[2023] 13 S.C.R. 258 : 2023 INSC 870

CASE DETAILS

SMT. M. HEMALATHA DEVI & ORS.

v.

B. UDAYASRI

(Civil Appeal Nos. 6500-6501 of 2023)

OCTOBER 05, 2023

[SANJAY KISHAN KAUL AND SUDHANSHU DHULIA, JJ.]

HEADNOTES

Issue for consideration: Whether the dispute between the parties is arbitrable, and once a party has availed the remedy before a public forum under a special beneficial legislation, can it be compelled to go for arbitration.

Consumer Protection Act, 2019 – Consumer Protection Act, 1986 – Arbitration Act & Conciliation, 1996 – s.11(6A), 8(1) – Arbitrability of consumer dispute – Constructed house/villa was not handed over to the buyer/consumer-respondent on time – Later, builder terminated the agreement and the appellants-builders/owners filed application u/s.11(5), (6), Arbitration Act, 1996 before the High Court for appointment of Arbitrator, in terms of the arbitration clause in the agreement – Respondent filed complaint before the District Forum – Appellants' application was dismissed, liberty was granted to file a s.8 application before the District Forum which when filed was dismissed – Review filed by the appellants, dismissed – Plea of the appellants that the High Court erred in dismissing their application as under the amended provisions of s.11, Arbitration Act, 1996 i.e. after insertion of sub-section 6A to s.11, by way of an amendment in 2016, the High Court had no choice but to refer the matter for arbitration:

Held: All disputes are not capable of being referred to arbitration – The exclusion of a dispute from arbitration may be express or implied, depending upon the nature of the dispute, and a party to a dispute cannot be compelled to resort to arbitration merely for the reason that it has been provided in the contract, to which it is a signatory – The arbitrability of a dispute has to be examined when one of the parties seeks redressal under a

welfare legislation, in spite of being a signatory to an arbitration agreement – Consumer Protection Act is a piece of welfare legislation with the primary purpose of protecting the interest of a consumer – Consumer disputes are assigned by the legislature to public fora, as a measure of public policy – Therefore, by necessary implication such disputes will fall in the category of non-arbitrable disputes, and these disputes should be kept away from a private fora such as 'arbitration', unless both the parties willingly opt for arbitration over the remedy before public fora – In the present case, the application u/s.11, Arbitration Act, 1996 filed by the appellants for appointment of an arbitrator, was not maintainable – Impugned orders which held this position upheld – High Court adopted the right approach in its two impugned orders, where it declined to interfere in the matter and appoint an arbitrator – Reasoning given in Emaar MGF Land Ltd. v. Aftab Singh [2018] 14 SCR 791 (Emaar III) would be equally applicable to s.11 application before the High Court – Both the provisions incorporated in s.8 and s.11 [i.e. sub-section (1) and sub-section 6A respectively], seemingly restrict the scope of the examination by the concerned courts, in their reference to arbitration, or appointment of arbitrator, as the case might be, and the language being common, "notwithstanding any judgment, decree or order" places a similar question before the two courts – Appeals dismissed. [Paras 9, 22, 23]

Consumer Protection Act, 2019 – Arbitration Act, 1996 – ss.11,8 – Plea by the appellants that since it is the builder who first approached the "Court" by filing an application u/s.11 for appointment of arbitrator, in terms of the agreement, the consumer should have submitted before the jurisdiction of the Arbitration and Conciliation Act, as agreed between the parties (in their agreement), rather than seeking remedy before the Consumer Forum:

Held: The question is of election, or of choice, and not of which party had approached the court first – More importantly it would be the nature of the dispute, which would determine the forum for its redressal – The law gives this choice to the consumer to either avail a remedy under the Consumer Protection Act, by filing a complaint before the Judicial Authority, or go for arbitration – This option is not available to the builder, as they are not 'Consumers', under the 2019 Act – It is the respondent here who

had to make a "choice" between submitting before the private fora i.e., the Arbitration Tribunal or to make a complaint before the Consumer Forum, which is a public for a – She chose to go to the latter – Her reply before the High Court on the s.11 application of the builder was not her submission to the arbitration process – In her reply, she informed the High Court of the complaint made by her as a consumer before the District Consumer Forum, which is a 'Judicial Authority' and hence s.8 of the Arbitration Act would come into play and not an application u/s.11 of the Arbitration Act – Merely because the builder had approached a Court first (u/s.11, Arbitration Act, 1996) will itself not oust the jurisdiction of the Consumer Courts – The jurisdiction of a Court is not determined by the fastest finger first, but the nature of the dispute, the public policy in the matter, the will of the legislature, the election or choice of the consumer amongst various factors. [Para 10]

Consumer Protection – Arbitration Act, 1996 – s.11(6A), 8(1) – Doubt as regards a consumer pursuing his remedy before Consumer Forums as against his going for arbitration, though being a party to an arbitration agreement, set to rest by Supreme Court decision in Emaar MGF Land Ltd. v. Aftab Singh [2018] 14 SCR 791 (Emaar III) – It re-examined the issue afresh in the light of the insertion of sub-section 6A to s.11 and sub-section 1 to s.8, Arbitration Act, 1996 – Legal position as it existed prior to the amendments and the effect of the amendment on the legal position as examined, discussed.

