$~J

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 22.05.2025
Judgment pronounced on: 11.08.2025

\+ **ARB. P. NO. 1860 OF 2024**

NEOSKY INDIA LIMITED & ANR. .....Petitioners

Through: Mr. Tanmaya Mehta, Ms. Nupur Kumar, Ms. Rashmi Gogoi, Mr. Ambuj Tiwari, Mr. Arjun Nagrath, Advs.

versus

MR. NAGENDRAN KANDASAMY & ORS. .....Respondents

Through: Mr. J. Sai Deepak, Sr. Adv. with Mr. Utkarsh Joshi, Mr. Anirudh Suresh, Ms. Anjali Menon, Ms. Kanishka Sharma, Advs.
Mr. Venkatesh Kumar, Adv. for R-4 and 5.

\+ **O.M.P.(I) (COMM.) 183/2024 & CCP(O) 57/2024, CCP(O)93/2024, I.A. 42241/2024, I.A. 42243/2024, I.A. 42244/2024, I.A. 42839/2024, I.A. 42847/2024**

NEOSKY INDIA LIMITED & ANR. .....Petitioners

Through: Mr. Tanmaya Mehta, Ms. Nupur Kumar, Ms. Rashmi Gogoi, Mr. Ambuj Tiwari, Mr. Arjun Nagrath, Advs.

versus

MR. NAGENDRAN KANDASAMY & ORS. .....Respondents

Through: Mr. J. Sai Deepak, Sr. Adv. with

Mr. Utkarsh Joshi, Mr. Anirudh Suresh, Ms. Anjali Menon, Ms. Kanishka Sharma, Advs.
Mr. Venkatesh Kumar, Adv. for R-4 and 5.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT

1. The petitioners have filed the present petition under Sections 11(4) and 11(6) of the Arbitration and Conciliation Act, 1996 (***"Act"***), seeking the appointment of an Arbitrator due to the respondents' failure to nominate their Arbitrator within the prescribed 30-day period from the notice dated 18.07.2024.

FACTUAL BACKGROUND

2. Petitioner No. 1 - Neosky India Limited (***"Neosky"***), is a public limited company and subsidiary of Rattan India Enterprises Ltd., while petitioner No. 2 - Throttle Aerospace Systems Private Limited (***"TAS"***) is a private limited company in the space of civil drones in which petitioner No. 1 has invested and in which respondent Nos. 1– 4 were employed, and respondent Nos. 1– 4 together have 40% shareholding.

3. On 25.05.2022, the petitioners entered into a Share Subscription and Shareholders Agreement (***"SSHA"***), a Non-Compete Agreement (***"NCA"***), and Employment Agreements with respondent No. 1 – Mr. Nagendran Kandasamy, respondent No. 2 – Ms. Nischita Madhu, respondent No. 3 – Mr. Shashi Kumar R, respondent no. 4 – Mr.

Gunjur Munianjappa Girish Reddy, and respondent No. 5 – Pinkin Consultancy Private Limited. The transaction involved a proposed fund infusion of Rs. 40 crores, pursuant to which petitioner No. 1 was to acquire a 60% equity stake in petitioner No. 2 company. As per the SSHA, Rs. 20 crores were infused upfront by petitioner No. 1, and the balance Rs. 20 crores were to be infused after a period of 18 months.

4. Under Clause 13.7 of the SSHA, respondent Nos. 1-5 were required to serve for five years and were restrained from engaging in competing businesses. Similarly, the NCA explicitly prohibited the above respondents from engaging in any of the competing businesses for a period of three years and further restricted them from soliciting any employees, clients, contractors, or similar parties during the term of the agreement and for up to one year following its expiry.

5. However, respondent Nos. 1, 2 and 3 resigned on 03.07.2023 and allegedly incorporated respondent No. 6, Zulu Defence Systems Pvt. Ltd., on 06.10.2023 to operate a competing drone venture, in violation of the non-compete clause contained in SSHA and Employment Agreements and appointed respondent Nos. 7 and 8 as the Directors of respondent No. 6.

6. On 27.05.2024, a petition bearing O.M.P(I)(COMM.) 183/2024 under Section 9 of the Act was filed before this Court, wherein the respondent Nos. 1 - 4 were restricted from competing with or disclosing information related to the petitioners *vide* an order dated 31.05.2024. Additionally, the petitioners also filed a contempt petition alleging wilful disobedience of the interim order dated 31.05.2024 passed in OMP(I)(COMM.) 183/2024. The contempt petition was

primarily based on the respondent Nos. 1 – 4's alleged continued engagement in competing business activities and violation of the non-compete obligations despite the subsisting restraint order.

7. Subsequently, on 18.07.2024, the petitioners issued a notice invoking arbitration under Clause 16.2 of SSHA and Clause 9(c) of NCA. Despite receiving the notice, the respondents failed to appoint an Arbitrator within the stipulated time of 30 days. Hence, the present petition was filed.

SUBMISSIONS

On behalf of the petitioners

8. Mr. Tanmaya Mehta, learned counsel for the petitioners, submits that the present dispute arises from breaches committed by respondent Nos.1-5 under the SSHA, NCA, and the respective Employment Agreements, all dated 25.05.2022.

9. He submits that respondent Nos. 1 - 3 abruptly resigned from their respective positions on 03.07.2023 and subsequently, on 06.10.2023, respondent No. 1 incorporated a private limited company, under the name and style – 'Zulu Defense Systems Pvt. Limited'/ respondent No. 6, operating in a directly competing business of drone manufacturing, in direct breach of (a) Clause 13.7 of the SSHA, (b) Clauses 3.2, 3.5, 5.4, 6.1 and 6.2 of the Employment Agreements, and (c) Clauses 1.1 and 6.1 of the NCA. Further, respondent Nos. 2 - 4 are working together with respondent No. 1 and carrying out competing business through respondent No. 6.

10. It is further contended that respondents have participated in Exhibitions to market their products (similar to the petitioners) at

public events through respondent No. 6, thereby violating the restrictive covenants under the NCA and Employment Agreements. Reference is made to orders passed by this Court in O.M.P.(I)(COMM.) 183/2024, wherein a *prima facie* finding was returned that the petitioners had made out a case for interim injunction, and respondent Nos. 1 - 4 were accordingly restrained from engaging in competing business or disclosing confidential information.

