Section 11 application and the scope of inquiry by the courts while deciding such application. The relevant portion of Section 11 reads as follows:

> "***11. Appointment of arbitrators.—***
>
> *(6) Where, under an appointment procedure agreed upon by the parties,—*

13 *Praveen Enterprises* (supra), paras 19-20, 26.

> *(a) a party fails to act as required under that procedure; or*
>
> *(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or*
>
> *(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,*
>
> *a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.*
>
> *(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*"

16. As has been stated above, a Section 11 application can be preferred by a party when the procedure for appointment stipulated in the arbitration agreement fails. It is relevant that Section 11 falls under Part I, Chapter III of the ACA that deals with "Composition of arbitral tribunal". The statutory scheme, along with the clear wording of Section 11(6), evidences that the purpose of this application is for the court to take "*necessary measure*", in the absence of any other means in the arbitration agreement, "*for securing the appointment*" of the arbitral tribunal. By constituting the arbitral tribunal when there is a deadlock or failure of the parties or the appointed arbitrators to act as per the arbitration agreement, the court only gives effect to the mutual intention of the parties to refer their disputes to arbitration.[14]

17. It is also relevant to note that while deciding such an application under Section 11(6), the High Court or this Court, as the case may be, undertakes a limited examination as per Section 11(6A). The

14 *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899, In re*, (2024) 6 SCC 1, para 150; *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 SCC OnLine SC 1754, para 122.

court's jurisdiction is confined to a *prima facie examination*, without conducting a mini-trial or laborious and contested inquiry, into the *existence* of the arbitration agreement, i.e., whether there exists a contract to refer disputes that have arisen between the parties to arbitration.[15] Further, any examination into the validity of the arbitration agreement must be restricted to the requirement of "formal validity", i.e., whether the requirements of a written agreement under Section 7 of the ACA are satisfied.[16] Beyond this, the court must leave it to the arbitral tribunal to "rule" on and adjudicate the existence and validity of the arbitration agreement on the basis of evidence adduced by the parties, in accordance with the principle under Section 16 of the ACA.[17]

18. More specifically, in respect of determining parties to the arbitral proceedings, the Constitution Bench in *Cox and Kings* (supra) delineated the role of the court in a Section 11 application in the context of non-signatories as parties to the arbitration agreement as follows:

> "***169.*** *In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the*

15 *In re, Interplay* (supra), paras 164-167.

16 ibid, para 165; *SBI General Insurance* (supra), para 110.

17 *In re, Interplay* (supra), para 167, 169; *SBI General Insurance* (supra), para 111.

> *non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16*."
>
> (emphasis supplied)

Therefore, the determination of whether certain persons are parties to the arbitration agreement, and consequently, whether they can be made party to the arbitration proceedings, is left to the arbitral tribunal. While the Section 11 court can return a prima facie finding on this issue, the same does not bind the arbitral tribunal, which must decide the issue based on evidence and the applicable legal principles.[18] The determination of this issue goes to the very root of the arbitral tribunal's jurisdiction, and hence, is covered under Section 16 of the ACA.[19]

19. It is also relevant to take note of this Court's decision in *Praveen Enterprises* (supra), wherein it held that when a court appoints the arbitral tribunal under Section 11, the arbitral tribunal's terms of reference are not restricted to specific disputes referred by the court, unless the arbitration agreement itself requires the court to formulate and refer disputes to arbitration.[20]

20. Considering the purpose of a Section 11 application for constitution of an arbitral tribunal and the limited scope of examination into the existence of the arbitration agreement and prima facie finding on who are parties to it, it follows that the court under Section 11 does not conclusively determine or rule on who can be made party to the arbitral proceedings. Therefore, merely because respondent nos. 2 and 3 were not parties before the High Court under Section 11, and disputes against them were not referred to the arbitrator by order

18 Also see *Ajay Madhusudan Patel v. Jyotrindra S. Patel*, (2025) 2 SCC 147, para 75.

19 ibid, paras 73, 76.7.

20 *Praveen Enterprises* (supra), paras 28-29. Also see *Bharat Petroleum Corporation Ltd. v. Go Airlines (India) Ltd.*, (2019) 10 SCC 250.

dated 24.11.2021, it does not mean that they cannot be impleaded at a later stage on this ground alone.

21. *Source of the Arbitral Tribunal's Jurisdiction and Relevant Inquiry under Section 16*: At this stage, it is clear that not being served with a Section 21 notice and not being made a party in the Section 11 application are not sufficient grounds to hold that a person cannot be made party to arbitral proceedings. We will now deal with the next question, i.e., when can a person be made party to the arbitration proceedings?