Consumer Protection Act, 2019 – Consumer Protection Act, 1986 – Arbitration Act, 1996 – Consumer Protection Act, a special and beneficial legislation – Remedies provided are special remedies and a consumer cannot be deprived of them:

Held: Being a special and beneficial legislation, the remedies provided in Consumer Protection Act are special remedies and a consumer cannot be deprived of them should he choose to avail such a remedy, in spite of an arbitration agreement between the parties – It is a remedy provided to the consumer where the consumer finds a defect in either goods or services provided to him and therefore seeks a redressal of his grievances before the consumer forum provided to him by the legislature. [Para 16]

LIST OF CITATIONS AND OTHER REFERENCES

Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751 : [2018] 14 SCR 791 – relied on.

Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others (2011) 5 SCC 532 : [2011] 7 SCR 310; *Fair Air Engineers (P) Ltd. v. N.K. Modi* (1996) 6 SCC 385 : [1996] 4 Suppl. SCR 820; *National Seeds Corporation Limited v. M. Madhusudhan Reddy and Another* (2012) 2 SCC 506 : [2012] 2 SCR 1065; *Rosedale Developers Private Limited v. Aghore Bhattacharya and Others* (2018) 11 SCC 337; *Aftab Singh v. Emaar MGF Land Ltd and Anr.,* 2017 SCC OnLine NCDRC 1614; *Emaar MGF Land Limited v. Aftab Singh,* 2018 SCC OnLine SC 2378; *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243 : [1993] 3 Suppl. SCR 615; *Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha,* (2004) 1 SCC 305 : [2003] 6 Suppl. SCR 659; *Skypak Couriers Ltd. v. Tata Chemicals Ltd.,* (2000) 5 SCC 294 : [2000] 1 Suppl. SCR 324; *A. Ayyasamy v. A. Paramasivam and Others* (2016) 10 SCC 386 : [2016] 11 SCR 521; *Ameet Lalchand Shah v. Rishabh Enterprises,* (2018) 15 SCC 678 : [2018] 6 SCR 1001; *SBP & Co. v. Patel Engg. Ltd.* (2005) 8 SCC 618: [2005] 4 Suppl. SCR 688; *Vidya Drolia v. Durga Trading Corpn.* (2021) 2 SCC 1 : [2020] 11SCR 1001 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6500-6501 of 2023.

From the Judgment and Order dated 19.05.2022 in ARBA No.97 of 2020 and dated 25.11.2022 in RIA No.01 of 2022 of the High Court for the State of Telangana at Hyderabad.

Appearances:

Kishore Rai, Sr. Adv., Himinder Lal, Roy Abraham, Ms. Reena Roy, Akhil Abraham, Ms. Neelam Saini, Advs. for the Appellants.

Krishna Dev Jagarlamudi, Ms. Bhabna Das, Ms. Inderdeep Kaur Raina, Advs. for the Respondent.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

SUDHANSHU DHULIA, J.

Leave granted.

2. The appellants before this Court have challenged two orders of the Telangana High Court. The first is the order dated 19.05.2022, dismissing the application of the appellants filed for the appointment of an arbitrator under Section 11 of the Arbitration & Conciliation Act, 1996 (for short 'Arbitration Act, 1996'). It was dismissed by the High Court on the ground that the dispute was pending before a Judicial Authority, which is the District Consumer Disputes Redressal Forum (for short 'District Consumer Forum'), where a complaint has been filed by the other party to the agreement, who is a consumer and therefore the appellants have the option to move an application under Section 8 of the Arbitration Act, 1996 for reference before Arbitration. Consequently, the appellants moved an application for referring the dispute for arbitration. The District Consumer Forum dismissed this application on the ground that the complainant has invoked a public law remedy before a "Judicial Authority", under a beneficial legislation for consumers, which is the Consumer Protection Act, 2019 (hereinafter referred to as 'The 2019 Act") and therefore under the facts and circumstances of this case, the dispute is non-arbitrable. Consequent to the dismissal of their application under Section 8 of the Arbitration Act, 1996, the appellants filed a Review Application before the High Court for review of its earlier order dated 19.05.2022. This Review Application was dismissed vide the second order of the High Court dated 25.11.2022, (which is again impugned before this Court), on the ground that the appellants had already acted upon the order dated 19.05.2022, and therefore is now estopped from seeking review of the order dated 19.05.2022. It is these two orders which are under challenge before this Court.

3. The facts as they stand today are that the complaint filed by the consumer (the sole respondent before this Court), has already been allowed by the District Consumer Forum and the builders (i.e., the appellants before this Court), have been directed to handover the possession of the plot along with the constructed villa and pay a compensation of Rs.15,00,000/- (Rupees

Fifteen Lakh Only) and a cost of Rs.1,00,000/- (Rupees One Lakh Only) with default stipulation. The findings given by the District Consumer Forum disclose the reasons as to why the builder backed out of its promise and made a default:

> *" ....., the opposite party no. 3 had chosen to send the termination notices and sought for execution of cancellation deed knowing that the value of the plot had escalated to more than 10 times from the date of agreement and the opposite parties wanted to take the benefit of such rise in price value. The opposite party no. 3 did not fix any reasonable time for performance of his obligation though time for handing over the possession was agreed by the opposite party no.3 in the agreement of sale. The opposite party no. 3 had issued termination notice in the year 2020 though he failed to keep his promise of handing over the possession of the Villa by March, 2017.*
>
> *The failure of the developer, who is also the land owner in the present case, to hand over the possession of the residential property to the complainant-purchaser within the contractually stipulated time count as a deficiency. There exists fault, shortcoming or inadequacy in the nature and manner of the action which has been undertaken to be executed in the implementation of the contract with regard to the service to be provided by the opposite parties. The terms of the agreement of sale have been drafted keeping in mind the interest of the developer (opposite party no. 3). The trade practice which tends to bring about restrictive trade practice, manipulation of price or its conditions of delivery or to affect now of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or as is likely to lead to rise in the price is nothing but restrictive practice by the opposite parties. Further, the act of the opposite parties amounts to deficiency of service and unfair trade practice. Hence, point no. a is answered in favour of the complainant.*
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> ***10. Point No. b:***
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> *Homebuyers put their hard-earned savings into the real estate projects with a hope that they will own their dream house one day. However,*

their dreams get shattered when the builders fail to deliver the possession of their houses even after a prolonged delay.

