



September 2025

## Scope of scrutiny under Section 11 (6) *vis-à-vis* Section 16 of the Arbitration and Conciliation Act, 1996 regarding non-signatories to the arbitration agreement

The Hon'ble Delhi High Court ("Delhi HC"), in the case of *Neosky India Limited and Anr. vs. Mr. Nagendran Kandasamy and Ors.*<sup>1</sup>, has allowed a petition under Section 11(6)<sup>2</sup> of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") referring certain non-signatories to the agreement to arbitration. The Delhi HC held that the question as to whether the non-signatories were veritable parties to the arbitration agreement could not be conclusively determined at the preliminary stage of inquiry under Section 11(6) of the Arbitration Act and must be left to the arbitrator.

### Brief facts

1. Neosky India Limited (Petitioner No. 1), was an investor in Throttle Aerospace Systems Private Limited ("TAS") (Petitioner No. 2) (collectively "**Petitioners**"). Respondent Nos. 1 to 5 (collectively "**Respondents**") were employees of TAS.
2. On May 25, 2022, the Petitioners entered into a Share Subscription and Shareholders Agreement ("**SSHA**"), Non-Compete Agreement ("**NCA**") and employment agreements with the Respondents. The SSHA and NCA contained separate arbitration clauses for adjudication of disputes among the parties.
3. The NCA prohibited the Respondents from engaging in any competing business for a period of 3 (three) years. It further restricted them from soliciting any employees, clients, contractors or similar parties for up to 1 (one) year following the non-compete period.
4. Respondent nos. 1 to 3 resigned from TAS on July 3, 2023. On October 6, 2023, they incorporated Zulu Defence Systems Private Limited ("**Respondent No. 6**").
5. Upon becoming aware of the incorporation of Respondent No. 6, the Petitioners filed a petition<sup>3</sup> before the Delhi HC under Section 9 of the Arbitration Act ("**Section 9 Petition**"), alleging that Respondent No. 6 was operating a competing drone venture. By way of an order dated May 31, 2024 ("**Interim Order**"), the respondent nos. 1 to 4 were restricted from competing with or disclosing information related to the Petitioners.

<sup>1</sup> Arb. P. No. 1860 of 2024 and OMP (I)(COMM.) 183/2024 (decided on August 11, 2025)

<sup>2</sup> Section 11(6) empowers the Supreme Court and the High Court to appoint an arbitrator in international and domestic arbitrations respectively, where the parties are unable to or refuse to appoint an arbitrator.

<sup>3</sup> OMP(I)(COMM.) 183/2024

6. In compliance with the Interim Order, respondent nos. 1 and 3 resigned from Respondent No. 6 on July 3, 2024 and divested their shareholding in the company. Thereafter, respondent nos. 7 and 8 were appointed as directors to ensure the continuity of Respondent No. 6's operations.
7. Subsequently, the Petitioners issued a notice invoking arbitration dated July 18, 2024 under clause 16.2 of SSHA and clause 9(c) of NCA. Since the Respondents failed to appoint an arbitrator, the Petitioners filed an application under Section 11 of the Arbitration Act.

## Issue

Whether the non-signatory parties should be referred to arbitration?

## Analysis and finding

1. The Delhi HC held that the scope of inquiry under Section 11 of the Arbitration Act is 'narrowly circumscribed', wherein the court is required only to ascertain the existence of a valid arbitration agreement and to reject a reference only where such an agreement is either non-existent or where the subject matter of dispute is non-arbitrable in law. The object behind such limited scrutiny is to uphold the principle of party autonomy.
2. Since the Respondent had not challenged the existence of a valid arbitration agreement but only contested the validity of the non-compete clause in the NCA, this was a dispute on merits, which could only be looked into by the arbitral tribunal. The Delhi HC held that the arbitration clause is autonomous and survives independently of the underlying agreement. This principle flows directly from Section 16(1)<sup>4</sup> of the Arbitration Act. Therefore, the disputes were referred to arbitration *qua* the Respondents.
3. Respondent nos. 6 to 8 objected to their impleadment in arbitration proceedings on the ground that they were non-signatories to the arbitration agreement. Relying upon the law laid down by the Hon'ble Supreme Court of India<sup>5</sup> and by the Delhi HC<sup>6</sup>, it was held that the determination, as to whether respondent nos. 6 to 8 were veritable parties and amenable to the arbitration proceedings, required appreciation of evidence and, therefore, was best left to the arbitrator.
4. While referring the disputes to arbitration *qua* respondent nos. 6 to 8, the Delhi HC took note of the inclusive nature of Section 16 of the Arbitration Act, which covers all preliminary issues touching upon the jurisdiction of the arbitral tribunal.
5. With respect to the issue of vacation of the Interim Order passed in Section 9 Petition, the Delhi HC held that the scope of enquiry under Section 9 of the Arbitration Act is confined to a *prima facie* assessment of the disputes and preservation of the subject matter of arbitration. To take such *prima facie* view, the Delhi HC considered that a non-compete clause which is intended to be made applicable post termination of the employment, is violative of Article 19(1)(g) of the Constitution of India and Section 27 of the Indian Contract Act, 1872. Further, the term of NCA stood expired on May 25, 2025. Therefore, since the contractual right stood expired by efflux of time, there was no obligation to be preserved through the interim relief. The Interim Order was, therefore, vacated.
6. The Delhi HC, therefore, referred the parties to arbitration and the Section 9 Petition was directed to be treated as an application under Section 17 of the Arbitration Act.

<sup>4</sup> Section 16(1) is about the independence of the arbitration clause *vis-à-vis* the underlying agreement.

<sup>5</sup> *Cox and Kings Ltd. vs. SAP India Private Limited*, (2024) 4 SCC 1; *Adavya Projects Private Limited vs. Vishal Structurals Private Limited*, 2025 SCC OnLine SC 806

<sup>6</sup> *KKH Finvest Private Limited vs. Jonas Haggard*, 2024 SCC OnLine Del 7254

## Conclusion

The judgments relied upon by the Delhi HC have indicated that *“the referral court will be required to prima facie rule on ... whether the non-signatory is a veritable party to the arbitration agreement”*. The intention, therefore, to refer the said question to the arbitrator only where a *prima facie* view is not possible can be inferred from the relied upon judgments. However, the Delhi HC has held that it should be left to the arbitrator to decide if a non-signatory is bound by the arbitration agreement.

The question, therefore, arises as to whether a prima facie view is incapable of being formed in a case where one non-signatory (Respondent No. 6) was non-existent at the time of execution of the arbitration agreement, and two other non-signatories (respondent nos. 7 and 8) were only subsequently employed by Respondent No. 6. This could be argued as a dilution of the principle that the basis for binding a non-signatory to an arbitration agreement is implied or tacit consent.

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**This Prism is prepared by:**



**Ananya Kumar**  
Partner



**Aparna Gupta**  
Senior Associate



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