22. This issue deals with the source of the arbitral tribunal's jurisdiction, which is derived from the consent of the parties to refer disputes to arbitration.[21] Such consent must be gathered from the arbitration agreement,[22] that must in accordance with Section 7 of the ACA, which provides:

> "***7. Arbitration agreement.—****(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in—*
>
> *(a) a document signed by the parties;*
>
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or*
>
> *(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*

21 *Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.*, (2015) 13 SCC 477, para 22; *Cox and Kings* (supra), para 69 (Chandrachud, J).

22 *ONGC Ltd. v. Afcons Gunanusa JV*, (2024) 4 SCC 481, para 263.

> *(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*"

23. Once a person consents to refer disputes to arbitration, and enters into an arbitration agreement under Section 7, he is bound by the same. The implication of being a party to the arbitration agreement is that such person has contractually undertaken to resolve any disputes referenced in the arbitration agreement through the agreed upon method of dispute resolution, i.e., arbitration. It is under this contractual obligation that a person can be impleaded as a party to the arbitral proceedings, even if he was not served with a Section 21 notice and not referred to arbitration by the court under Section 11.

24. As briefly stated above, the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of *kompetenz-kompetenz*, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement, and the scope of disputes referrable to arbitration under the agreement.[23] Considering that the arbitral tribunal's power to make an award that binds the parties is derived from the arbitration agreement, these jurisdictional issues must necessarily be decided through an interpretation of the arbitration agreement itself. Therefore, the arbitral tribunal's jurisdiction must be determined against the touchstone of the arbitration agreement.

25. This view finds support in the jurisprudence and practice of international commercial arbitration. It is notable that while most national legislations do not expressly provide for joinder of parties by the arbitral tribunal, this must be done with the consent of all the parties.[24] Gary Born has taken the view that the arbitral tribunal can direct the joinder of parties when the arbitration agreement expressly

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23 *Uttarakhand Purv Sainik Kalyan Nigam Ltd.* v. *Northern Coal Field Ltd.*, (2020) 2 SCC 455, para 7.11; *Cox and Kings* (supra), para 163 (Chandrachud, J); *Ajay Madhusudhan Patel* (supra), para 75.

24 *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009). See also David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (23rd edn, Sweet and Maxwell 2009).

provides for the same. However, he states that in reality, most arbitration agreements, whether *ad hoc* or providing for institutional arbitration, neither expressly preclude nor expressly permit the arbitral tribunal to join parties. In such cases, the power must be implied,[25] particularly when there is a multi-party arbitration clause in the same underlying contract that does not expressly address the joinder of parties in the arbitral proceedings. He states that: "*In these circumstances, there is a substantial argument that the parties have impliedly accepted the possibility of consolidating arbitrations under their multi-party arbitration agreement and/or the joinder or intervention of other contracting parties into such arbitrations… the parties' joint acceptance of a single dispute resolution mechanism, to deal with disputes under a single contractual relationship, reflects their agreement on the possibility of a unified proceeding to resolve their disputes, rather than necessarily requiring fragmented proceedings in all cases*." Further, in jurisdictions where there is no provision in the national arbitration statute authorising the courts to consolidate arbitrations or to join parties, it is left to the arbitral tribunal to determine this issue at the first instance.[26]

26. Therefore, as per the legal principles under the ACA as well as in international commercial arbitration, it is a foundational tenet that the arbitral tribunal's jurisdiction is derived from the consent of the parties to refer their disputes to arbitration, which must be recorded in an arbitration agreement. The proper judicial inquiry to decide a jurisdictional issue under Section 16 as to whether a person/entity can be made a party to the arbitral proceedings will therefore entail an examination of the arbitration agreement and whether such person is a party to it. If the answer is in the affirmative, such person can be made party to the arbitral proceedings and the arbitral tribunal can exercise jurisdiction over him as he has consented to the same.