11. Mr. Mehta, further submits that the breaches committed by respondent Nos. 1 - 5 give rise to substantive disputes that fall squarely within the scope of the Arbitration Clauses contained in Clause 16.2 of the SSHA and Clause 9(c) of the NCA, both dated 25.05.2022. The existence and validity of these Arbitration Clauses are not disputed by respondent Nos. 1 - 5, all of whom are signatories to SSHA and NCA. In addition, respondent Nos. 1 - 3 have already acknowledged the Arbitration Agreement, as recorded in paragraph 10 of the order dated 20.09.2024 passed in OMP(I)(COMM) 183/2024, thereby estopping them from disputing arbitration at this stage.

12. In view of the above, it is submitted that the matter is liable to be referred to arbitration as it is well settled that, under Section 11 of the Act, the scope of judicial scrutiny is limited to the *prima facie* existence of a valid arbitration agreement. Reliance is placed on ***SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754*** and ***Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1***, to submit that any objections relating to the validity or enforceability of

the Agreements including the non-compete clause must be determined by the Arbitral Tribunal under Section 16 of the Act, not this Court under Section 11.

13. Mr. Mehta, learned counsel, has also relied on Section 16(1)(a) and (b) of the Act, which affirm the doctrine of separability and *kompetenz-kompetenz*, to reiterate that any challenge to the main agreement does not affect the Arbitration Clause.

14. With regards to non-signatories, he submits that the settled position in law is that the issue of whether a non-signatory is bound by an Arbitration Agreement must be left to the Arbitral Tribunal to decide. Reliance is placed on the judgments of the Hon'ble Supreme Court in ***Cox and Kings Ltd. v. SAP India Pvt. Ltd. (2024) 4 SCC 1, Suresh Kumar Kakkar v. Ansal Properties & Infrastructure Ltd., 2024 SCC OnLine Del 7735, and KKH Finvest (P) Ltd. v. Jonas Haggard, 2024 SCC OnLine Del 7254***, wherein this Court clarified that the determining factor is primarily an assessment regarding the conduct, role, and involvement of the non-signatory in the underlying contract. In order to assess the same, this Court is required to consider factors such as mutual intent, relationship between the signatories and non-signatories, commonality of subject matter, composite nature of transactions and performance of the contract.

15. It is further contended that respondent No. 6 was incorporated as the primary vehicle for the breach of the non-compete obligations under the SSHA and NCA, and that such breach continues through its operations. Respondent Nos. 1 and 3, who are the original founders and former key managerial persons of petitioner No. 2, incorporated

respondent No. 6, and as recorded in the order dated 20.09.2024 in O.M.P. (I)(COMM) 183/2024, together held 65% of the shares of respondent No. 6 at that time. It is submitted that the alleged divestment of shares by them, as disclosed in the affidavit dated 11.12.2024, is a sham. These facts and the continued operation of respondent No. 6 in breach of the non-compete clause establish a sufficient nexus to warrant its referral to Arbitration.

16. Further, it is submitted that respondent Nos. 7 and 8 are the present Directors of respondent No. 6 and are alleged to be knowingly facilitating the continuing breach of the non-compete obligations. Their impleadment is necessary for the effective adjudication of the dispute. Accordingly, the petitioners pray that respondent Nos. 6 - 8, although non-signatories to the Arbitration Agreement, be referred to Arbitration along with respondent Nos. 1 - 5, leaving open all questions of jurisdiction, maintainability, and arbitrability for determination by the Arbitral Tribunal.

<u>On behalf of the respondent Nos. 1-3</u>

17. Mr. J. Sai Deepak, learned senior counsel for respondent Nos. 1 - 3, submits that the order dated 31.05.2024 passed by this Hon'ble Court in O.M.P. (I)(COMM) 183/2024, which forms the basis of the relief sought in the present petition, is liable to be vacated. It is submitted that even as per the petitioners' case, the non-compete Clause, which is central to the dispute, expired on 25.05.2025, being three years from the effective date of the agreement, i.e., 25.05.2022.

18. He further submits that the petitioners have failed to comply with the mandatory requirement under Section 9(2) of the Act, which requires

initiation of Arbitration Proceedings within 90 days of the grant of interim relief. Merely issuing a notice invoking Arbitration is not sufficient compliance. In the absence of actual commencement of Arbitration proceedings, the interim order is liable to be vacated. Reliance is placed on judicial precedents including ***Ezen Aviation Pty Limited v. Big Charter Pvt. Ltd., 2021:DHC:4152-DB and Royal Orchid Hotels Pvt. Ltd. v. Hotel Grand Centre Point, 2024:KHC:46323.***

19. It is also submitted that the restraint imposed on them is in the nature of a post-termination non-compete restriction, which is explicitly void under Section 27 of the Indian Contract Act, 1872. The Employment Agreements permit resignation by giving 90 days' notice (Clause 5.4), and the SSHA further permits resignation for cause, including "wilful misconduct" by the petitioners (Clause 13.4). It is submitted that they acted in accordance with these Clauses and resigned on 03.07.2023 after learning of serious misconduct by the petitioners, including alleged siphoning of intellectual property.

20. It is further argued that the non-compete clause, even if valid for the period of employment, cannot survive post-resignation. Such clauses are barred by law and violative of the fundamental rights of the respondents to carry on their trade and profession under Article 19(1)(g) of the Constitution of India. The restraint effectively deprives the respondents of their only source of livelihood and their right to life under Article 21 of the Constitution of India.

21. Without prejudice to the above, Mr. Deepak, learned senior counsel, submits that respondent Nos. 1- 3 do not oppose reference to

Arbitration in principle. However, they oppose being forced into Arbitration while continuing to be restrained by an interim order that is legally untenable. The interim orders have placed them in an inequitable position, since the petitioners have not complied with their obligations. The ongoing contempt proceedings and the pendency of alleged claims of Rs. 750 crores further worsen their ability to defend themselves.

22. Lastly, he submits that the non-compete obligations, even if assumed to be valid, are in any case set to expire on 25.05.2025. Hence, any relief premised on the same cannot survive beyond that date.

On behalf of the respondent Nos. 4-5

23. Mr. Venkatesh Kumar, learned counsel for respondent Nos. 4 and 5 submits that no dispute or breach has been alleged against them in relation to the SSHA or the NCA, both dated 25.05.2022. The petitioners themselves have conceded that these respondents are impleaded solely because they are signatories to the Agreements.

