REVISED

ITEM NO.17 COURT NO.7 SECTION IV-B

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition for Special Leave to Appeal (C) Nos. 7455-7456/2023

(Arising out of impugned final judgment and order dated 23-01-2023 in ARBC No. 216/2021 23-01-2023 in ARBC No. 220/2021 passed by the High Court Of Punjab & Haryana At Chandigarh)

CAREER INSTITUTE EDUCATIONAL SOCIETY Petitioner(s)

VERSUS

OM SHREE THAKURJI EDUCATIONAL SOCIETY Respondent(s)

(FOR ADMISSION and I.R.)

Date : 24-04-2023 These matters were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE M.M. SUNDRESH

For Petitioner(s)
Mr. Rajive Bhalla, Sr. Adv.
Mr. Amit Aggarwal, Adv.
Mr. Sumeir Ahuja, Adv.
Mr. Deepak Samota, Adv.
Mr. Yajur Bhalla, Adv.
Mr. Jaisurya Jain, Adv.
Mr. Ashish Vajpayee, Adv.
Ms. Akansha Gulati, Adv.
Ms. Ragini Sharma, Adv.
Mr. Shubham Bhalla, AOR

For Respondent(s)
Ms. Pinki Aggarwal, Adv.

UPON hearing the counsel the Court made the following
O R D E R

We do not find any merit in the present special leave petitions and hence, the same are dismissed.

However, we would like to record some reasons for dismissal of the present special leave petitions.

The judgment in *Vidya Drolia & Ors. vs. Durga Trading Corporation*[1] did not examine and decide the issue of effect of unstamped or under-stamped underlying contract on the arbitration agreement. As this issue and question has not been decided in *Vidya Drolia* (supra), the decision is not a precedent on this question.

***Vidya Drolia* (supra) did refer to the judgment in the case of *Garware Wall Ropes Limited vs. Coastal Marine Constructions and Engineering Limited*[2], but in a different context, as is evident from paragraphs 146 and 147.1 of the judgment in *Vidya Drolia* (supra), which are reproduced below:**

> **"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and**

1 (2021) 2 SCC 1
2 (2019) 9 SCC 209

unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. xxx xxx xxx

147.1. In Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof: (SCC p. 238)

> **“29. This judgment in Hyundai Engg. Case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did “exist”, so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the subcontract would not “exist” as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with “existence”, as opposed to Section 8, Section 16 and Section 45, which deal with “validity” of an arbitration agreement is answered by this Court’s understanding of the expression “existence” in Hyundai Engg. case (supra), as followed by us.”**

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements.

Invalid agreement is no agreement.

xxx xxx xxx"

It is apparent from the aforementioned paragraphs in *Vidya Drolia* (supra) that reference to the decision in *Garware Wall Ropes Limited* (supra) was made to interpret the word 'existence', and whether an 'invalid' arbitration agreement, can be said to exist? This examination was to decide "who decides existence of an arbitration agreement" in the context of Sections 8 and 11 of the Arbitration and Conciliation Act, 1996.

The distinction between *obiter dicta* and *ratio decidendi* in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, *State of Gujarat & Ors. vs. Utility Users' Welfare Association & Ors.*[3] and *Jayant Verma & Ors. vs. Union of India & Ors.*[4].

The first judgment in *State of Gujarat* (supra) applies, what is called, "the inversion test" to identify what is *ratio decidendi* in a judgment. To test whether a particular proposition of law is to be treated as the *ratio decidendi* of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the *ratio decidendi* of the case.

In *Jayant Verma* (supra), this Court has referred to an earlier decision of this Court in *Dalbir Singh & Ors. vs. State of Punjab*[5]

3 (2018) 6 SCC 21
4 (2018) 4 SCC 743
5 (1979) 3 SCC 745

to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, *albeit* operates as *res judicata*. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the *obiter dicta*.

Applying these principles, we dismissed the special leave petitions.

Pending applications, if any, shall stand disposed of.

(DEEPAK GUGLANI)
AR-cum-PS

(R.S. NARAYANAN)
COURT MASTER (NSH)

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6 (2021) 2 SCC 1
7 (2019) 9 SCC 209

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8 (2018) 6 SCC 21
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