
(2026) 03 DEL CK 0550

In the Delhi High Court

Case No : Arbitration Appeal (COMM.) No. 47 Of 2025 & I.A.No. 22290 Of 2025

Era Infra Engineering Limited

APPELLANT

Vs

National Highways Authority Of India & Anr.

RESPONDENT

Date of Decision : 23-03-2026

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 5, 11, 11(6), 11(6A), 16, 16(2), 16(3), 16(4), 31(6), 34, 37, 37(1), 37(2)(a)

Citation : (2026) 03 DEL CK 0550

Hon'ble Judges : Avneesh Jhingan, J

Bench : Single Bench

Advocate : Sudhir Nandrajog, Kirtiman Singh, Kushil Anand, Manthan Dixit, Maullick, Ankita, Santosh Kumar, Siddharth Mehta, Ritik Dwivedi

Final Decision : Allowed

Judgement

Avneesh Jhingan, J

1. The appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') is filed against the award of the Arbitral Tribunal (for short 'the tribunal') dated 30.07.2025 rejecting application for impleadment.

Facts

2. The brief facts are that the National Highways Authority of India (for short 'NHAI') issued a Notice Inviting Tender in February 2009 for four-laning of the 'Muzaffarnagar-Haridwar section of NH-58' in the states of Uttar Pradesh and Uttarakhand. The appellant, ERA Infra Engineering Limited, a public limited company along with Open Joint Stock Company (OJSC)-SIBMOST after entering into a Joint Bidding Agreement dated 26.03.2009, bided as a consortium and was awarded the project on 29.12.2009. In terms of clauses 2.2.6(f) and 2.2.6(g) of the Request for Qualifications ('RFQ') and the Letter of Acceptance (LOA), a Special Purpose Vehicle (for short 'SPV') - Haridwar Highway Private Limited, a limited liability company under the Companies Act, 1956 was

incorporated on 02.02.2010. The LOA required the concessionaire i.e. SPV to furnish an unconditional bank guarantee of Rs.37.70 crores as performance security.

2.1 A Concession Agreement (for short 'CA') dated 24.02.2010 was entered between NHA and the SPV. On 14.06.2010 Engineering, Procurement and Construction Agreement (for short 'EPC Agreement') was executed between the appellant and the SPV for execution of the project. Disputes arose between the parties, the CA was terminated by NHA on 19.06.2019 and the SPV invoked arbitration.

Preliminary Objection on Maintainability

3. Learned counsel for the respondent raised a preliminary objection that the appeal under Section 37 of the Act is not maintainable. It is contended that rejection of an impleadment application shall not fall within the ambit of Section 37(2)(a) of the Act and it does not amount to acceptance of a plea under Section 16(2) or 16(3) of the Act.

3.1 Reliance is on the decision of this court in *Hindustan Prefab Ltd. v. M/s NCC Ltd.*, 2021:DHC:1802 and of the Madras High Court in *M/s. Marg Ltd. v. M/s. PGA Trading & Services & Ors.*, ARB. Appeal No. 11/25, to contend that the appeal is not maintainable against the impugned order. The decision in *National Thermal Power Corp. Ltd. v. Siemens Atkeingesellschaft*, (2007) 4 SCC 451 is relied upon to buttress the contention that an appeal is not maintainable if the order passed does not fall under Sections 16(2) or 16(3) of the Act. The submission is that Section 5 of the Act stipulates minimum judicial intervention in arbitral proceedings and that an appeal under Section 37 is maintainable only against the orders mentioned therein.

3.2 The argument is that Sections 16(2) and 16(3) of the Act will come into play only if the plea that the tribunal lacks jurisdiction or is exceeding the jurisdiction is accepted whereas in the present case the application for impleadment was rejected and there was no acceptance of a plea. It is contended that the issue of jurisdiction was not decided by the tribunal but the application was rejected on merits and the tribunal has not held that it lacked jurisdiction.

4. Per contra the project was awarded to the consortium and at that time the SPV was not in existence. The obligation to execute the project and to comply with the terms of the tender is that of the consortium and the SPV was incorporated to give effect to the awarded project. The submission is that the consortium is a necessary party in the arbitral proceedings.

4.1 Decisions of the Supreme Court in *Adavya Projects Private Limited v. Vishal Structurals Private Limited & Ors.*, 2025 SCC OnLine SC 806 and *ASF Buildtech (P) Ltd. v. Shapoorji Pallonji & Co. (P) Ltd.*, (2025) 9 SCC 76, are relied upon to fortify the submission that rejection of an impleadment application

is a decision under Section 16 on the jurisdiction of the tribunal and the order is appealable under Section 37 of the Act.