24. While not disputing the existence of the Arbitration Agreement under Clause 16.2 of the SSHA, he contends that they should not be compelled to participate in arbitration proceedings in the absence of any genuine or specific claims against them. He relies on ***Goqii Technologies (P) Ltd. v. Sokrati Technologies (P) Ltd., (2025) 2 SCC 192***, to submit that Section 11 jurisdiction should not be used to drag parties into arbitration where no real dispute exists.

On behalf of the respondent Nos. 6-8

25. Learned counsel for respondent Nos. 6 - 8, submits that the Section 11 Petition is not maintainable against them, as they are neither

signatories to the SSHA nor the NCA. These agreements were entered into exclusively between petitioners and respondent Nos. 1 - 5. As such, no Arbitration Agreement exists between the petitioners and respondent Nos. 6 - 8.

26. It is submitted that respondent No. 6 - Zulu Defense Systems Pvt. Ltd., ("***Zulu***") was incorporated by respondent Nos. 1 and 3 to pursue a business distinct from that of TAS. While TAS focused on civil, medical, and survey drones, Zulu intended to manufacture tactical and kamikaze drones for military use, a domain not covered under the business of TAS.

27. It is further submitted that in compliance with the interim order passed by this Court on 31.05.2024, respondent Nos. 1 and 3 resigned from Zulu on 03.07.2024. Thereafter, respondent Nos. 7 and 8 were appointed as Directors to ensure the continuity of Zulu's operations. It is further submitted that respondent nos. 1 and 3, who previously held 69.5% of the shares in Zulu, have fully divested their shareholding. Form SH-4 was submitted on 26.11.2024, and pursuant to a resolution of Zulu, the original share certificates were cancelled, and fresh share certificates were issued to the transferees. Learned counsel for respondent Nos. 6-8 also states that the shareholding certificate dated 02.12.2024 has also been placed on record to demonstrate that respondent Nos. 1 and 3 are no longer shareholders or associated with Zulu in any manner.

28. It is further submitted that mere past association of respondent Nos. 1 and 3 with respondent No. 6 is insufficient to bind them to the

Arbitration proceedings and impleading them amounts to misuse of the Arbitration process.

ANALYSIS AND FINDINGS

29. I have heard the learned counsel appearing for the parties and have gone through the materials placed on record.

30. The question that falls for my consideration is whether a valid Arbitration Agreement exists between the parties.

31. Before answering the question, it is important to first set out the scope of judicial interference at the stage of a Section 11 petition. In ***Interplay (supra)***, the Hon'ble Supreme Court considered the scope of judicial interference by a referral court in a Section 11 petition. At paragraph 81, the Court observed:-

> "*81. One of the main objectives behind the enactment of the Arbitration Act was to minimise the supervisory role of Courts in the arbitral process by confining it only to the circumstances stipulated by the legislature. For instance, Section 16 of the Arbitration Act provides that the Arbitral Tribunal may rule on its own jurisdiction 'including ruling on any objection with respect to the existence or validity of the arbitration agreement'. The effect of Section 16, bearing in view the principle of minimum judicial interference, is that judicial authorities cannot intervene in matters dealing with the jurisdiction of the Arbitral Tribunal. Although Sections 8 and 11 allow Courts to refer parties to arbitration or appoint Arbitrators, Section 5 limits the Courts from dealing with substantive objections pertaining*

to the existence and validity of arbitration agreements at the referral or appointment stage. A referral court at Section 8 or Section 11 stage can only enter into a prima facie determination. The legislative mandate of prima facie determination ensures that the referral courts do not trammel the Arbitral Tribunal's authority to rule on its own jurisdiction."

(Emphasis added)

32. A similar position was reiterated in ***SBI General Insurance Co. Ltd. (supra)*** where the Hon'ble Supreme Court observed that the Arbitral Tribunal is the preferred first authority to look into the questions of arbitrability and jurisdiction, and the courts at the referral stage should not venture into contested questions involving complex facts. The operative part reads as follows:-

"114. In view of the observations made by this Court in Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re [*Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899, In re*, (2024) 6 SCC 1 : 2023 INSC 1066] , *it is clear that the scope of enquiry at the stage of appointment of Arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else.* …

***

125. We are also of the view that ex facie frivolity and dishonesty in litigation is an aspect which the Arbitral Tribunal is equally, if not more, capable to decide upon the

appreciation of the evidence adduced by the parties. We say so because the Arbitral Tribunal has the benefit of going through all the relevant evidence and pleadings in much more detail than the referral court. If the referral court is able to see the frivolity in the litigation on the basis of bare minimum pleadings, then it would be incorrect to doubt that the Arbitral Tribunal would not be able to arrive at the same inference, most likely in the first few hearings itself, with the benefit of extensive pleadings and evidentiary material."

(Emphasis added)

33. Thus, it is quite clear that the scope of inquiry before the referral court under Section 11 of the Act is narrowly circumscribed. The Court is required only to ascertain the existence of a valid Arbitration Agreement and to reject reference only where such an Agreement is either non-existent, or where the subject matter of the dispute is non-arbitrable in law. This limited scrutiny is designed to uphold the principle of party autonomy and to respect the arbitral process.

34. It is neither appropriate nor permissible for this Hon'ble Court to enter into an adjudication of the merits of the underlying dispute, nor to consider or allow production of detailed evidence at this stage. The rationale behind this approach is to ensure that preliminary objections or complex factual disputes regarding the validity or scope of the arbitration clause especially where intertwined with the main contract, are appropriately considered by the Arbitral Tribunal itself under the doctrine of *kompetenz-kompetenz*. Accordingly, unless the Arbitration

Agreement is found to be manifestly non-existent or unenforceable on the face of the record, the matter must be referred to Arbitration for a full and fair determination by the Tribunal.

Existence of a Valid and Enforceable Arbitration Agreement

35. In the present case, the SSHA and NCA both dated 25.05.2022, contain arbitration clauses (Clause 16.2 and Clause 9(c), respectively) which are reproduced below:

Clause 16 of the SSHA:

"*16. Arbitration, Governing Law and Jurisdiction:*

16.1 This Agreement shall be governed by the laws of India and the courts of New Delhi shall have exclusive jurisdiction over this Agreement.