27. *Returning to the Facts of the Case*: Now that we have set out the legal principles on when can a person be made party to an arbitration proceeding and how must the arbitral tribunal proceed under Section 16, we will deal with the approach adopted in the

25 Gary Born, *International Commercial Arbitration*, vol 2 (3rd edn, Kluwer Law International 2021) 2777.

26 ibid, 2788-2789.

present case. While allowing the Section 16 application by order dated 15.02.2024, the arbitral tribunal proceeded only on the basis that respondent nos. 2 and 3 were not served with the Section 21 notice and were not parties in the Section 11 application. The arbitral tribunal did not go into whether these respondents are parties to the arbitration agreement, and whether its jurisdiction extends to them. We are extracting the relevant portion of the arbitral tribunal's order:

> "*8. Ld. Counsel for the Claimant has also relied upon various judgments and in particular the judgment in "Cox and Kings Ltd. Vs. SAP India Pvt. Ltd. & Anr.", Arbitration Petition (Civil) No. 38/2020, dated 06.12.2023 to argue that on the principle of competence-competence this Tribunal can continue the Arbitral proceedings against Respondents No.2 and 3 as they are necessary parties to these proceedings and their presence is required for effective adjudication of the disputes being raised by the Claimant. In my view this submission is also without any merit in as much as the principle of competence-competence can be applied only when the Court or the Tribunal finds that the presence of even non-signatories of the Arbitral Agreement is required. A non-signatory of the Arbitral Agreement can be added in the Arbitral Proceedings if he has played a positive, direct and substantial role in the negotiations and performance of the Contract which contains an Arbitral Clause and as such the Court or the Tribunal may add him also in the proceedings for effectual adjudication of the disputes between the parties. This principle is like the provision of Order 1 Rule 10 of the CPC. However, in this case this Tribunal has not at all found or held that the presence of Respondents No.2 and 3 is essential in these proceedings for effective adjudication of the disputes being raised by the Claimant. At this stage the Tribunal is concerned only with the question of joining Respondents No.2 and 3 without serving upon them a notice under Section 21 of the A&C Act, 1996 which admittedly was never served upon them and as such the Arbitral proceedings initiated by the Claimant against them are unsustainable.*

> *9. The objection raised by Respondents No.2 and 3 / Applicants in the present proceedings against them is also on the ground that they were never made a party to Section 11 A&C Act, 1996 proceedings and the High Court while making a reference and appointing the undersigned as an Arbitrator had only Respondent No. 1 before it. It is argued that there is no reference qua Respondents No.2 and 3 by the High Court of Delhi and as such the present proceedings against them are void and illegal. As already discussed above the principle of competence-competence is not applicable to the Respondents No. 2 and 3 at this stage. The absence of any reference qua them by the High Court under Section 11 of the A&C Act, 1996 renders these proceedings against them void-ab-initio and as such they cannot be proceeded against by this Tribunal*."

28. The arbitral tribunal's approach clearly shows that it did not exercise its jurisdiction in accordance with the principle of *kompetenz-kompetenz*, and rather held that such issue does not at all arise at the present stage. Even the High Court, while exercising appellate jurisdiction under Section 37, proceeded on a similar basis. In view of the legal principles set out above, we are of the view that this is an incorrect approach. Rather, the arbitral tribunal should have inquired into whether respondent nos. 2 and 3 are parties to the arbitration agreement to determine whether they could have been impleaded in the statement of claim. We will be elaborating on this issue at a later stage.

29. *High Court Decisions on these Issues*: Now that we have laid down the purpose of a Section 21 notice, the scope of inquiry in a Section 11 application, and the judicial approach to determining jurisdictional issues under Section 16, including whether a person can be made party to the arbitration proceedings, we find it necessary to clarify various decisions by High Courts that deal with these legal issues.

30. The Delhi High Court in *Alupro Building Systems Pvt Ltd. v. Ozone Overseas Pvt Ltd.*[27] allowed an application under Section 34 of the

27 2017 SCC OnLine Del 7228.

ACA against an award passed by an arbitrator who was unilaterally appointed by the respondent therein, without issuing a notice to the petitioner therein under Section 21 of the ACA. The High Court proceeded to delineate the various functions served by a Section 21 notice as follows:[28] (i) To inform the other party as to the claims, which will enable them to accept or dispute the claims; (ii) To enable the other party to point out if certain claims are time-barred, barred by law, or untenable, or if there are counter-claims; (iii) For arriving at a consensus for appointment of arbitrators under the arbitration agreement; (iv) For parties to inform each other about their proposed arbitrator, to enable the other party to raise any objections/issues regarding qualification; (v) To trigger the court's jurisdiction under Section 11 in case the appointment procedure fails; and (vi) To fix the date of commencement of arbitration for the purpose of Section 43(1).

30.1 The decision in *Alupro Building Systems* (supra) has been relied on by the High Court in its impugned order to hold that the notice under Section 21 is a mandatory requirement before a person can be made party to arbitral proceedings.