5. In rebuttal the learned counsel for the respondent contended that the decisions of the Supreme Court relied upon by the appellant were not dealing with the issue of maintainability of an appeal under Section 37 of the Act.

6. The question is whether the order of the tribunal rejecting the application for impleadment is appealable under Section 37 of the Act?

7. There were contradictory views of various High Courts on the question as to whether impleadment of a non-signatory was to be decided by the referral court while deciding a petition under Section 11 of the Act. The Supreme Court in *ASF Buildtech (P) Ltd.* (supra) decided the issue of "whether the tribunal has the power to implead/join non-signatories to the arbitration agreement". It was held that the tribunal is empowered to examine whether a non-signatory is bound by the arbitration agreement and can implead such a necessary party. The jurisdiction of the tribunal is not affected by non-raising of the issue of impleadment before the referral court. It was considered that in case the referral court refuses impleadment of a non-signatory, the party would be rendered without a statutory remedy and on the other hand against a determination of the issue of jurisdiction and impleadment by the tribunal, the order would be amenable to challenge under the Act. It would be fruitful to reproduce the following paragraphs of the judgement:

"103. Thus, even in the absence of the non-signatory being made a party to the proceedings before the Referral Court, and where the question of its impleadment has neither been raised nor addressed or left open to the Arbitral Tribunal by the Referral Court, the Arbitral Tribunal would be full empowered to examine this issue in the first instance and determine whether any non-signatory is bound by the arbitration agreement based on the factual circumstances of the case, and if necessary, implead such non-signatory to the arbitration proceedings.

108. Put differently, although notionally the exercise of determining "existence of the arbitration agreement qua the non-signatory", may, on the surface appear to be concerned with the arbitration agreement or clause in question, yet one must be mindful that the actual focus of such exercise lies in determining the existence of consent of the parties through fact patterns to such arbitration agreement or clause and not vice-versa. It is the existence of mutual consent to arbitrate—not the formal existence of the arbitration agreement—that is the heart of this inquiry.

110. Even if it is assumed for a moment that the Referral Court in its jurisdiction under Section 11 of the 1996 Act has the discretion to determine whether a non-signatory is a veritable party to the arbitration agreement or not, by virtue of *Cox and Kings* (1), the Referral Court should only refrain but rather loathe the exercise of such discretion. Any discretion which is

conferred upon any authority, be it Referral Courts must be exercised reasonably and in a fair manner. Fairness in this context does not just extend to a non-signatory's rights and its apprehension of prejudice, fairness also demands that the arbitration proceedings is given due time to gestate so that the entire dispute is holistically decided. Any determination even if prima-facie by a Referral Court on such aspects would entail an inherent risk of frustrating the very purpose of resolution of dispute, if the Referral Courts opine that a non-signatory in question is not a veritable party. On the other hand, the apprehensions of prejudice can be properly mitigated by leaving such question for the Arbitral Tribunal to decide, as such party can always take recourse to Section 16 of the 1996 Act and thereafter in appeal under Section 37, and where it is found that such party was put through the rigmarole of arbitration proceedings vexatiously, both the Tribunal and the courts, as the case may be, should not only require that all costs of arbitration insofar as such non-signatory is concerned be borne by the party who vexatiously impleaded it, but the Arbitral Tribunal would be well within its powers to also impose costs.

116. Similarly, in *Ajay Madhusudan* (supra) it was held that since a detailed examination of numerous disputed questions of fact was required for determining whether the non-signatory is a veritable party to the arbitration agreement, the same cannot be examined in the limited jurisdiction under Section 11 of the 1996 Act as it would tantamount to a mini trial. Accordingly, the Arbitral Tribunal was found to be the appropriate forum for deciding the said issue on the basis of the evidence that may be adduced by the parties.”

8. Before proceeding further, it would be relevant to quote Section 16 and 37 of the Act:

“16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section

(2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

"37. Appealable orders.—(1) 2 [Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—

(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.

(2) Appeal shall also lie to a court from an order of the arbitral tribunal—

(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or takeaway any right to appeal to the Supreme Court."