16.2 In the event of any dispute, controversy, claim or conflict between the Parties arising out of or relating to this Agreement (including issues relating to the performance or non-performance of the obligations set om herein or the breach, termination or invalidity thereof) (a "Dispute''), such Dispute shall be referred to an arbitral tribunal consisting of three Arbitrators. One Arbitrator shall be appointed by the Party serving the notice of dispute, the other Arbitrator shall be appointed by the respondent Party and the third Arbitrator shall be appointed by the two Arbitrators so appointed. The arbitration proceedings shall be convened under the provisions of the Arbitration and Conciliation Act, 1996 (as amended from to lime time) and the award so granted by the arbitral tribunal shall be final

and binding on the Parties.

16.3 The seat of the arbitration shall be New Delhi and the language of the arbitration shall be English. The Parties shall continue to adhere to their obligations under this Agreement pending the adjudication of the dispute by arbitration."

Clause 9 of the NCA:

"9. GOVERNING LAW, ARBITRATION AND JURISDICTION

(a) This Agreement shall be governed by and interpreted in accordance with the laws India;

(b) The Parties hereto unconditionally submit to the exclusive jurisdiction of the courts of New Delhi for the determination of any matters arising out of or under this Agreement.

(c) In the event of any dispute, controversy, claim or conflict between the Parties arising out of or relating to this Agreement (including issues relating to the performance or non-performance of the obligations set out herein or the breach, termination or invalidity thereof) (a "Dispute"), such Dispute shall be referred to a tribunal consisting of three Arbitrators: one Arbitrator shall be appointed by the Party serving the notice of dispute and the other Arbitrator shall be appointed by the respondent Party and the two Arbitrators so appointed shall appoint the third member of

the arbitral tribunal. The arbitration proceedings shall be convened under the provisions of the Arbitration and Conciliation Act, 1996 and the award so granted by 18 the arbitral tribunal shall be final and binding on the Parties. The language of the arbitration shall be English, and the seat of arbitration shall be in New Delhi, India."

36. These clauses clearly indicate the presence of an Arbitration Agreement between the petitioners and the respondent Nos. 1-5. In the present case, the respondent Nos. 1-5 have not disputed the existence of Arbitration Agreement and have even conceded to Arbitration in their replies as well as the Order dated 20.09.2024.

37. However, without prejudice to the above, the respondent Nos. 1-3 have contended that the non-compete clause is contrary to public policy and hence unenforceable. They have relied on the decision of the Hon'ble Supreme Court in ***Magic Eye Developers (P) Ltd. v. Green Edge Infrastructure (P) Ltd., (2023) 8 SCC 50***, to argue that this Court must conclusively determine the legality of the non-compete obligations and the alleged misuse of confidential information, rather than leaving these issues for the Arbitral Tribunal. It is stated that since these disputes go to the root of the matter, they fall within the domain of the referral court. The paragraph relied upon reads as under:-

"13……if the dispute/issue with respect to the existence and validity of an Arbitration Agreement is not conclusively and finally decided by the referral court while exercising the pre-referral jurisdiction under Section 11(6) and it is left to

the arbitral tribunal, it will be contrary to Section 11(6A) of the Arbitration Act. It is the duty of the referral court to decide the said issue first conclusively to protect the parties from being forced to arbitrate when there does not exist any Arbitration Agreement and/or when there is no valid Arbitration Agreement at all."

38. I am unable to agree with the said submission.

39. A careful reading of ***Magic Eye (supra)*** makes it evident that the Hon'ble Supreme Court distinguished between two types of inquiries at the pre-referral stage under Section 11(6):-

i. A primary inquiry regarding the existence and validity of the arbitration agreement, which may be conclusively decided by the referral court if disputed; and

ii. A secondary inquiry regarding non-arbitrability of the claims, which may only be examined on a *prima facie* basis, especially when dismissal is manifestly warranted.

40. In the present case, the existence of Arbitration Agreements under Clause 16.2 of the SSHA and Clause 9(c) of the NCA is not disputed by respondent Nos. 1 to 5. On the contrary, they have participated in proceedings under Section 9 of the Act, and respondent Nos. 1 – 3 agreed to arbitration, as recorded in the Order dated 20.09.2024. The contention that the non-compete clause is void or that confidential information was misused requires a detailed factual examination based on documents and statements of witnesses, in addition to legal examination. These issues do not pertain to the validity of the arbitration clause itself, but rather to the merits of the dispute.

41. The legal position in this regard is well-settled. In ***Aslam Ismail Khan Deshmukh v. ASAP Fluids Pvt. Ltd***. ***(2025) 1 SCC 502***, the Hon'ble Supreme Court held that at the Section 11 stage, a Court must refrain from conducting a mini-trial or entering into disputed factual questions that fall within the arbitral domain. The operative portion reads as under:-

> "*51. It is now well settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the Arbitration Agreement exists – nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral courts and force other parties to the agreement into participating in a time consuming and costly arbitration process.*
>
> *52. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration."*

42. Even in the Section 9 proceedings, OMP (I) (COMM) 183 of 2024, *vide* Order dated 31.05.2024, this Court observed that the non-

compete clause was for a reasonable duration and that detailed adjudication was better suited for the arbitral forum. The relevant observation reads:-

> *"15. Similarly, Mr. Suresh raises the contention that the non-Compete Agreement itself is void, but I am not inclined to accept this submission at this stage, as these matters are to be adjudicated in arbitration. I find prima facie that the Non-Compete Agreement was for a reasonable period of three years, which fell within the period during which the respondents were bound to provide services to petitioner No.2.*"

43. Accordingly, I find no basis to entertain the respondents' request for adjudication on breach of contract, unfair trade practices, or validity of the non-compete at this stage. These claims are substantive in nature, fall within the scope of the Arbitration Clause, and are to be adjudicated by the Arbitrator. This is consistent with the limited remit of this Court under Section 11(6) read with Section 11(6A) of the Act.

44. In view of the above, I find that the Arbitration Agreement between the parties is valid, enforceable, and binding. The disputes in the present case fall squarely within the scope of the Arbitration Clauses, and no ground has been made out to refuse reference under Section 11 of the Act.

45. Even if the respondents' contention regarding the invalidity of the non-compete clause is taken at face value, the law is well settled that an arbitration clause is autonomous and survives independently of the

underlying agreement. This principle flows directly from Section 16(1) of the Act, which embodies the doctrine of severability.