30.2 While we agree with the decision insofar as holding that the notice under Section 21 is mandatory, unless the contract provides otherwise, we do not agree with the conclusion that non-service of such notice on a party nullifies the arbitral tribunal's jurisdiction over him. The purpose of the Section 21 notice is clear – by fixing the date of commencement of arbitration, it enables the calculation of limitation and it is a necessary precondition for filing an application under Section 11 of the ACA. The other purposes served by such notice – of informing the respondent about the claims, giving the respondent an opportunity to admit and contest claims and raise counter-claims, and to object to proposed arbitrators – are only incidental and secondary. We have already held that the contents of the notice do not restrict the claims, and any objections regarding limitation and maintainability can be raised before the arbitral tribunal, and the ACA provides mechanisms for challenging the appointment of arbitrators on various grounds. Hence, while a Section 21 notice may

28 ibid, paras 25-30.

perform these functions, it is not the primary or only mechanism envisaged by the ACA.

30.3 In this light, and considering that in the facts of the present case a Section 21 notice was in fact issued to respondent no. 1, we find it difficult to accept that the decision in *Alupro Building Systems* (supra) can be relied on to entirely reject the arbitral tribunal's jurisdiction over respondent nos. 2 and 3.

31. The next decision is in *De Lage Landen Financial Services India (P) Ltd. v. Parhit Diagnostic (P) Limited,*[29] which has been relied on by the appellant. This decision arose out of a Section 11 application that was allowed by the Delhi High Court by holding that the respondent therein had due notice of the arbitration proceedings. Upon considering the facts of the case and the appointment mechanism in the arbitration agreement therein, the Court held that the rationale of serving a Section 21 notice as laid down in *Alupro* (supra) stood fulfilled, and hence, the Section 11 application was maintainable. In the present impugned order, the High Court differentiated this decision by holding that the respondent in *De Lage Landen Financial Services* (supra) was made a party to the Section 11 proceedings, which is absent in this case. At this stage, it will suffice to say that *De Lage Landen Financial Services* (supra) does not seem to have deviated from the legal position on a Section 21 notice laid down in *Alupro* (supra), and its decision must be understood in the context of its facts.

32. Another relevant decision is that of *Arupri Logistics (P) Ltd. v. Vilas Gupta,*[30] wherein the Delhi High Court was dealing with the arbitral tribunal's power to implead non-signatories to the arbitration agreement as parties. It held that unlike a court that has the power to implead parties under Order I, Rule 10 of the Code of Civil Procedure, 1908, no such provision exists under the ACA. Further, proceeding on the basis that a non-signatory is not a party to the arbitration agreement, the High Court held that the arbitral tribunal cannot exercise jurisdiction over a non-signatory and impleading such person would be contrary to consent being the foundation of arbitration. It is necessary to note that this decision was prior to the Constitution Bench judgment in *Cox and Kings* (supra), wherein it

29 2021 SCC OnLine Del 4160.

30 2023 SCC OnLine Del 4297.

was held that non-signatories can be impleaded in the arbitration if their conduct shows that they are veritable parties to the arbitration agreement. We also find that the reasoning in *Arupri Logistics* (supra) is in line with what we have held hereinabove, i.e., the jurisdiction of the arbitral tribunal to implead a person depends on whether such person is a party to the arbitration agreement.

33. Finally, we must refer to the Bombay High Court's decision in *Cardinal Energy & Infra Structure (P) Ltd. v. Subramanya Construction & Development Co. Ltd.,*[31] which has a similar factual matrix as this case. The petitioners therein were not served with the Section 21 notice or made party in the Section 11 proceedings. Rather, they were impleaded by the arbitral tribunal after it had framed issues, upon an application by respondent nos. 1 and 2 therein. In a Section 34 application against the arbitral award, the High Court considered the issue of whether the petitioners therein, who were non-signatories to the arbitration agreement, could have been impleaded without them being referred to arbitration in the order under Section 11. By referring to *Cox and Kings* (supra), the relevant portion of which we have extracted hereinabove, the High Court held that the arbitral tribunal has the power to decide whether a non-signatory is bound by the arbitration agreement. The referral court only gives a prima facie finding on this issue, and leaves it to the arbitrator to decide the same. By relying on this rationale, the High Court held that the non-joinder of a party in a Section 11 application does not preclude its impleadment in the arbitration proceedings by the arbitral tribunal.