9. Under Section 37(1) of the Act, an appeal against the court orders mentioned therein shall lie to the court authorised to hear appeals against the original decrees of such court. Under Section 37(2)(a), an appeal shall lie against an order of the tribunal accepting a plea referred to in sub-sections (2) or (3) of Section 16. The Section bars an appeal against any other order apart from those specifically mentioned.

10. Section 16 empowers the tribunal to rule its own jurisdiction. Under sub-section (2) a plea that the tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party having appointed or participated in the appointment of an arbitrator shall not be precluded from raising such a plea. As soon as the scope is violated during the proceedings, a plea that the tribunal is exceeding the scope can be raised under sub-section (3). Section 16(4) dilutes the rigours of Sections 16(2) and 16(3) of the stage to raise the plea and empowers the tribunal to admit a plea under sub-sections (2) or (3) at a later stage, upon being satisfied of justification for the delay.

11. For impleadment the appellant filed an application under Section 16 of the Act, pleading to be a necessary party to the arbitral proceedings and to be

bound by the CA despite not being a signatory thereto. The application was rejected by the tribunal holding that the CA was between the SPV and the respondent and the tribunal being a creature of the contract should not ordinarily implead a non-signatory as a party. In other words, the tribunal held that it does not have jurisdiction qua the issues sought to be raised by the appellant (a non-signatory to the CA) and it would be exceeding its scope of authority by impleading the appellant as a party.

12. Jurisdiction is the authority of the court to adjudicate a cause of action and grant the relief sought. Refusal to go into the merits of a claim can fall within the exercise of jurisdiction. The relevant portion of the decision of Supreme Court in RE-Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, 2023 INSC 1066 is quoted below:

“125....Jurisdiction is generally defined as the power of a court or tribunal to hear and determine a cause, and to adjudicate or exercise any judicial power in relation to such cause. Jurisdiction refers to the authority of a court or tribunal to decide matters that are litigated before it or to take cognizance of matters presented before it in a formal way for its decision. In *Official Trustee, West Bengal v. Sachindra Nath Chatterjee*, this Court held that for a court to have jurisdiction to decide a particular matter, it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought. In *NTPC v. Siemens Atkeingesllchaft*, this Court observed that any refusal to go into the merits of a claim may be in the realm of jurisdiction. Accordingly, it was observed that the issue of limitation goes to jurisdiction because if a claim is barred by limitation, a tribunal can refuse to exercise its jurisdiction.”

13. The Constitution Bench decision of the Supreme Court in *Cox & Kings Ltd. v. SAP India (p) Ltd. & Anr.*, (2024) 4 SCC 1 held that the determination of the parties to the agreement is an issue touching upon the competence of the tribunal. The relevant portion is quoted below:

“163. Section 16 of the Arbitration Act enshrines the principle of competence-competence in Indian arbitration law. The provision empowers the Arbitral Tribunal to rule on its own jurisdiction, including any ruling on any objections with respect to the existence or validity of arbitration agreement. Section 16 is an inclusive provision which comprehends all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The doctrine of competence-competence is intended to minimise judicial intervention at the threshold stage. The issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal.”

(emphasis supplied)

14. The Supreme Court in *Ajay Madhusudan Patel & Ors. v. Jyotrindra S. Patel & Ors.*, (2025) 2 SCC 147 while summarising the legal position on the issue of the “scope of jurisdiction of the referral court under Section 11(6) of the 1996 Act”

and considering the decision in Cox & Kings Ltd. (supra) held that the issue of determining the parties to the arbitration agreement can be decided under Section 16 of the Act. The relevant portion is quoted below:

"76.7. Cox & Kings² specifically dealt with the scope of inquiry under Section 11 when it comes to impleading the non-signatories in the arbitration proceedings. While saying that the referral court would be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory party is a veritable party to the arbitration agreement, it also said that in view of the complexity in such a determination, the Arbitral Tribunal would be the proper forum. It was further stated that the issue of determining parties to an arbitration agreement goes to the very root of the jurisdictional competence of the Arbitral Tribunal and can be decided under its jurisdiction under Section 16."

(emphasis supplied)

15. The Supreme Court in ASF Builtech (P) Ltd. (supra) albeit, dealt with the issue that impleadment of a non-signatory is to be decided by the tribunal but while holding so, took into consideration that in the eventuality of this issue being decided by the referral court the party would have no statutory remedy against an order rejecting the prayer. On the contrary the determination made by the tribunal on the issue of impleadment and jurisdiction would be amenable to challenge under Section 16 and 37 of the Act.

16. The court on an application for impleadment passes a procedural order but the tribunal in arbitration determines whether it has jurisdiction vis-a-vis the rights and liabilities of a non-signatory to the agreement. While deciding the impleadment of a non-signatory the tribunal deals with the issue of jurisdiction and this falls within the ambit of Section 16(2) and 16(3) of the Act.

17. The contention of the respondent that a decision of the tribunal rejecting the application for impleadment does not tantamount to accepting a plea of the tribunal not having jurisdiction and is not appealable under Section 37 of the Act, lacks merit. The word used in Section 16 of the Act is 'plea' and not 'application'. There is no restriction in Section 16 that a plea of lack of jurisdiction or exceeding jurisdiction can be raised only by a particular party. To put it differently for rejecting the application for impleadment, the plea of the respondent that the appellant was not bound by CA being a non-signatory and that the tribunal had no jurisdiction to deal with the issues sought to be raised by the appellant was accepted.

18. The submission of the learned counsel for the respondent that the question of jurisdiction was not decided by the tribunal and the word 'jurisdiction' is not used in the award, is noted to be rejected. The nature of the issue decided by the tribunal is relevant and not the language used in the award. Moreover from paragraphs 28 and 29 of the award it is evident that the tribunal held that being a creature of the contract it should not ordinarily implead a non-signatory to the CA as a party. The tribunal decided that it had no

jurisdiction qua the non-signatory to the CA.

19. The Supreme Court in *ASF Buildtech (P) Ltd. (supra)* while holding that the issue of impleadment should be left to be decided by the tribunal, considered that a statutory remedy would be available against the decision of the tribunal. In case the preliminary objection of the respondent that an appeal under Section 37 of the Act is not maintainable is accepted, the only remedy if available to the petitioner would be under Section 34 of the Act i.e. after passing of the arbitral award. Prejudice would be caused to the petitioner for having to challenge the award within the limited scope under Section 34 of the Act and that too without participating in the arbitral proceedings. Moreover, in case if under section 34 it is concluded that the petitioner in spite of being a non-signatory to the agreement is a necessary party the entire proceedings shall come to naught for non-impleadment of a necessary party in arbitral proceedings. The parties would then have to undergo another round, resulting in delay which would be contrary to the basic objective of speedy and efficient dispute resolution through arbitration.

20. The rejection of the application for impleadment brings a dead end to the proceedings so far as the non-signatory seeking impleadment is concerned. The wait for seeking remedy till passing of the award and thereafter in case of success, the entire arbitration exercise to be undertaken de novo would defeat the object of the enactment of the Act especially when a right to appeal is provided on a conjoint reading of Sections 16 and 37 of the Act. For this reason the statutory remedy mentioned in *ASF Buildtech (P) Ltd. (supra)* is not a remedy under Section 34 of the Act which would be against the spirit of the Act of time bound conclusion of dispute resolution by arbitration.

21. The reliance placed on the decision of *Hindustan Prefab Ltd. (supra)* by the respondent is of no help. In that case the court had expressed serious reservations on the maintainability of an appeal under Section 37 of the Act against rejection of an application for impleadment but had not decided this issue and proceeded to deal with the matter on merits.

22. The Madras High Court in *M/s. Marg Ltd. (supra)* was dealing with the issue as to whether impleadment of a party would fall under Section 17 of the Act and this is not the issue in the present case.

23. In all fairness, it should be noted that the consistent view of this Court in *Rhiti Sports Management Pvt. Ltd. v. Power Play Sports & Events Ltd.*, 2018:DHC:2808, *National Highway Authority of India v. Lucknow Sitapur Expressway Ltd.*, 2022:DHC:5696, *Goyal MG Gases Pvt. Ltd. v. Panama Infrastructure Developers Pvt. Ltd.*, 2023 SCC OnLine Del 1894, *National Highway Authority of India v. IRB Ahmedabad Vadodra Super Express Tollways Pvt. Ltd.*, 2024:DHC:2665 and *Coslight Infra Company Pvt. Ltd. v. Concept Engineers*, 2024:DHC:8755, has been that rejection of an impleadment application does not constitute an 'award' amenable to challenge under Section

34 of the Act and that rejection of the prayer for impleadment is not an interim award under Section 31(6) of the Act. These authorities do not deal with the issue as to whether rejection of a prayer for impleadment would fall under Sections 16(2) and 16(3) of the Act. Moreover, these cases were decided prior to the decision of the Supreme Court in ASF Buildtech (P) Ltd. (supra) wherein the contrary views of the High Courts holding that the issue of impleadment is not to be decided by the tribunal were over-ruled, considering that the party aggrieved of rejection of impleadment will not have a statutory remedy available against such rejection.

24. The preliminary objection of maintainability of appeal is rejected. The rejection of the application for impleadment of a non-signatory to the CA falls within the ambit of Sections 16(2) & (3) and is appealable under Section 37 of the Act.

Contention on Impleadment on behalf of the Appellant

25. It is argued that the expression 'party' under Section 7 of the Act includes non-signatories in appropriate cases. Reliance is placed on the decision of the Supreme Court in Cox and Kings Ltd. (supra). The contention is that on a conjoint reading of the clauses of the CA and the EPC Agreement, there is a relationship between NHAI and the consortium.

Arguments of the Respondent

26. It is argued that the CA was entered into between the SPV and NHAI, the appellant was not a signatory to the CA and is not a necessary party to the proceedings. The definition of 'parties' in Article 48.1 of the CA is relied upon. The submission is that the parties to the agreement are defined as parties collectively and individually but the appellant is not a party to the agreement. The contention is that had it been the intent of NHAI to enter into a contract with the appellant, the CA would have been executed with the appellant and not with the SPV. Clause 47.13 of the CA is pressed into service to submit that the CA was solely for the benefit of the parties thereto and their successors but created no duty, standard of care or liability in favour of any person not a party to the CA. It is emphasised that clause 1.4.2 of the CA provides that a specific clause is to prevail over a general clause and therefore clause 47.13 of the CA shall prevail over clause 7.1 of the CA. The judgement of the Supreme Court in Cox and Kings Ltd. (supra) is relied upon to argue that only in the rarest of cases a non-signatory is to be impleaded as a party. Contention is that there is no pleading to make out a rare case. The last submission is that the scope of interference under Section 37 of the Act is limited and the view taken by the tribunal is a plausible one.

27. From the clauses of the RFQ, the CA and the EPC Agreement it emerges:

(i) Clause 2.2.6 (f) of the RFQ stipulates that the parties to a consortium shall form an SPV to execute the project if the bid is awarded to the consortium.

(ii) Article 48.1 of the CA defines the term 'Parties' to mean the parties to the CA collectively and individually.

(iii) The expression 'Project Agreements' includes the CA, the Financing Agreements, the EPC Contract, the O&M Contract, the Tolling Contract, and any other agreements entered into by the SPV in relation to the project but it excludes the Escrow Agreement, the Substitution Agreement and agreements for procurement of goods or services involving consideration upto five crore.

(iv) The 'EPC Agreement' is defined as the engineering, procurement and construction contract(s) entered into by the SPV with one or more contractors for carrying out the project works in accordance with the provisions of the CA.

(v) Clause 1.4.2(a) of the CA provides that in case of any inconsistency between two or more clauses of the CA, the provision of a specific clause relevant to the issue under consideration shall prevail over a general clause.

(vi) Under clause 5.3.1 of the CA, the SPV could not undertake change in ownership without prior approval of NHAI. Clause 5.3.2 defines 'change in ownership' and provides that approval for such change would be considered from the perspective of national security and public interest.

(vii) Clause 5.6 of the CA stipulates that the SPV shall not without prior written consent of NHAI directly or indirectly engage in, be concerned with or be interested in any other business other than the project awarded.

(viii) Clause 7.1 (k) of the CA requires that the SPV shall at no time effect any change in ownership except in accordance with the CA and the provisions of clause 5.3 thereof. It mandates that the consortium members, together with their associates shall hold not less than fifty-one percent of the issued and paid-up equity as on the date of the CA. Each evaluated consortium member shall hold not less than twenty-six percent of such equity during the construction period and for two years thereafter.

(ix) Clause 7.1(l) of the CA provides that the members of the consortium and their associates shall have the financial standing and resources to fund the equity and to raise debt necessary for implementation of the project.

(x) Clause 7.1 (m) of the CA states that each consortium member has requested NHAI to enter into the CA with the SPV pursuant to the Letter of Award and has agreed to and unconditionally accepted the terms and conditions set forth therein.

(xi) Clause 47.13 of the CA clarifies that the CA does not create any duty, standard of care or liability in favour of any person not a party to the CA and is intended solely for the benefit of the parties, their successors and permitted assigns.

(xii) Clause 44.6 of the EPC Agreement deals with the consequences of termination of the CA. Under clause 44.6.1, if NHAI does not step into the

shoes of the SPV in terms of the substitution agreement, the EPC Agreement shall automatically be terminated from the date of termination of the CA.

(xiii) Under clause 44.6.2 of the EPC Agreement, upon termination of the CA the EPC contractor (appellant) shall not be entitled to any further payment and the SPV shall be entitled to invoke the performance guarantee in respect of losses and claims arising from such termination.

28. The law is settled that a non-signatory to the contract can be impleaded as a party in arbitral proceedings. It would be relevant to quote the following decisions of the Supreme Court:

28.1 In ASF Buildtech (P) Ltd. (supra) it was held:

“(i) Whether the Arbitral Tribunal has the power to implead/join non-signatories to the arbitration agreement?

14. One of the principal contentions raised by the appellants herein for the purpose of assailing the impugned judgment is that the petitioner Company being a non- signatory to the arbitration Agreement was never made a party to the proceedings before the Referral Court under Section 11 of the 1996 Act by virtue of which the Arbitral Tribunal came to be constituted. No notice of invocation was issued either to the appellant Company herein. In such circumstances, it was submitted that the appellant Company; a non-signatory to the arbitration agreement could not have been joined as a party after the referral stage i.e. after the constitution of the Arbitral Tribunal solely on the basis of the averments made in the counterclaim/statement of claim of Respondent 1 herein. In other words, it was contended that after the culmination of the referral stage in terms of Section 11 of the 1996 Act, the Arbitral Tribunal has no power whatsoever to implead or join a non-signatory to the arbitration agreement and that such power vests only with the Referral Court that too prior to the Arbitral Tribunal coming into existence.

102. What follows from this is that, the question whether a non-signatory is bound by the arbitration agreement is completely independent of the question concerning the “existence” of an arbitration agreement. The two inquiries—while related—are distinct in nature and function. The “existence” of an arbitration agreement pertains solely to its formal presence in the contractual documentation, as per the requirements under the 1996 Act and once established, it obligates the referral of the dispute to arbitration. By contrast, the question of whether a non- signatory is bound by the arbitration agreement involves a more nuanced determination of the parties' intentions, contractual relationships, and the broader context of the agreement, which is not confined to the formal text of the arbitration clause alone.

103. Thus, even in the absence of the non-signatory being made a party to the proceedings before the Referral Court, and where the question of its

impleadment has neither been raised nor addressed or left open to the Arbitral Tribunal by the Referral Court, the Arbitral Tribunal would be fully empowered to examine this issue in the first instance and determine whether any non-signatory is bound by the arbitration agreement based on the factual circumstances of the case, and if necessary, implead such non-signatory to the arbitration proceedings.

109. There runs no umbilical cord between the exercise of determining the "existence of the arbitration agreement" and determining its "existence qua the non-signatory". The latter is an independent and substantive determination that falls outside the narrow and circumscribed domain of the Referral Court's singular obligation under Section 11 sub-section (6A) of the 1996 Act and as such cannot be conflated to be one pertaining to or attacking the "existence" of an arbitration.

129. It is well within the jurisdiction of the Arbitral Tribunal to decide the issue of joinder and non-joinder of parties and to assess the applicability of the Group of Companies Doctrine. Neither in *Cox & Kings (1)* (supra) nor in *Ajay Madhusudan* (supra), this Court has said that it is only the Reference Courts that are empowered to determine whether a non-signatory should be referred to arbitration. The law which has developed over a period of time is that both "courts and tribunals" are fully empowered to decide the issues of impleadment of a non-signatory and the Arbitral Tribunals have been held to be preferred forum for the adjudication of the same."

28.2 In *Adavya Projects (P) Ltd.* (supra) it was held:

"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 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 referable to arbitration under the agreement. 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."

28.3 In *ONGC Ltd. v. Discovery Enterprises (P) Ltd.*, (2022) 8 SCC 42 it was held:

"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.”

28.4 In *Cox & Kings Ltd.* (*supra*) it was held:

“123. The participation of the non-signatory in the performance of the underlying contract is the most important factor to be considered by the Courts and tribunals. The conduct of the non-signatory parties is an indicator of the intention of the non-signatory to be bound by the arbitration agreement. The intention of the parties to be bound by an arbitration agreement can be gauged from the circumstances that surround the participation of the non-signatory party in the negotiation, performance, and termination of the underlying contract containing such agreement. The UNIDROIT Principle of International Commercial Contract, 2016 [UNIDROIT Principles of International Commercial Contracts, 2016, Article 4.3.] provides that the subjective intention of the parties could be ascertained by having regard to the following circumstances:

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

124. In *Dow Chemical*², consent of the non-signatory parties to arbitrate was implied primarily in view of their predominant participation in the conclusion, performance, and termination of contracts. Similarly, this Court in *Canara Bank [MTNL v. Canara Bank, (2020) 12 SCC 767]* observed that a non-signatory entity may be bound by an arbitration agreement where a parent or a member of the group of companies is a signatory to the arbitration agreement and the non-signatory entity of the group has been engaged in the negotiation or performance of the commercial contract.

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

to bind it to the arbitration agreement.

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

169. In case of joinder of non-signatory parties to an arbitration agreement, the following two scenarios will prominently emerge : first, where a signatory party to an arbitration agreement seeks joinder of a non-signatory party to the arbitration agreement; and second, where a non-signatory party itself seeks invocation of an arbitration agreement. In both the scenarios, the referral court will be required to prima facie rule on the existence of the arbitration agreement and whether the non-signatory is a veritable party to the arbitration agreement. In view of the complexity of such a determination, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory party is indeed a party to the arbitration agreement on the basis of the factual evidence and application of legal doctrine. The Tribunal can delve into the factual, circumstantial, and legal aspects of the matter to decide whether its jurisdiction extends to the non-signatory party. In the process, the Tribunal should comply with the requirements of principles of natural justice such as giving opportunity to the non-signatory to raise objections with regard to the jurisdiction of the Arbitral Tribunal. This interpretation also gives true effect to the doctrine of competence- competence by leaving the issue of determination of true parties to an arbitration agreement to be decided by the Arbitral Tribunal under Section 16.”

(emphasis supplied)

29. The bidding was undertaken by the consortium and the appellant is one of its members. The SPV was incorporated pursuant to the LOA. The EPC Agreement was executed by the SPV with the appellant. The appellant continued to remain involved in the project. The performance bank guarantees and corporate guarantees were furnished by the SPV utilising the

credit limit of the appellant. The project was financially backed by the consortium. Under clause 7.1(k) of the CA, the consortium members along with their associates had to hold not less than fifty-one percent of the issued and paid-up equity of the SPV as on the date of the CA. Clause 7.1(m) provides that each member of the consortium had requested NHAI to enter into the CA with the SPV pursuant to Letter of Award and had unconditionally accepted the terms and conditions set forth therein. There is a clear understanding between consortium and NHAI that the members of the consortium had accepted the terms and conditions of the CA.

30. The principles laid down by the Supreme Court in ONGC Ltd. (supra) are fulfilled in the present case. There is mutual intent between the parties to bind the members of the consortium in relation to the project. The relationship between the appellant and the SPV is evident from the financial structuring of the project. The performance of the contract affects not only the SPV but also the appellant. The consequences of non-performance have an impact on the appellant also.

31. The definition of 'parties' and clause 47.13 of the CA as relied upon by the respondent cannot be read in isolation ignoring clause 7.1 of the CA. The interplay between these clauses shall be considered by the tribunal at an appropriate stage. Whether clause 7.1 or clause 47.13 of the CA is the specific clause governing the issue and the effect of clause 1.4.2 of the CA are matters to be determined by the tribunal.

32. The submission of learned counsel for the respondent that had there been an intention to include the appellant the CA would have been executed directly between NHAI and the appellant and not through the SPV, does not enhance the case of the respondent. While deciding the application for impleadment the intention of the parties is to be gathered from the clauses of the contract and from nothing beyond it.

33. There cannot be a blanket proposition that a non-signatory to an agreement cannot be impleaded as a party in arbitral proceedings. The tribunal is vested with the jurisdiction to implead a non-signatory connected with or bound by the agreement. The intricate connection between NHAI, the SPV, the consortium and its member including the appellant is prima facie established. Consequently the appellant is a proper and necessary party and is ordered to be impleaded.

34. The appeal is allowed. Pending application is also disposed of.

35. It is clarified that the observations made hereinabove are only for the purpose of deciding the challenge to the dismissal of the prayer of impleadment and shall not be construed as an opinion on the merits of the disputes. The tribunal shall decide the issues independently and without being influenced by the observations made by this court.