46. In ***M/s Kuldeep Kumar Contractor v. Hindustan Prefab Limited, 2023 SCC OnLine Del 1088***, the Hon'ble Delhi High Court held as under:-

> *"35. Doctrine of Severability hails from the statutory provisions laid under Section 16(1) of the Act, 1996. The doctrine emphasizes on the principle that the arbitration clause in a contract is treated separately from the main contract and it continues to be in effect even if the main contract is invalidated, vitiated, or terminated for any reason. It is crystal clear that an arbitration clause is independent of the underlying contract. It makes sure that if one party alleges that the other breached the terms of the agreement, the agreement will remain in effect for the purposes of quantifying the claims arising from such breach.*"

47. In view of the above position, it is clear that even where the validity of the underlying contract is under challenge, the Arbitration Clause embedded within it is not rendered inoperative. The Arbitration Agreement, being a separate and severable component, continues to operate for the purposes of adjudicating disputes arising out of or in connection with the said Agreement.

Impleadment of Non-Signatories (Respondent Nos. 6, 7 And 8) to Arbitration Proceedings

48. The petitioners have also sought to implead respondent Nos. 6 - 8 namely, Zulu Defence Systems Pvt. Ltd. (respondent No. 6) and its directors (respondent Nos. 7 and 8), who are admittedly not signatories to the Arbitration Agreements contained in the SSHA and NCA.

49. The petitioners have argued that these respondents are alter egos of the signatories (respondent Nos. 1 and 3) and are deeply involved in the alleged contractual breaches and misuse of proprietary information, and are therefore necessary parties to the Arbitration.

50. On the other hand, the respondent Nos. 6-8 have argued that they are non-signatories to the Arbitration Agreement contained in SSHA and NCA, and that they no longer share any substantial interest with respondent Nos. 1 and 3 that may make respondent Nos. 6 - 8 a necessary party to the Arbitration.

51. The law on impleadment of non-signatories in arbitration proceedings is well settled. In ***Cox & Kings Ltd. (supra)***, the Hon'ble Supreme Court held as under:-

> "*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. [Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd.,*

(2020) 2 SCC 455 : (2020) 1 SCC (Civ) 570] 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.

***

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.

***

170.12. At the referral stage, the referral court should leave it for the Arbitral Tribunal to decide whether the non-signatory is bound by the arbitration agreement."

(Emphasis added)

52. Similarly in ***Adavya Projects (P) Ltd. v. Vishal Structurals (P) Ltd., 2025 SCC OnLine SC 806***, the Hon'ble Supreme Court reiterated that the question of who is a party to the arbitration agreement lies within the Tribunal's domain. The relevant paragraph reads as under:-

"24.....the determination of who is a party to the arbitration agreement falls within the domain of the arbitral tribunal as per Section 16 of the ACA. Section 16 embodies the doctrine of kompetenz-kompetenz, i.e., that the arbitral tribunal can determine its own jurisdiction. The provision is inclusive and covers all jurisdictional questions, including the existence and validity of the arbitration agreement, who is a party to the arbitration agreement, and the scope of disputes referrable to arbitration under the agreement. 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."

(Emphasis added)

53. Further, the test of veritable party has been explained by this Court in ***KKH Finvest (P) Ltd. (supra).*** The operative portion of the said judgment reads as under:-

"80. Thus, the assessment required to be undertaken by this Court - to give prima facie observations on whether the respondents are veritable parties or not - is primarily an assessment regarding the conduct, role, and involvement of the non-signatory in the underlying contract i.e. the MoS. At the outset, it is to be noted that the term "veritable parties" applies to both persons and entities [refer to Cox & Kings (supra), para 96]. In order to assess the same, this Court is required to consider factors such as mutual intent, relationship between the signatories and non-signatories, commonality of subject matter, composite nature of transactions and performance of the contract.

81. The intention of the parties to be bound by an Arbitration Agreement is to be gathered from the circumstances surrounding the involvement of a non-

signatory party in the negotiation, performance, and termination of the underlying contract containing the agreement. If the non-signatory's actions align with those of the signatories, it could reasonably lead the signatories to believe that the non-signatory was a veritable party to the contract containing the arbitration clause. To infer the non-signatory's consent, its participation/involvement in the negotiation or performance of the contract must be positive, direct, and substantial, rather than merely incidental. The burden of proof to establish the same lies on the party seeking to implead the non-signatories to the arbitration proceedings, in this case, the petitioners."

54. In essence, the concept of a veritable party to an Arbitration Agreement refers to a non-signatory who, though not formally a party to the written Arbitration Clause, has such a close legal or factual relationship with the signatories and the underlying contract that it would be unjust or improper to exclude them from the arbitral proceedings.

55. With this being the position in law, I am of the view that at this preliminary stage, it would be inappropriate to make a conclusive determination as to whether respondent Nos. 6 - 8 are also parties to the arbitral dispute. The petitioners have alleged that respondent No. 6 was created solely for the purpose of transferring the petitioners' business, and that respondent Nos. 1 - 3 have transferred such business to respondent No. 6 with the active connivance and involvement of respondent Nos. 7 and 8. These allegations involve

complex factual assertions that merit detailed consideration after affording an opportunity of hearing to all parties. Given the limited scope of scrutiny by this Court under the present proceedings, it cannot be definitively held at this stage that respondent Nos. 6 - 8 are not veritable parties to the arbitral dispute. The resolution of this issue necessarily requires the appreciation of evidence. Accordingly, the determination of whether respondent Nos. 6 - 8 are amenable to the Arbitration Proceedings is best left to the Arbitrator.

CONCLUSION

56. As discussed above, the respondents have raised a number of objections against the present petition, however, none of the objections raised question or deny the existence of the Arbitration Agreement under which the arbitration has been invoked by the petitioner in the present case. Thus, the requirement of *prima facie* existence of an arbitration agreement, as stipulated under Section 11 of the Act, is satisfied.

57. In view of the aforesaid, the present petition is allowed and the following directions are issued: -

i. Mr. Justice S.K. Kaul (Retired Supreme Court Judge) (Mob. No. 9818000370) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

ii. The learned Arbitrator shall fix his own fee.

iii. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

iv. It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claims, any other preliminary objections, as well as claims/counter-claims, deletion of any of the respondents and merits of the dispute of either of the parties, are left open for adjudication by the learned Arbitrator.

v. The parties shall approach the learned Arbitrator within two weeks from today.

58. In light of the above directions, the present petition is disposed of.

OMP (I) COMM 183 of 2024

59. This is a petition filed under Section 9 of the Act seeking interim relief against the respondents.

60. For the sake of brevity, the facts already set out above are not being repeated herein. For adjudication, it is sufficient to state that respondent Nos. 1 - 3 resigned from petitioner No. 2 on 03.07.2023 and shortly thereafter incorporated respondent No. 6 on 06.10.2023, to run a competing business in violation of their contractual obligations as alleged by the petitioners. Further, it is the case of the petitioners that respondent Nos. 7 and 8, being the directors, are also actively involved in the competing venture, i.e. respondent No. 6.

61. The scope and object of Section 9 of the Act have been elucidated by the Hon'ble Supreme Court in ***Arcelormittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd., (2022) 1 SCC 712.*** The Court held that interim relief under Section 9 is intended to protect the subject matter of Arbitration and ensure that Arbitral Proceedings do not

become infructuous or the eventual award is rendered meaningless. The relevant paragraphs read as under: -

> *"88. Applications for interim relief are inherently applications which are required to be disposed of urgently. Interim relief is granted in aid of final relief. The object is to ensure protection of the property being the subject-matter of arbitration and/or otherwise ensure that the arbitration proceedings do not become infructuous and the arbitral award does not become an award on paper, of no real value.*
>
> *89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable injury or prejudice may be caused to the party seeking interim relief.*
>
> *90. It could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17.*
>
> *91. When an application has already been taken up for consideration and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct the exercise arises only*

when the application is being entertained and/or taken up for consideration. As observed above, there could be numerous reasons which render the remedy under Section 17 inefficacious. To cite an example, the different Arbitrators constituting an Arbitral Tribunal could be located at far away places and not in a position to assemble immediately. In such a case, an application for urgent interim relief may have to be entertained by the Court under Section 9(1).”

62. In the present case, the reliefs sought are in the nature of injunctive reliefs aimed at preventing the frustration of rights arising from the contractual relationship between the parties. It is well settled that the scope of enquiry under Section 9 is confined to a *prima facie* assessment of the disputes and preservation of the subject matter of Arbitration. Issues such as the interpretation of contract terms and the scope of the underlying agreements fall squarely within the jurisdiction of the Arbitral Tribunal. The Court, at this stage, is only to determine whether the petitioner has made out a *prima facie* case, whether the balance of convenience lies in favour of grant of interim relief, and whether the petitioner would suffer irreparable harm in the absence of such relief.

63. The petitioners have sought injunctive relief to prevent frustration of rights under the NCA dated 25.05.2022. On 31.05.2024, this Court had granted an interim injunction in favour of the petitioners, restraining respondent Nos. 1 - 4 from engaging in any competing business. The relevant portion of that order reads as under:-

"15. Similarly, Mr. Suresh raises the contention that the Non-Compete Agreement itself is void, but I am not inclined to accept this submission at this stage, as these matters are to be adjudicated in arbitration. I find prima facie that the Non-Compete Agreement was for a reasonable period of three years, which fell within the period during which the respondents were bound to provide services to petitioner No.2.

16. These issues will ultimately have to be adjudicated between the parties in arbitration proceedings. However, having regard to the specific clauses of the SSHA, Employment Agreements, and Non-Compete Agreement, which form part of the transaction documents to which respondent Nos.1 to 4 were all parties, I am of the view that the petitioners have made out a prima facie case for grant of an ad interim order. The balance of convenience is also in favour of such an order being passed. I am satisfied that the petitioners would suffer irreparable loss if ad interim orders are not granted in their favour.

17. For the aforesaid reasons, respondent Nos. 1 to 4 are restrained until the next date of hearing from engaging, directly or indirectly, in any business competing with the business of petitioner No.2 company."

64. The issue that arises at this stage is whether the said interim relief ought to be continued or vacated.

65. It is submitted by the respondent Nos. 1-3 that respondent Nos. 1 - 3 have already resigned from the petitioner No. 2. Therefore, Clause 1.1 of the NCA is unenforceable against them, being in violation of Section 27 of the Indian Contract Act, 1872, which prohibits agreements in restraint of trade, particularly in relation to ex-employees. It has further been contended that the term of the NCA expired on 25.05.2025. In view of the same, they submit that the interim injunction granted by this Hon'ble Court on 31.05.2024 is no longer sustainable and ought to be vacated.

66. The petitioners, however, dispute this contention and submit that the breach of the NCA by the respondents commenced on 06.10.2023, which is the date on which respondent No. 6 - an allegedly competing company was incorporated. This breach was well within the contractual three-year period of the NCA, which commenced from the effective date of 25.05.2022. The competing business initiated by the respondents on 06.10.2023 has continued uninterrupted and unabated till date. Therefore, the petitioners contend that the breach is a continuing one, and the rights under the NCA continue to subsist in law until such breach ceases.

67. In support of their submission, the petitioners rely on the settled principle that no person can be permitted to take advantage of their own wrong. It is stated that in the present case, the respondents, having breached the non-compete obligations prior to their expiry, cannot now claim protection under the expired clause while continuing to violate the agreement.

68. Further, it is submitted that where the contractual right in favour of a party is time-bound, but such right is unlawfully obstructed or interfered with by the other party, the period of breach is liable to be excluded while computing the original duration of that right. Accordingly, the petitioners submit that the period during which respondents have been in breach of the non-compete clause starting from 06.10.2023 till such breach ceases, ought to be added to the original contractual period of three years. Reliance is placed on ***Beg Raj Singh v. State of U.P. & Ors., (2003) 1 SCC 726*** and more particularly on paragraph 7 which reads as under:-

> ***"7.*** *Having heard the learned counsel for the petitioner, as also the learned counsel for the State and the private respondent, we are satisfied that the petition deserves to be allowed. The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the*

respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him. The present one is such a case. The delay in final decision cannot, in any manner, be attributed to the appellant. No auction has taken place. No third-party interest has been created. The sand mine has remained unoperated for the period for which the period of operation falls short of three years. The operation had to be stopped because of the order of the State Government intervening which order has been found unsustainable in accordance with stipulations contained in the mining lease consistently with GO issued by the State of Uttar Pradesh. Merely because a little higher revenue can be earned by the State Government that cannot be a ground for not enforcing the obligation of the State Government which it has incurred in accordance with its own policy decision."

69. Therefore, the petitioners argue that the non-compete obligations of the respondents must be deemed to continue until a period equivalent to the original term is observed in full, excluding the period of unlawful breach**.** If a party is entitled to a right for a particular period, and the said period is unlawfully interrupted by the breach of the other party, the period of unlawful interruption is liable to be added to the period of the original right. Reliance is placed on ***Dharam Veer v. Union of India, AIR 1989 Del 227*** and more particularly on paragraph 40 which reads as under:-

> *"40. The next question, that arises, is to what relief is the petitioner entitled? By virtue of an illegal order his enjoyment of the lease and possession thereof has been unlawfully interrupted through circumstances beyond his control. Is he entitled to exclusion of the period of unlawful interruption? It would appear to us he is. Not to exclude the period from 14th July, 1986 till the petitioner is put back in possession would amount to perpetuating the illegal order of termination by virtue of which the respondents have taken possession, the result would be that the lease period of three years would stand unlawfully reduced to less than a year."*

70. Reliance is also placed on ***Avtar Singh v. Union of India, 1992 SCC OnLine Del 539*** and more particularly on paragraphs 69 and 70, which read as under:

> *"69. Consequently, the Division Bench issued a writ of mandamus to the respondents to restore possession to the*

petitioner immediately. It was further directed that the period of unlawful interruption shall be excluded in computing the three year term of the lease.

70. Following this judgment, I am of the opinion, that the petitioner shall be entitled to be restored possession of the lease granted to him and he shall also be entitled to exclusion of the period of unlawful interruption in computing the ten year term of the lease."

71. This Court is unable to accept the reliance placed by the petitioners on the judgments in ***Beg Raj Singh (supra), Dharam Veer (supra) and Avtar Singh (supra)***. These decisions pertain to disputes involving premature or wrongful interference with leasehold rights, where the courts granted equitable relief by excluding the period of interruption in computing the tenure of a subsisting lease. In ***Beg Raj Singh (supra)***, the Hon'ble Supreme Court held that the lessee, who was deprived of enjoyment of a mining lease due to State interference, could not be denied the full benefit of the lease term merely on account of the time lost to litigation. Likewise, in ***Dharam Veer (supra)*** and ***Avtar Singh (supra)***, the High Court directed restoration of possession and allowed for the exclusion of the period during which the petitioner was unlawfully prevented from exercising his leasehold rights. These judgments were rendered in the context of proprietary interests and operate within a different legal framework.

72. Even reliance on ***Paul Deepak Rajaratnam v. Surgeport Logistics (P) Ltd., 2025 SCC OnLine Del 5062*** does not aid the petitioners' case. In this case, although a termination notice had been issued by one of the

parties, the conduct of the respondent indicated that they continued to act in accordance with the terms of the SHA even after the purported termination. In fact, formal acceptance of the termination came significantly later, after Arbitral Proceedings had already been initiated. This Court found that the delayed assertion of the termination was an afterthought, especially since it was raised only in response to the arbitration. As a result, the Court held that the SHA continued to subsist and that the restrictive covenants therein, including the non-compete clause, were enforceable, as they operated during the term of a valid Agreement and did not amount to a restraint of trade under Section 27 of the Indian Contract Act, 1872. The operative paragraph reads as under:-

> *"83. It is well settled that restrictive covenants during the term of a valid contract are not considered in restraint of trade under Section 27 of the ICA. Since the learned Arbitrator has found that the SHA is still in force, to which I agree, Clause 15 of the SHA is not in restraint of trade and remains enforceable."*

73. I have considered the submissions advanced on behalf of the petitioners. While I note their contention that the respondents' breach commenced during the currency of the NCA and that the period of breach should be excluded in computing the contractual term, I am unable to accept this argument in the present circumstances.

74. In the present case, it is an admitted position that respondent Nos. 1 - 3 have tendered their resignations from the petitioner No. 2 company on 03.07.2023 and have since stepped down from their respective

positions as CEO, COO, and CTO. In terms of Clause 5.4 of the Employment Agreements, the resignation is to be effective upon completion of a 90-day notice period, which concluded on 01.10.2023. It is further not in dispute that respondent No. 5 company - Zulu Defence Systems Pvt. Ltd. was incorporated only thereafter, on 06.10.2023. Consequently, it is evident that respondent Nos. 1 - 3 ceased to be employees of petitioner No. 2 company as on the said date, and no employment relationship continues to subsist between the parties.

75. Turning to Clause 1.1 of the NCA, it states that

> "*1.1For a period of three years from the Effective Date of this Agreement (the "Non-Compete Term") the promoters shall not, for a period of three years from the effective date of the agreement, directly or indirectly: (a) be employed or provide services to a competing entity; (b) act as an agent, representative, contractor or consultant with any competing entity; (c) acquire or retain any beneficial ownership interest in a competing entity; or (d) engage in a business that directly or indirectly competes with the business of the petitioners.*"

76. A plain reading of Clause 1.1 of the NCA reveals that the restraint therein was intended to operate only during the term of the agreement and was applicable to the individuals in their capacity as "Promoters." It is not disputed that respondents Nos. 1 - 3 resigned from their respective positions on 03.07.2023 and thereby ceased to be promoters/employees of petitioner No. 2.

77. It is now well settled that post-service restrictive covenants in employment contracts, which operate after cessation of employment, are unenforceable under Indian law.

78. Recently, the Hon'ble Supreme Court in ***Vijaya Bank v. Prashant B Narnaware, 2025 SCC OnLine SC 1107*** examined the scope of Section 27 of the Indian Contract Act, 1872. The relevant paragraphs read as under:

> *"12.....Though the Contract Act does not profess to be a complete code, Act is exhaustive with regard to the subject matter contained therein. That is to say, validity of a restrictive covenant in an agreement including an employment agreement in regard to restraint in exercise of lawful profession, trade or business has to be tested on the touchstone of Section 27 of the Contract Act.*
>
> *13. Whether Section 27 operates as a bar to a restrictive covenant during the subsistence of an employment contract fell for decision in Niranjan Shankar Golikari v. Century Spinning and Manufacturing Co. After an illuminating discussion on the subject, the Bench made a distinction between restrictive covenants operating during the subsistence of an employment contract and those operating after its termination. The Bench held as follows:-*
>
> > *"17. The result of the above discussion is that considerations against restrictive covenants are different in cases where the restriction is to apply during the period after the termination of the contract*

than those in cases where it is to operate during the period of the contract. Negative covenants operative during the period of the contract of employment when the employee is bound to serve his employer exclusively are generally not regarded as restraint of trade and therefore do not fall under Section 27 of the Contract Act. A negative covenant that the employee would not engage himself in a trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not therefore a restraint of trade unless the contract as aforesaid is unconscionable or excessively harsh or unreasonable or one-sided.."

14. This view was reiterated in the concurrent opinion of A.P. Sen, J. in Superintendence Company (P) Ltd. v. Krishan Murgai. Endorsing the ratio in Golikari (supra) with regard to validity of restrictive covenants during the subsistence of a contract, A.P. Sen, J. held:-

"18. Agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are not void under Section 27 of the Contract Act, on the ground that they are in restraint of trade. Such agreements are enforceable. The reason is obvious. The doctrine of restraint of trade never applies during the continuance of a contract of employment; it applies

only when the contract comes to an end. While during the period of employment, the courts undoubtedly would not grant any specific performance of a contract of personal service, nevertheless Section 57 of the Specific Relief Act clearly provides for the grant of an injunction to restrain the breach of such a covenant, as it is not in restraint of, but in furtherance of trade.

19. In Niranjan Shankar Golikari case this Court drew a distinction between a restriction in a contract of employment which is operative during the period of employment and one which is to operate after the termination of employment. After referring to certain English cases where such distinction had been drawn, the Court observed: "A similar distinction has also been drawn by courts in India and a restraint by which a person binds himself during the term of his agreement directly or indirectly not to take service with any other employer or be engaged by a third party has been held not to be void and not against Section 27 of the Contract Act."

15. *In view of these authoritative pronouncements, it can be safely concluded law is well settled that a restrictive covenant operating during the subsistence of an employment contract does not put a clog on the freedom of a contracting party to trade or employment."*

(Emphasis added)

79. Similarly, in ***Percept D'Mark (India) (P) Ltd. v. Zaheer Khan, (2006) 4 SCC 227,*** the Hon'ble Supreme Court held as under:-

> "*60. We have perused the contract in detail. The terms of the contract were expressly limited to 3 years from 30-10-2000 to 29-10-2003, unless extended by mutual agreement, and all obligations and services under the contract were to be performed during the term.*
>
> *61. Clause 31(b) was also to operate only during the term i.e. from the conclusion of the first negotiation period under clause 31(a) on 29-7-2003 till 29-10-2003. This respondent 1 has scrupulously complied with. So long as clause 31(b) is read as being operative during the term of the agreement i.e. during the period from 29-7-2003 till 29-10-2003, it may be valid and enforceable. However, the moment it is sought to be enforced beyond the term and expiry of the agreement, it becomes prima facie void, as rightly held by the Division Bench.*
>
> *62. If the negative covenant or obligation under clause 31(b) is sought to be enforced beyond the term i.e. if it is enforced as against a contract entered into on 20-11-2003 which came into effect on 1-12-2003, then it constitutes an unlawful restriction on respondent 1's freedom to enter into fiduciary relationships with persons of his choice, and a compulsion on him to forcibly enter into a fresh contract with the appellant even though he has fully performed the previous contract, and is, therefore, a restraint of trade*

which is void under Section 27 of the Contract Act.

63. Under Section 27 of the Contract Act: (a) a restrictive covenant extending beyond the term of the contract is void and not enforceable, (b) the doctrine of restraint of trade does not apply during the continuance of the contract for employment and it applies only when the contract comes to an end, (c) as held by this Court in Gujarat Bottling v. Coca-Cola [(1995) 5 SCC 545] this doctrine is not confined only to contracts of employment, but is also applicable to all other contracts."

(Emphasis added)

80. Thus, the position that emerges is that the doctrine of restraint of trade, as embodied under Section 27 of the Indian Contract Act, 1872, applies when the contract comes to an end. A clear distinction exists between a non-compete clause that operates during the subsistence of employment or an Agreement, and one that is sought to be enforced post-termination. While a restrictive covenant during the term of employment may be legally permissible, any such restraint operating after the termination of employment or expiry of the agreement is subject to the rigours of Section 27. Once the NCA has come to an end by efflux of time, or ceases to apply due to the termination of employment, it cannot be enforced post expiry of the Contract.

81. Accordingly, in the present case, the NCA ceased to apply to the respondent Nos. 1-3 from the date of their resignations. Furthermore, the non-compete clause was contractually limited to a fixed duration of three years from the effective date, which expired by efflux of time

on 25.05.2025. In view of this, the restraint cannot now be sought to be enforced post-expiry, as it would be in the nature of a post-termination restraint.

82. If the contention of the petitioners is accepted, it would give rise to an anomalous and legally untenable situation. To illustrate, consider a scenario where an NCA is contractually limited to a duration of three years. If one party alleges a breach from day one of the agreement, and such an allegation results in an interim injunction, then following the petitioners' line of reasoning, the non-compete would need to be enforced for an additional three years. This would, in effect, double the agreed restraint period and extend the NCA beyond its original term, despite the fact that the parties never intended such an extension.

83. Moreover, if upon conclusion of trial it is found that the alleged breach never occurred, the respondents would have nevertheless been subjected to a restraint for a period longer than contractually agreed, solely due to an unproven allegation. Such an outcome is not only inequitable but also contrary to settled legal principles. Non-compete clauses, by their very nature, must be subject to strict scrutiny, as these can turn into post-contractual restraint and would amount to rewriting the contract in a manner that extends the restraint beyond what was mutually agreed.

84. Allowing them to be extended based on *prima facie* observations would violate Section 27 of the Indian Contract Act, 1872, and would amount to imposing an unreasonable restriction on the respondents' right to practice their trade or profession, which is protected under Article 19(1)(g) of the Constitution of India.

85. For the reasons noted above, the interim injunction granted by this Court on 31.05.2024 under Section 9 of the Act, which restrained the respondents from engaging in competing business, is no longer sustainable and needs to be vacated. Clause 1.1 of the NCA categorically provides that the restriction would subsist for a period of three years from the Effective Date, which has now lapsed. The contractual right having been extinguished by efflux of time, there is no continuing obligation that may now be preserved through the interim relief. Hence, the interim injunction stands vacated.

86. As the Arbitrator is being appointed, the present petition shall be treated as an application under Section 17 of the Act and shall be decided by the Arbitrator in accordance with law, insofar as the other reliefs are concerned.

87. Since the Contempt Petitions being CCP(O) 57/2024 and CCP(O) 93/2024 are raising disputed questions of facts, the petitioners are at liberty to revive the same after the opinion of the Arbitrator in accordance with Section 27(5) of the Act.

88. In view of the above, the present petition stands disposed of.

89. Pending applications, if any, also stand disposed of.

JASMEET SINGH, J

AUGUST 11th, 2025/DE