    33.1 In the impugned order in this case, the High Court differentiated *Cardinal Energy & Infra Structure* (supra) on the ground that the arbitral tribunal's order in this case does not hold respondent nos. 2 and 3 to be proper parties to the arbitration proceedings. However, as we have stated above as well, the arbitral tribunal did not decide the issue of whether these respondents are parties to the arbitration agreement and proper parties to the proceedings before it. Hence, the decision in *Cardinal Energy & Infra Structure* (supra) was not properly considered by the High Court in this case.

31 2024 SCC OnLine Bom 964.

34. *Whether Respondent Nos. 2 and 3 are Parties to the Arbitration Agreement*: In light of the legal position set out hereinabove, we will now consider whether respondent nos. 2 and 3 are parties to the arbitration agreement, in order to determine whether the arbitral tribunal can exercise jurisdiction over them. While we determine this issue, it is necessary to set out the contours of our jurisdiction. Since this appeal arises from the dismissal of an appeal under Section 37(2)(a) of the ACA against the arbitral tribunal's order deciding its jurisdiction under Section 16, we are not confined by the grounds set out in Section 34 of the ACA. While deciding an appeal against the arbitral tribunal's order under Section 16, the appellate courts "*must have due deference to the grounds which have weighed with the Tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the Arbitral Tribunal with the power to rule on its own jurisdiction*."[32]

35. As we have held above, the arbitral tribunal in this case did not delve into the issue of whether respondent nos. 2 and 3 are parties to the arbitration agreement and consequently, whether they can be impleaded in the arbitral proceedings. It is also undisputed that these respondents are not signatories to the LLP Agreement that contains the arbitration agreement in Clause 40. In this light, we are required to examine whether respondent nos. 2 and 3 are parties to the arbitration agreement.

36. In *Cox and Kings* (supra), this Court held that non-signatories are parties to the arbitration agreement if the conduct of the signatories and non-signatories indicates mutual intention that the latter be bound by the arbitration agreement.[33] The test to determine whether such a non-signatory is a party is as follows:

> "*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 are applied holistically. For instance,*

32 *ONGC Ltd. v. Discovery Enterprises (P) Ltd.*, (2022) 8 SCC 42, para 55.

33 *Cox and Kings* (supra), paras 116, 120, 123, 126 (Chandrachud, J)

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."[34]

36.1 The factors laid down in *ONGC v. Discovery Enterprises* (supra) must be holistically considered to determine whether non-signatories are parties to the arbitration agreement, which are as follows:

> "*40. In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:*
>
> *(i) The mutual intent of the parties;*
>
> *(ii) The relationship of a non-signatory to a party which is a signatory to the agreement;*
>
> *(iii) The commonality of the subject-matter;*
>
> *(iv) The composite nature of the transactions; and*
>
> *(v) The performance of the contract*."

36.2 Finally, in light of the requirement under Section 7 of the ACA that the arbitration agreement must be in writing, the mutual intention of non-signatories to be bound by the arbitration agreement must be evidenced in writing. The non-signatory's conduct in the formation, performance, and termination of the

34 Followed in *Ajay Madhusudhan Patel* (supra).

contract, and surrounding circumstances like direct relationship with signatory parties, commonality of subject-matter, and composite nature of transaction must be ascertained from the record of the agreement, as held in *Cox and Kings* (supra):

> "*229. Since the fundamental issue before the Court or tribunal under Section 7(4)(b) and the Group of Companies doctrine is the same, the doctrine can be subsumed within Section 7(4)(b). Consequently, the record of agreement that evidences conduct of the non-signatory in the formation, performance, and termination of the contract and surrounding circumstances such as its direct relationship with the signatory parties, commonality of subject-matter, and composite nature of transaction, must be comprehensively used to ascertain the existence of the arbitration agreement with the non-signatory. In this inquiry, the fact of a non-signatory being a part of the same group of companies will strengthen its conclusion. In this light, there is no difficulty in applying the Group of Companies doctrine as it would be statutorily anchored in Section 7 of the Act.*
>
> *230.1. An agreement to refer disputes to arbitration must be in a written form, as against an oral agreement, but need not be signed by the parties. Under Section 7(4)(b), a court or Arbitral Tribunal will determine whether a non-signatory is a party to an arbitration agreement by interpreting the express language employed by the parties in the record of agreement, coupled with surrounding circumstances of the formation, performance, and discharge of the contract. While interpreting and constructing the contract, courts or tribunals may adopt well-established principles, which aid and assist proper adjudication and determination. The Group of Companies doctrine is one such principle.*"