In the present case, the obligation of the opposite party no. 3 (who is the land owner and developer) to deliver the Villa on the time mentioned in the agreement of sale was not fulfilled despite receipt of payment of amount as per the said agreement. The receipt of part payment towards transfer of the plot by the opposite parties without discharging their obligations for the construction of the Villa and finally cancelling the agreement of sale unilaterally on the pretext that the prices have gone up for the subject property is nothing but commission of deficiency of service and adoption of unfair trade practice on the part of the opposite parties."

The builders, who are the appellants before this Court, have already filed their statutory appeal before the State Consumer Commission which is presently pending and the order of the District Forum has been stayed.

4. The essential argument of the appellants before this Court is that the High Court committed a gross error in dismissing the application of the appellants under Section 11 (sub-sections 5 & 6) of the Arbitration Act, 1996 for the reasons that under the amended provision of Section 11 of the Arbitration Act, 1996 i.e., after insertion of sub-section 6A to Section 11, by way of an amendment in 2016[1], the High Court had no choice but to refer the matter for arbitration. The provision which has been pressed into service reads as under:

"11. Appointment of arbitrators: -

XXX XXX XXX

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

1 It may be necessary to note that the aforesaid provision was inserted by an Act No.3 of 2016 and though by an Act No.33 of 2019, Sub Section 6A has been omitted but as the relevant provisions of the amending Act (No.33 of 2019) has not been notified as yet, Sub Section 6A continues to be in operation.

order of any Court, confine to the examination of the existence of an arbitration agreement."

5. The validity of the two orders impugned before us, therefore, have to be examined in light of sub-section 6A to Section 11 and Section 8 of the Arbitration Act, 1996. We will thus also be examining whether the dispute between the parties is arbitrable, and once a party has availed the remedy before a public forum under a special beneficial legislation, can it be compelled to go for arbitration?

In order to arrive at a conclusion, we will first have to refer to the nature of the dispute between the parties. The respondent before this Court is a home buyer who had entered into an Agreement for Sale with the present appellants on 27.08.2013. The present appellants will hereinafter be referred to as the builders/owners and the respondents as buyer/consumer. The builders/owners are three in number. They are:

(a) M/s R.G. Prime Spaces Private Limited

(b) Smt. M. Hemalatha Devi

(c) M/s Legend Estates Private Limited

They are the joint owners of the land on which they had agreed to construct a residential house/villa for the buyer/consumer Smt. B. Udayasri. The terms of agreement dated 27.08.2013 stipulate that the project will be developed by M/s Legend Estates Private Limited who is one of the owners of the property. The total area of the land on which the residential house/villa was to be constructed was 357 sq. yards in Kokapet Village, Rajendra Nagar Mandal, Ranga Reddy District, Telangana, and the total construction was 4,000 sq. feet for a total sale consideration of Rs.49,42,000/- (Rupees Forty Nine Lakhs and Forty Two Thousand Only).

6. As per the agreement, the mode of payment was to be done as per clauses 9.1, 9.2 and 9.3 which read as under:

"9.1 Mode: The purchaser paid to the Developer, the total consideration mentioned in Clause 8.1 above, in the following manner:

S. No.	*Date*	*Chq. No.*	*Bank*	*Amount*
1.	*29/08/2013*	*303650*	*ING, Vysya Bank, Hyderabad*	*4,94,200*
			Total	*4,94,200*

9.2 The balance of Rs.44.47,800/- (Rupees Forty Four Lakhs Seven Thousand Eight Hundred Only) shall be paid by the vendee at the time of registration of sale deed in favour of purchaser or her nominee/s.

9.3 Essence: timely payment of the total consideration is the essence of this contract."

The possession of the house was to be given as per clauses 10.1 and 10.1.1 of the agreement which reads as under:

"10.1 Possession: Vacant and peaceful possession of the said plot along with constructed villa shall be delivered by the Developer to the Purchaser simultaneously with the full payment of the Total Consideration as mentioned in the Sale deed and the Construction Agreement and registration of Sale Deeds in favour of the purchaser shall be done after completion of Villa.

10.1.1 The Developer agrees to hand over possession of the said Villa within period of three years and six months grace period from the date of agreement of sale. That in case of the developer is unable to hand over the possession of Villa in stipulated time then the developer is liable to pay the purchaser compensation Rs.5/- per sq. ft., per month for any delay in completing the construction of the Villa."

7. It is therefore, absolutely clear that the builders/owners had to hand over the fully constructed house/villa to the buyer, within three years from the date of the agreement i.e., 27.08.2013, with a six months grace period. In other words, this constructed house/villa had to be handed over to the buyer/consumer on or before February 27, 2017. This has admittedly not been done. What happened instead is that in 2020, i.e., after three years from the date when the constructed house/villa had to be handed over to the buyer, the builder sends a "Termination Notice" to the buyer and terminates the agreement, ostensibly on the ground that the buyer had not signed "the Construction Agreement". It is not disputed that at the time of signing the

agreement in the year 2013, the buyer in terms of the agreement (Clauses 9.1, 9.2 and 9.3) had handed over the first instalment of Rs. 4,94,200/- (Rupees Four Lakh Ninety Four Thousand and Two Hundred Only) to the builders/ owners. The remaining amount of Rs.44,47,800/- (Rupees Forty Four Lakh Forty Seven Thousand and Eight Hundred Only) was to be paid at the time of registration of Sale Deed and handing over of the constructed house to the buyer/consumer. This event, as we have already stated above, never took place.

8. Meanwhile, the builders/owners after sending notice to the consumer/buyer moved an application under sub-sections 5 and 6 of Section 11 of the Arbitration Act, 1996 before the High Court for appointment of an Arbitrator, in terms of the arbitration clause which is admittedly there in the agreement.

The buyer, who was also a consumer, as defined under the 2019 Act, moved a complaint before the District Consumer Forum. At the same time, having received notice of Section 11 application, the respondent filed her reply before the Court. In her reply, the respondent apprised the High Court that she being a consumer has moved a complaint before a Judicial Authority, which is District Consumer Forum, where an application under Section 8 of the Arbitration Act, 1996 for appointment of Arbitrator is always available to the appellants. Vide the impugned order dated 19.05.2022, the application of the present appellants was dismissed by the High Court, and the appellants were granted liberty to move a Section 8 application of the Arbitration Act, 1996 before the District Consumer Forum. This application (under Section 8 of the Arbitration Act, 1996), as we have already referred to above, was later dismissed by the District Consumer Forum on the ground that the legislature had purposely provided a remedy under the 2019 Act in addition to any other remedy which may be available to the consumer and although there is an Arbitration clause between the parties but that itself will not oust the jurisdiction of a Consumer Court for the reason that it is a remedy available to the consumer in a public fora. The District Consumer Forum relied upon the Judgment of this Court in ***Emaar MGF Land Ltd. v. Aftab Singh, (2019) 12 SCC 751*** **("Emaar III")** (this seminal decision of the Supreme Court, we would be discussing in detail in a while), wherein it has been

held that an Arbitration Clause in the agreement does not bar the jurisdiction of the Consumer Forum to entertain the complaint. After the dismissal of their Section 8 application, the appellants moved an application before the Telangana High Court seeking review of its order dated 19.05.2022. The Review Petition was also dismissed vide order dated 25.11.2022 on the ground that the earlier order had been acted upon by the appellants.

9. Now before this Court, there is a long line of decisions, including the decision which had come up post amendment to sub-section (1) of Section 8 and post insertion of sub-section 6A to Section 11 of the Arbitration Act, 1996, where it has been held that in spite of sub-section (1) to Section 8 the Court has to find out not only whether there is an arbitration clause in the agreement but whether the dispute is arbitrable or not.

All disputes are not capable of being referred to arbitration[2]. The nature of certain disputes may be such that they should never be sent near an arbitration table. To give an illustration, there would be certain types of criminal matters, matters involving public corruption, etc. This aspect has been well considered by this Court in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others, (2011) 5 SCC 532*** and it has been held as under:

> *"35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly*

2 "Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an Arbitral Tribunal is empowered to give." [Russel on Arbitration (22 Edn.)]

reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."

The exclusion of a dispute from arbitration may be express or implied, depending again upon the nature of the dispute, and a party to a dispute cannot be compelled to resort to arbitration merely for the reason that it has been provided in the contract, to which it is a signatory. The arbitrability of a dispute has to be examined when one of the parties seeks redressal under a welfare legislation, in spite of being a signatory to an arbitration agreement. 'The Consumer Protection Act' is definitely a piece of welfare legislation with the primary purpose of protecting the interest of a consumer. Consumer disputes are assigned by the legislature to public fora, as a measure of public policy. Therefore, by necessary implication such disputes will fall in the category of non-arbitrable disputes, and these disputes should be kept away from a private fora such as 'arbitration', unless both the parties willingly opt for arbitration over the remedy before public fora.

In ***Fair Air Engineers (P) Ltd. v. N.K. Modi (1996) 6 SCC 385,*** Section 8 of the Arbitration Act, 1996 was considered in light of the provisions of the 1986 Act.

"16. It would, therefore, be clear that the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the civil action in a suit under

the provisions of the Code of Civil Procedure. Thereby, as seen, Section 34 of the Act does not confer an automatic right nor create an automatic embargo on the exercise of the power by the judicial authority under the Act. It is a matter of discretion. Considered from this perspective, we hold that though the District Forum, State Commission and National Commission are judicial authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, we are of the considered view that it would be appropriate that these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the forums on their own and on the peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be otherwise those given in the Act."

Again, the question which came up before this Court was whether existence of Arbitration clause in the agreement would exclude the jurisdiction of the Consumer Courts and whether the Consumer Court is bound to refer the matter for reference to arbitration. This was in the case of ***National Seeds Corporation Limited v. M. Madhusudhan Reddy and Another (2012) 2 SCC 506*** and it was answered thus:

"64. According to the learned counsel for the appellant, if the growers had applied for arbitration then in terms of Section 8 of the Arbitration and Conciliation Act the dispute arising out of the arbitration clause had to be referred to an appropriate arbitrator and the District Consumer Forums were not entitled to entertain their complaint. This contention represents an extension of the main objection of the appellant that the only remedy available to the farmers and growers who claim to have suffered loss on account of use of defective seeds sold/supplied by the appellant was to file complaints with the Seed Inspectors concerned for taking action under Sections 19 and/or 21 of the Seeds Act.

65. The consideration of this issue needs to be prefaced with an observation that the grievance of a farmer/grower who has suffered financially due to loss or failure of crop on account of use of defective seeds sold/supplied by the appellant or by an authorised person is not remedied by prosecuting the seller/supplier of the seeds. Even if such person is found guilty and sentenced to imprisonment, the aggrieved farmer/grower does not get anything. Therefore, the so-called remedy available to an aggrieved farmer/grower to lodge a complaint with the Seed Inspector concerned for prosecution of the seller/supplier of the seeds cannot but be treated as illusory and he cannot be denied relief under the Consumer Protection Act on the ground of availability of an alternative remedy.

66. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."

Later, in a similar matter before this Court ***[Rosedale Developers Private Limited v. Aghore Bhattacharya and Others (2018) 11 SCC 337],*** the plea of the builder for arbitrability was dismissed at the very threshold as a "frivolous piece of litigation", relying upon ***National Seeds Corporation Limited*** (supra).

10. Another question raised before this Court by the appellants is that since it is the builder who had first approached the "Court" by filing an application under Section 11 for appointment of an arbitrator, in terms of the agreement, the consumer in all fairness should have submitted before the jurisdiction of the Arbitration and Conciliation Act, as agreed between the parties (in their agreement), rather than seeking remedy before the Consumer Forum.

The question, however, is of election, or of choice, and not of which party had approached the court first. More importantly it would be the nature of the dispute, which would determine the forum for its redressal. The law gives this choice to the consumer to either avail a remedy under the Consumer Protection Act, by filing a complaint before the Judicial Authority, or go for arbitration. This option is not available to the builder, as they are not 'Consumers', under the 2019 Act. It is the respondent here Smt. B. Udayasri who has to make a "choice" between submitting before the private fora i.e., the Arbitration Tribunal or to make a complaint before the Consumer Forum, which is a public fora. She has chosen to go to the latter. Her reply before the Telangana High Court on the Section 11 application of the builder is not her submission to the arbitration process. In her reply, she informs the High Court of the complaint made by her as a consumer before the District Consumer Forum, which is a 'Judicial Authority' and hence Section 8 of the Arbitration Act, 1996 would come into play and not an application under Section 11 of the Arbitration Act, 1996.

Now merely because the builder had approached a Court first (under Section 11 of the Arbitration Act, 1996) will itself not oust the jurisdiction of the Consumer Courts. The jurisdiction of a Court is not determined by the fastest finger first, but the nature of the dispute, the public policy in the matter, the will of the legislature, the election or choice of the consumer amongst various factors.

11. Any doubt which so far may have existed for a consumer pursuing his remedy before Consumer Forums as against his going for 'arbitration', though being a party to an arbitration agreement, have now been set to rest by a recent Supreme Court decision in ***Emaar III*** (supra). This decision is significant for the reason that it has re-examined the whole issue afresh in the light of the insertion of sub-section 6A to Section 11 and sub-section 1 to Section 8 of the Arbitration Act, 1996.

A short background to this case should be in order as this Court while determining the present dispute has relied heavily on the above decision. We must also refer here to the well elaborated order of a larger bench of National Consumer Disputes Redressal Commission (NCDRC), dated 13.07.2017 in ***Aftab Singh v. Emaar MGF Land Ltd and Anr., 2017 SCC OnLine NCDRC 1614 ("Emaar I")*** which had set the background to the decision of this Court in ***Emaar III*** (supra).

By Act No.3 of 2016, an amendment was incorporated, inter alia, in Sections 8 & 11 of the Arbitration Act, 1996. The amendment was incorporated by Act No. 3 of 2016 was w.e.f. 23.10.2015. These are as follows:

Pre-Amendment	Post Amendment
Section 8:	**Section 8:**
8. Power to refer parties to arbitration where there is an arbitration agreement.—	8. Power to refer parties to arbitration where there is an arbitration agreement.—
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.	(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.	(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1) and

	the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.
(3) ……..	(3) …….
Section 11:	**Section 11:**
Appointment of arbitrators.—	Appointment of arbitrators.—
(1) …….	(1) …….
(2) …….	(2) …….
(3) …….	(3) …….
(4) If the appointment procedure in sub-section (3) applies and—	(4) If the appointment procedure in sub-section (3) applies and—
(a) …….	(a) ……
(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.	(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;
(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within	(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within

thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.	thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
(6) Where, under an appointment procedure agreed upon by the parties,—	(6) Where, under an appointment procedure agreed upon by the parties,—
(a) …..	(a) …..
(b) ….	(b) …..
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.	(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.

	(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

Now post amendment, the newly incorporated sub-section (1) to Section 8 has the words "notwithstanding any judgment, decree or order of the Supreme Court or any court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists". When complaints were filed before the consumer forum, such matters were referred to a larger three-member bench of NCDRC. The question referred was whether the judicial authority i.e., the consumer forum had any option (post amendment), but to refer the dispute to arbitration when an application under Section 8 is moved before it. The answer which was given by the NCDRC in a well-considered order, holds that there is no change in the law on the arbitrability of a dispute before a consumer forum, and the Consumer Court is hence not liable to refer the matter for arbitration.

This decision of NCDRC dated 13.07.2017 was challenged by the builder in his statutory appeal before this court, which was summarily dismissed, vide order dated 13.02.2018 in ***Emaar MGF Land Limited*** *v.* ***Aftab Singh, 2018 SCC OnLine SC 2378 ("Emaar II").***

Subsequently a review petition was filed before this Court seeking review of the order dated 13.02.2018. The matter was hence reconsidered by this court, in the light of the 2016 amendment and the question was whether the amendment now necessitates a reappraisal of the earlier view of this Court. This Court after giving an extensive hearing to the parties reaffirmed its earlier views holding that the amendment in the Act, would not make any difference to the legal position held earlier.

12. The main argument of the appellants was that subsequent to the amendment in the year 2016 (Act No. 3 of 2016) by which the Parliament added the word "notwithstanding any judgment, decree or order" refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists, the legislative intent was clear that hereinafter Judicial

Authority is mandated to refer a dispute for arbitration once there was a valid arbitration agreement, and an application under Section 8 is duly presented. The argument was that though prior to the amendment, and in view of the law laid down by this Court in ***National Seeds Corporation Limited*** (supra), an option was available to the consumer to avail a remedy under the Consumer Protection Act, but post amendment and in terms of the unambiguous language of Section 8, the judicial authority is left with no option but to refer the dispute for arbitration when an application is moved before the judicial authorities under Section 8 of the Arbitration Act, 1996. The same argument has been made before us by the appellants, though in the context of their Section 11 application before the High Court, they would argue that in view of the similar mandate now given in sub-section 6A of Section 11, the High Court had no choice but to appoint an arbitrator!

13. The counter argument before this Court raised on behalf of the consumer (in ***Emaar MGF Land Ltd.*** case), was that the Consumer Protection Act is a beneficial legislation for the consumers, which gives a speedy, and expeditious remedy for redressal of consumer disputes. If the argument of the review petitioners were to be accepted then it would amount to setting at naught the beneficial legislation i.e., Consumer Protection Act. It would also have similar effect in cases relating to trusts, tenancy disputes, industrial disputes, IPR and other non-arbitrable disputes. It was for this reason that the three-member Bench of NCDRC in ***Emaar I*** (supra) had said *"the ripple of the amendment to Section 8(1) cannot be so large as to inundate domains of other legislations and jurisprudence, painstakingly built by the Legislators and Courts, especially without any engagement, debate and critique with the foundations of these related laws."*

14. This court then examined the legal position as it existed prior to the amendments and the effect of the amendment on the legal position.

The preamble of the 1986 Act was examined.[3] The 1986 Act was enacted to provide better protection of consumer interest and to have level

3 Although the Consumer Protection Act of 1986 has now been repealed and the new Act of 2019 i.e., the Consumer Protection Act, 2019 has come into force, yet for our purpose the reference to the 1986 Act at various places in the present judgment would not make any difference as the basic purpose of the 1986 Act and 2019 Act remains primarily the protection of consumers and providing them with an easy, inexpensive redressal mechanism of their grievances

playing field for the consumers in the market driven economy. The 1986 Act as a beneficial legislation was considered in ***Lucknow Development Authority v. M.K. Gupta (1994) 1 SCC 243***. It was considered thus:

> *"……. To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a Preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot."*

In ***Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha, (2004) 1 SCC 305***, in paras 11 and 12 it was held as under:

> *"11. From the Statement of Objects and Reasons and the scheme of the 1986 Act, it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for*

that purpose to provide for better redressal, mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers. To serve the purpose of the Act, various quasi-judicial forums are set up at the district, State and national level with wide range of powers vested in them. These quasi-judicial forums, observing the principles of natural justice, are empowered to give relief of a specific nature and to award, wherever appropriate, compensation to the consumers and to impose penalties for non-compliance with their orders.

12. As per Section 3 of the Act, as already stated above, the provisions of the Act shall be in addition to and not in derogation of any other provisions of any other law for the time being in force. Having due regard to the scheme of the Act and purpose sought to be achieved to protect the interest of the consumers better, the provisions are to be interpreted broadly, positively and purposefully in the context of the present case to give meaning to additional/extended jurisdiction, particularly when Section 3 seeks to provide remedy under the Act in addition to other remedies provided under other Acts unless there is a clear bar."

It was held that the 1986 Act was enacted to provide better protection of the interest of consumers and for providing a redressal mechanism, which is cheaper, easier, expeditious and effective. For this purpose, various quasi-judicial forums were setup at district, state and national level with a wider range of powers vested in these Judicial Authorities. These Judicial Authorities were vested with the powers to give relief of a specific nature and to award compensation to the consumer wherever it was felt necessary to impose penalty for non-compliance of their orders, and the judicial authorities were vested with such powers. Now compare this with the power of the arbitrator. An arbitrator does not have the power to impose a penalty. This is also one of the essential differences between the two forums. It was finally held that the provisions given under the 1986 Act were in addition to, and not in derogation to, any other provisions or any other law for the time being in force.

15. In ***Fair Air Engineers (P) Ltd.*** (supra) and in ***Skypak Couriers Ltd. v. Tata Chemicals Ltd.,*** (2000) 5 SCC 294 the above position was reiterated by this Court. The finding of this Court in ***National Seeds Corporation***

Limited (supra) has also been referred to in the preceding paragraphs of this Judgment wherein it was held that arbitration is not the only remedy available to the consumer and they can either seek a reference to arbitration or file a complaint under the 1986 Act, but can never be forced to seek a remedy only under Arbitration Act, 1996, in spite of the arbitration agreement in the contract.

This position was reiterated by this Court in ***Rosedale Developers Private Limited*** (supra), wherein paras 4, 6 and 7 stated as under:

> "4. In our opinion, there is no merit in the submission of the learned counsel. The question whether the existence of an arbitration clause contained in the agreement *executed between the parties excludes the jurisdiction of the consumer forum and on an application made by either party, the consumer forum is duty-bound to make a reference to the arbitrator was extensively considered in National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy [National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506: (2012) 1 SCC (Civ) 908] and it was observed…… (SCC pp. 534-35, paras 64-66).*
>
> *5……..*
>
> *6. The judgments relied upon by Shri Ghose do not have any bearing on the issue raised in this appeal. In neither of those cases, has this Court interpreted the provisions of the 1996 Act in the light of the provisions contained in the 1986 Act. Therefore, the propositions laid down in those judgments that Section 8 of the 1996 Act is mandatory cannot lead to an inference that the consumer forum is bound to make a reference to the Arbitral Tribunal.*
>
> *7. In view of the abovestated legal position, the National Commission did not commit a*ny error by holding that the remedy of arbitration available to the complainant does not bar the jurisdiction of the consumer forums and the consumer forums are not under an obligation to refer the matter to the Arbitral Tribunal. With the above observation, the appeal is dismissed."

16. This Court in a series of decisions, while considering both the provisions in the Consumer Protection Act, 1986 and the Arbitration Act, 1996, has held that the Consumer Protection Act being a special and beneficial legislation, the remedies provided therein are special remedies

and a consumer cannot be deprived of them should he choose to avail such a remedy, in spite of an arbitration agreement between the parties. It is a remedy provided to the consumer where the consumer finds a defect in either goods or services provided to him and therefore seeks a redressal of his grievances before the consumer forum provided to him by the legislature. While referring to a plethora of precedents in the matter, this Court had held in ***Emaar III*** (supra) that not only the proceedings under the 1986 Act are special proceedings which will continue under the Act in spite of the arbitration agreement, but there would also be a large number of other proceedings as well which ought to continue in spite of an arbitration agreement such as proceedings in Criminal Court, a Commercial dispute of a particular nature or any other non-arbitrable dispute. In Para 30 of ***Emaar III*** (supra), it was stated as under:

> "30. Not only the proceedings of the Consumer Protection Act, 1986 are special proceedings which were required to be continued under the Act despite an arbitration agreement, there are large number of other fields where an arbitration agreement can neither stop nor stultify the proceedings. For example, any action of a party, omission or commission of a person which amounts to an offence has to be examined by a criminal court and no amount of agreement between the parties shall be relevant for the said case. For example, there may be a commercial agreement between two parties that all issues pertaining to transaction are to be decided by arbitration as per arbitration clause in the agreement. In case where a cheque is dishonoured by one party in transaction, despite the arbitration agreement party aggrieved has to approach the criminal court. Similarly, there are several issues which are non-arbitrable. There can be prohibition both express or implied for not deciding a dispute on the basis of an arbitration agreement."

17. In ***Booz Allen and Hamilton Inc.*** (supra), what would be a non-arbitrable dispute was elaborated by this Court in detail. ***Emaar III*** (supra) then analysed whether this position has changed after the 2016 amendment in the Arbitration Act, 1996. The provisions amended in the Arbitration Act, 1996 particularly with which we are concerned here i.e., Sections 8 and 11 have already been referred to in the preceding paragraphs. This Court in ***Emaar III*** (supra), after a change in the provisions post amendment, referred to Section 2(3) of the Arbitration Act, 1996, which reads as under:

"2. (3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."

Thus, it was clear that this part of the Arbitration Act, 1996 (i.e., Part I) shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration. Those disputes which cannot be submitted for arbitration have already been referred to above and have been discussed in detail in ***Booz Allen and Hamilton Inc.*** (supra). For the sake of repetition and in order to just make an illustration, these disputes would be:

(i) patent, trademarks and copyright;

(ii) anti-trust/competition laws;

(iii) insolvency/winding up;

(iv) bribery/corruption;

(v) fraud;

(vi) criminal matter.

In ***A. Ayyasamy*** *v.* ***A. Paramasivam and Others (2016) 10 SCC 386,*** this Court in para 35 had held as under:

"35. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , this Court held that (at SCC p. 546, para 35) adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as : (SCC pp. 546-47, para 36)

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

(iii) matters of guardianship;

(iv) insolvency and winding up;

(v) testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

(vi) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishor Shah v. Jayesh Dinesh Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act."

18. This Court in ***Emaar III*** (supra) then considered the scope and effect of Section 5 of the Arbitration Act, 1996 which reads as under:

"5. Extent of judicial intervention. – Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

19. What were then the factors which necessitated an amendment, inter alia, in Sections 8 and 11 of the Arbitration Act, 1996 and what was the purpose behind these amendments? This aspect again has been examined in

detail in ***Emaar III*** (supra). Such amendments were recommended by the Law Commission in its 246th Report, paragraph 33 of the 246th Report of the Law Commission stated as under:

> *"33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie."*

The Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill 2015 reads as under:

> *"2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act.*
>
> * * *
>
> *6. (iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;*
>
> *Notes on the Clauses on amendment in Section 8 read as follows:*
>
> *"Clause 4 of the Bill seeks to amend Section 8 of the principal Act to specify that the judicial authority shall refer the parties to arbitration*

unless it finds that prima facie no valid arbitration agreement exists. A proviso below sub-section (2) is inserted to provide that where the original arbitration agreement or certified copy thereof is not available with the party who apply under sub-section (1), and is retained by the other party, such party shall file a copy of the arbitration agreement along with application under sub-section (1) praying to the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the court.

On amendment to Section 11 by inserting sub-section (6-A), the following was stated:

"Clause 6 of the Bill seeks to amend Section 11 of the principal Act to provide that appointment of arbitrator shall be made by the Supreme Court or the High Court, as the case may be, instead of the Chief Justice of India or the Chief Justice of the High Court. Sub-section (6-A) is inserted to provide that the Supreme Court or the High Court while considering application under sub-sections (4) to (6) shall confine to the examination of an arbitration agreement."

20. The amendment which was made in Section 8 of the Arbitration Act, 1996 came up for consideration before this Court in ***Ameet Lalchand Shah*** *v.* ***Rishabh Enterprises, (2018) 15 SCC 678***, where in paras 28 and 30, it was stated as under:

"28. 'Principally four amendments to Section 8(1) have been introduced by the 2015 Amendments — (i) the relevant "party" that is entitled to apply seeking reference to arbitration has been clarified/ amplified to include persons claiming "through or under" such a party to the arbitration agreement; (ii) scope of examination by the judicial authority is restricted to a finding whether "no valid arbitration agreement exists" and the nature of examination by the judicial authority is clarified to be on a "prima facie" basis; (iii) the cut-off date by which an application under Section 8 is to be presented has been defined to mean "the date of" submitting the first statement on the substance of the dispute; and (iv) the amendments are expressed to apply notwithstanding any prior judicial precedent. The proviso to Section 8(2) has been added to allow a party that does not possess the original or certified copy of the arbitration agreement on account of it

being retained by the other party, to nevertheless apply under Section 8 seeking reference, and call upon the other party to produce the same.' (Ref.: Justice R.S. Bachawat's Law of Arbitration and Conciliation, Sixth Edn., Vol. I (Sections 1 to 34) at p. 695 published by Lexis Nexis).

* * *

30. The language of amendment to Section 8 of the Act is clear that the amendment to Section 8(1) of the Act would apply notwithstanding any prayer, judgment, decree or order of the Supreme Court or any other court. The High Court laid [Ameet Lalchand Shah v. Rishabh Enterprises, 2017 SCC OnLine Del 7865] emphasis upon the word '... unless it finds that prima facie no valid agreement exists'. The High Court observed that there is no arbitration agreement between Astonfield and Rishabh. After referring to Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] and the amended Section 8 and Section 45 of the Act, the High Court pointed out the difference in language of Section 8 and Section 45 of the Act. The High Court distinguished between Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] and Chloro Controls [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] and observed that Sukanya Holdings [Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531] was not overruled by Chloro Controls [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]."

21. This Court ultimately held that the main purpose of bringing an amendment inter alia in Sections 8 and 11 of the Arbitration Act, 1996 was to minimise the scope of judicial authority, which was to refuse reference to arbitration only on the ground when it prima facie finds that there was no valid arbitration agreement. The legislative intent for the amendment was confined to limiting judicial intervention, and once the Court finds that there is a valid arbitration agreement, it has no option but to refer the matter for arbitration. But this would not mean that where the matter itself is non-arbitrable, or is covered by a special legislation such as the Consumer Protection Act, it still has to be referred for arbitration. In Para 59 of ***Emaar III*** (supra), it was stated as under:

"59. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the petitioner that after the amendment the law as laid down by this Court in National Seeds Corpn. Ltd. [National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy, (2012) 2 SCC 506 : (2012) 1 SCC (Civ) 908] is no more a good law cannot be accepted. The words "notwithstanding any judgment, decree or order of the Supreme Court or any court" were meant only to those precedents where it was laid down that the judicial authority while making reference under Section 8 shall be entitled to look into various facets of the arbitration agreement, subject-matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning."

Emaar III (supra) though ends with a caveat, where it leaves the option with the party who may have an option to choose between a public or private forum, may consciously choose to go for private fora. This is what it says:

"63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statues does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration."

22. Thus, in our considered opinion in the case at hand, the Telangana High Court had adopted the right approach in its two impugned orders, where it declined to interfere in the matter and appoint an arbitrator.

True in ***Emaar III*** (supra) this Court had examined the scope of sub-section (1) to Section 8 and not of sub-section 6A to Section 11 of the Arbitration Act, 1996. All the same, the reasoning given in the above judgment would be equally applicable to Section 11 application before the High Court. Both the provisions incorporated in Section 8 and Section 11 of the

Arbitration Act, 1996 [i.e., sub-section (1) and sub-section 6A respectively], seemingly restrict the scope of the examination by the concerned courts, in their reference to arbitration, or appointment of arbitrator, as the case might be, and the language being common, "notwithstanding any judgment, decree or order" places a similar question before the two courts.

More importantly, when the Principal Civil Court or a judicial authority such as consumer redressal forum can have powers to dismiss a Section 8 application on the ground of arbitrability of a dispute, will such powers not be available with the High Courts? In ***SBP & Co.*** *v.* ***Patel Engg. Ltd.***[4] , it was decided by this Court that both Section 8 and Section 11 of Arbitration Act, 1996 are complementary provisions. This position has been reiterated, in the post-amendment context, in ***Vidya Drolia*** *v.* ***Durga Trading Corpn.***[5]

23. The application under Section 11 of the Arbitration Act, 1996 for appointment of an arbitrator, was not maintainable in the present case, and consequently we uphold the impugned orders dated 19.05.2022 and 25.11.2022, which held this position. We refrain from saying anything further on the matter as the dispute is still sub judice before the State Consumer Forum (Appellate Authority).

24. The appeals are hereby dismissed.

Headnotes prepared by:
Divya Pandey

Appeals dismissed.

4 (2005) 8 SCC 618
5 (2021) 2 SCC 1