37. In this case, Clause 40 of the LLP Agreement (extracted hereinabove) is expansive in its wording. It covers disputes arising between the partners inter se each other, and between the partners on the one

hand and the LLP and its administrator on the other hand, when such disputes pertain to the LLP Agreement or its construction, or relate to the rights, duties, and liabilities of the partners. This arbitration agreement covers the present disputes arising out of reconciliation of accounts in relation to the ITF Project, as this directly affects the rights and liabilities of the appellant and respondent no. 1, who are the partners. Further, the arbitration agreement itself includes within its scope disputes that may arise between the partners and the LLP (respondent no. 2), and the partners and the administrators of the LLP, i.e., respondent no. 3 as he is the CEO of the LLP and responsible for its administration under Clause 8 of the LLP Agreement. The question that must be answered is whether respondent no. 2 and 3 have consented to being bound by such arbitration agreement.

38. We must answer this question in the affirmative based on the following considerations. With respect to respondent no. 2, it was created under the LLP Agreement and the scope of its activities and the management of its business are set out in the LLP Agreement. It is pursuant to the objectives, purpose, and terms of the LLP Agreement that respondent no. 2 undertook the ITF Project, for which a Supplementary LLP Agreement and an MoU were also signed by the partners. Hence, it can be said that respondent no. 2 is carrying out its business and entering into contracts and dealings with third parties, such as undertaking the ITF Project, based on the terms of the LLP Agreement. Hence, by way of its conduct, respondent no. 2 has undertaken to be bound by the LLP Agreement and it is therefore bound by the arbitration clause contained therein. Similarly, respondent no. 3, who is the CEO of the LLP and is responsible for its administration and looking after its business derives his position and duties from Clause 8 of the LLP Agreement. His obligations as the CEO of the LLP are therefore derived under the LLP Agreement, and he is acting under this contract. Therefore, it can be said that respondent no. 3 is also bound by the arbitration clause contained in the LLP Agreement, not in his individual capacity but as the CEO of the LLP.

39. Therefore, in view of the fact that respondent nos. 2 and 3 have, through their conduct, consented to perform contractual obligations under the LLP Agreement, it is clear that they have also agreed to be bound by the arbitration agreement contained in Clause 40 therein. Since they are parties to the underlying contract and the arbitration

agreement, the arbitral tribunal has the power to implead them as parties to the arbitration proceedings while exercising its jurisdiction under Section 16 of the ACA and as per the *kompetenz-kompetenz* principle.

40. *Summary of Conclusions*: Our legal analysis of the issues that we set out above, as well as our findings in the facts of the given appeal, can be stated as follows:

I. A notice invoking arbitration under Section 21 of the ACA is mandatory as it fixes the date of commencement of arbitration, which is essential for determining limitation periods and the applicable law, and it is a prerequisite to filing an application under Section 11. However, merely because such a notice was not issued to certain persons who are parties to the arbitration agreement does not denude the arbitral tribunal of its jurisdiction to implead them as parties during the arbitral proceedings.

II. The purpose of an application under Section 11 is for the court to appoint an arbitrator, so as to enable dispute resolution through arbitration when the appointment procedure in the agreement fails. The court only undertakes a limited and prima facie examination into the existence of the arbitration agreement and its parties at this stage. Hence, merely because a court does not refer a certain party to arbitration in its order does not denude the jurisdiction of the arbitral tribunal from impleading them during the arbitral proceedings as the referral court's view does not finally determine this issue.

III. The relevant consideration to determine whether a person can be made a party before the arbitral tribunal is if such a person is a party to the arbitration agreement. The arbitral tribunal must determine this jurisdictional issue in an application under Section 16 by examining whether a non-signatory is a party to the arbitration agreement as per Section 7 of the ACA.

IV. In the facts of the present appeal, respondent nos. 2 and 3 are parties to the arbitration agreement in Clause 40 of the LLP Agreement despite being non-signatories. Their conduct is in accordance with and in pursuance of the terms of the LLP Agreement, and hence, they can be made parties to the arbitral proceedings.

41. In light of the above reasoning, we allow the present appeal and set aside the impugned judgment and order of the High Court of Delhi dated 08.07.2024 in Arb. A. (Comm.) 24/2024. We direct that respondent nos. 2 and 3 be impleaded as parties before the arbitral tribunal, and the proceedings must be continued from the stage of arbitral tribunal's order dated 15.02.2024. Considering that the claim was filed in 2022, we would request the arbitral tribunal to complete the hearings and pass its award as expeditiously as possible.

42. No order as to costs.

43. Pending applications, if any, stand disposed of.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey