READING POWER INTO SILENCE: THE INTERPRETIVE ARCHITECTURE OF NON-SIGNATORY JOINDER AFTER ASF BUILDTECH

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ABSTRACT

The Supreme Court of India's decision in ASF Buildtech (P) Ltd v Shapoorji Pallonji and Co (P) Ltd resolved a long-standing conflict among the High Courts on whether an arbitral tribunal may, on its own motion, implead a non-signatory to an arbitration agreement under the Group of Companies Doctrine. Existing commentary has largely treated the decision as a straightforward victory for tribunal autonomy that will relieve referral courts of the evidentiary 'mini-trial' associated with Section 11 petitions. This article argues that the decision's more durable significance lies in the interpretive method by which it was reached: a deliberate application of the 'always speaking' canon of statutory construction to Section 16 of the Arbitration and Conciliation Act 1996, coupled with a doctrine of implied incidental powers that reads the authority to give effect to a jurisdictional ruling into the bare power to make one. Tracing this interpretive trajectory from SBP & Co v Patel Engg Ltd through the 2015 Amendment, Vidya Drolia, the Stamp Duty reference, SBI General Insurance Co Ltd v Krish Spinning, and Cox and Kings Ltd v SAP India (P) Ltd, this article contends that ASF Buildtech completes a two-decade migration from textual literalism to purposive dynamism in the allocation of jurisdictional competence between courts and tribunals. It then offers an original critique: because the 'Discovery Test' for non-signatory status is avowedly fact-intensive and conduct-based, it risks transplanting the very evidentiary inquiry that Section 11(6A) sought to exclude from the referral stage into the post-award review under Sections 34 and 37, where a fuller record and a less deferential standard of review for jurisdictional facts may make such challenges more, rather than less, viable. Drawing on the joinder architecture of institutional rules such as the SIAC and HKIAC Rules, the article concludes by proposing that Parliament use the pending Arbitration and Conciliation (Amendment) Bill, 2024 to codify a bounded, two-stage joinder power, rather than leave the boundaries of implied tribunal authority to further ad hoc judicial elaboration.

Keywords: Arbitration; Group of Companies Doctrine; non-signatories; Kompetenz-Kompetenz; Section 16; ASF Buildtech; Cox and Kings; statutory interpretation; implied powers; institutional arbitration.

I. INTRODUCTION

For nearly a decade, the question of whether a non-signatory could be bound to arbitrate under the Group of Companies Doctrine was resolved, almost by default, at the referral stage before a High Court exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act 1996 ("the Act"). This is precisely the outcome Parliament sought to prevent when it inserted Section 11(6A) into the Act in 2015, confining the referral court's inquiry to the mere existence of an arbitration agreement.[1] On 2 May 2025, in ASF Buildtech (P) Ltd v Shapoorji Pallonji and Co (P) Ltd, the Supreme Court held that an arbitral tribunal may, on its own motion and without any prior direction from a referral court, implead a non-signatory that it finds to be bound by the arbitration agreement.[2] The decision resolved a decade-long conflict between High Courts that had read the Act's silence on joinder as a prohibition, and those that had read the same silence as an invitation to interpretation.

Most early commentary on ASF Buildtech approaches it as a doctrinal event: a further consolidation of Kompetenz-Kompetenz, and a practical measure that will spare litigants the 'mini-trial' that a Section 11 petition contesting non-signatory status had come to resemble. That account is not wrong, but it undersells the more interesting feature of the judgment. What is distinctive about ASF Buildtech is not simply that the Supreme Court decided in favour of tribunal power. It is how the Court arrived there: by treating Section 16 of the Act as an 'always speaking' provision, and by inferring, from the bare textual power to 'rule on' a tribunal's own jurisdiction, an implied and necessary power to make that ruling effective by impleading the party whom the ruling concerns. This interpretive method, rather than the specific holding on joinder, is arguably the more durable legacy of the case, because it is transferable to future disputes about the scope of tribunal authority that have nothing to do with non-signatories at all.

This article makes three claims. First, ASF Buildtech is best read as the culmination, not the origin, of a two-decade interpretive migration in Indian arbitration law: a migration from the textual literalism of SBP & Co v Patel Engg Ltd[3] toward the purposive, 'always speaking' statutory construction that now characterises the Supreme Court's arbitration jurisprudence,

[1]The Arbitration and Conciliation Act 1996, s 11(6A) (India), inserted by the Arbitration and Conciliation (Amendment) Act 2015, with effect from 23 October 2015.
[2]ASF Buildtech (P) Ltd v Shapoorji Pallonji and Co (P) Ltd, 2025 INSC 616 (SC); also reported at (2025) 9 SCC 76.
[3]SBP & Co v Patel Engg Ltd (2005) 8 SCC 618.

already visible in Vidya Drolia v Durga Trading Corpn,[4] the Stamp Duty reference,[5] SBI General Insurance Co Ltd v Krish Spinning,[6] and Cox and Kings Ltd v SAP India (P) Ltd.[7] Second, notwithstanding the Court's own description of the arbitral tribunal as a 'one-stop forum', the specific test it endorses for determining non-signatory status (the fact-intensive, multi-factor 'Discovery Test') risks relocating rather than eliminating the evidentiary inquiry that Section 11(6A) was designed to keep out of the referral stage, because that inquiry will now recur, largely unchanged, in the arbitral record, where it remains available for challenge under Sections 34 and 37. Third, drawing on the joinder architecture found in the rules of leading arbitral institutions, this article suggests that Parliament's pending Arbitration and Conciliation (Amendment) Bill, 2024 could adopt a two-stage, criteria-based joinder framework that would preserve the efficiency gains of ASF Buildtech while giving courts, tribunals and parties clearer notice of where the threshold for joinder lies.

The article proceeds in eight further parts. Part II maps the statutory silence that gave rise to the underlying interpretive conflict. Part III traces the doctrinal drift from SBP to Krish Spinning that progressively narrowed the referral court's role. Part IV examines how Cox and Kings relocated the textual basis of the Group of Companies Doctrine. Part V analyses ASF Buildtech itself: the 'always speaking' reading of Section 16, the existence/intention distinction, the Discovery Test, and the treatment of Section 21 notice. Part VI argues that these developments together reveal an interpretive method rather than a series of unconnected holdings. Part VII offers a critical assessment of whether the Discovery Test genuinely reduces pendency or merely relocates it. Part VIII considers the comparative architecture of institutional joinder rules, and Part IX concludes with a legislative proposal.

II. THE STATUTORY SILENCE

The Act nowhere uses the words 'join', 'implead', or 'add as a party'. Section 2(1)(h) defines a 'party' as a party to the arbitration agreement, without more. Section 7 defines an arbitration agreement by reference to a defined legal relationship and certain formal requirements. Sections 8 and 45 (the provisions empowering 'judicial authorities' to refer parties to arbitration) were amended in 2015 and 2019 respectively to extend their reach to 'a party to

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[4]Vidya Drolia v Durga Trading Corpn (2021) 2 SCC 1.

[5]In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899, 2023 INSC 1066.

[6]SBI General Insurance Co Ltd v Krish Spinning, 2024 INSC 532.

[7]Cox and Kings Ltd v SAP India (P) Ltd, 2023 INSC 1051 : 2023 SCC OnLine SC 1634.

the arbitration agreement or any person claiming through or under him', language that on its face contemplates persons beyond the immediate signatories. Section 16 confers on the arbitral tribunal the competence to rule on its own jurisdiction, including objections to the existence or validity of the arbitration agreement, but says nothing express about impleading a person who was never before it. Section 17 confers power to grant interim measures within a closed list of categories, none of which mentions joinder. Section 21 fixes the date on which arbitral proceedings are deemed to commence, for limitation purposes, by reference to a notice of invocation.[8]

This is a genuine textual vacuum, and it produced two interpretive camps among the High Courts. The first, visible in the Bombay High Court's decision in ONGC Ltd v Jindal Drilling and Industries Ltd,[9] the Delhi High Court's decisions in Balmer Lawrie & Co Ltd v Saraswathi Chemicals[10] and Sudhir Gopi v Indira Gandhi National Open University,[11] the Madras High Court's decision in V.G. Santhosam v Shanthi Gnanasekaran,[12] and, most elaborately, the Delhi High Court's decision in Arupri Logistics (P) Ltd v Vilas Gupta[13] , read the absence of an express joinder power as a deliberate legislative withholding. On this view, an arbitral tribunal is a creature of contract and statute in a narrower sense than a court: it possesses only the powers the Act and the arbitration agreement expressly confer, cannot invoke the residuary or inherent powers available to a civil court under the Code of Civil Procedure 1908, and cannot expand its own jurisdiction to bind a person who never agreed, even ostensibly, to submit to it. Since only Sections 8 and 45 had been amended to extend 'party' status to persons claiming through or under a signatory, and since that amendment spoke only to 'judicial authorities' and not to tribunals, the implication, on an expressio unius reading, was that Parliament had considered the question and confined the expanded joinder power to courts at the referral stage.

The second camp, represented by the Gujarat High Court's decisions in IVRCL Ltd v Gujarat State Petroleum Corpn Ltd[14] and IMC Ltd v Board of Trustees of Deendayal Port Trust,[15] and later joined by the Bombay High Court's own reconsideration in Cardinal Energy and Infra

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[8]The Arbitration and Conciliation Act 1996, ss 2(1)(h), 7, 8, 16, 17(1)(ii), 21 and 45.
[9]ONGC Ltd v Jindal Drilling and Industries Ltd (2015) SCC OnLine Bom 1707.
[10]Balmer Lawrie & Co Ltd v Saraswathi Chemicals (Proprietors: Saraswathi Leather) (2017) SCC OnLine Del 7519.
[11]Sudhir Gopi v Indira Gandhi National Open University (2017) SCC OnLine Del 8345.
[12]V.G. Santhosam v Shanthi Gnanasekaran (2020) SCC OnLine Mad 560.
[13]Arupri Logistics (P) Ltd v Vilas Gupta (2023) SCC OnLine Del 4297.
[14]IVRCL Ltd v Gujarat State Petroleum Corpn Ltd, First Appeal No. 1714 of 2015 (Guj HC, decided 8–13 October 2015) (Kureshi J).
[15]IMC Ltd v Board of Trustees of Deendayal Port Trust (2018) SCC OnLine Guj 4972.

Structure (P) Ltd v Subramanya Construction and Development Co Ltd[16] , took a more functional view. If an arbitral tribunal already possesses the authority to lift the corporate veil, apply the alter ego doctrine, and determine questions of agency and privity as part of its ordinary adjudicatory function, there is no principled reason to treat the application of the Group of Companies Doctrine differently merely because it happens to bear on the composition of the array of parties rather than the merits of a claim. On this account, the tribunal is the more competent forum precisely because it alone has the benefit of pleadings, disclosure and oral evidence: the very things a referral court, confined by Section 11(6A) to a prima facie inquiry, does not have.

This conflict could not be resolved by textual analysis alone, because the text was, on either reading, genuinely silent. What ASF Buildtech supplies is not a newly discovered word in the statute, but a method for resolving silence, and it is to the genealogy of that method that this article now turns.

III. TWO DECADES OF DOCTRINAL DRIFT: FROM SBP TO KRISH SPINNING

A. SBP & Co and the High-Water Mark of Referral-Court Scrutiny

In SBP & Co v Patel Engg Ltd, a seven-judge bench characterised the power exercised by the Chief Justice (or a designate) under Section 11 as a judicial power rather than a merely administrative one, and held that this entitled the referral court to conclusively decide preliminary jurisdictional issues before referring the parties to arbitration.[17] The practical effect was to make the referral court, rather than the eventual tribunal, the natural forum for resolving contested questions of party status, since any such question could plausibly be characterised as bearing on whether an arbitration agreement existed between the parties actually before the court.

B. Legislative Reversal and the Limits of Section 11(6A)

Parliament reversed this expansion through the 2015 Amendment, inserting Section 11(6A) to confine the referral court's examination to the existence of an arbitration agreement.[18] The

[16]Cardinal Energy and Infra Structure (P) Ltd v Subramanya Construction and Development Co Ltd (2024) SCC OnLine Bom 964.
[17]SBP & Co (n 3).
[18]The Arbitration and Conciliation (Amendment) Act 2015, inserting s 11(6A) into the Arbitration and Conciliation Act 1996, with effect from 23 October 2015.

provision was a direct legislative response to the mini-trial phenomenon SBP had encouraged, and it succeeded in narrowing (though, as the next two developments show, did not eliminate) the referral court's appetite for fact-finding.

C. Vidya Drolia's Residual Filter

In Vidya Drolia v Durga Trading Corpn, the Supreme Court nonetheless preserved a residual role for the referral court to screen out claims that are ex facie non-arbitrable or otherwise 'deadwood', reasoning that a purely prima facie standard risked referring plainly meritless disputes to the expense of a full arbitration.[19] This residual filter reopened, in a narrower compass, precisely the kind of evidentiary inquiry Section 11(6A) had been enacted to close off, since determining whether a claim is 'deadwood' often requires the referral court to form at least a preliminary view of the underlying facts.

D. The Stamp Duty Reference and Krish Spinning

The seven-judge Constitution Bench in In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act 1996 and the Indian Stamp Act 1899 held, in the specific context of unstamped or insufficiently stamped agreements, that questions concerning the existence, validity and enforceability of an arbitration agreement are for the tribunal, and not the referral court, to determine.[20] SBI General Insurance Co Ltd v Krish Spinning then extended this same reasoning to Vidya Drolia's residual 'deadwood' category itself, holding that even that limited filtering function must yield to the tribunal.[21] Krish Spinning is, in effect, the moment at which the last remaining doctrinal aperture through which a referral court could conduct its own evidentiary inquiry was closed. Read together, SBP, the 2015 Amendment, Vidya Drolia and Krish Spinning describe a ratchet: each development narrowed, but rarely eliminated outright, the referral court's residual discretion, until Krish Spinning left almost none.

This lineage, from SBP to Krish Spinning, is largely absent from existing commentary on ASF Buildtech, which tends to treat the case as continuous chiefly with Cox and Kings and the Group of Companies Doctrine. But the Krish Spinning line matters because it supplies the second premise of the ASF Buildtech syllogism: not only had the textual basis of the Group of

[19] Vidya Drolia (n 4).
[20] In Re: Interplay (n 5).
[21] Krish Spinning (n 6).

Companies Doctrine been relocated to a provision applicable to tribunals (as Part IV below discusses), but the institutional preference for tribunal-stage fact-finding over referral-court fact-finding had already, by 2024, hardened into the default rule for every other species of preliminary jurisdictional question. ASF Buildtech simply completes the set by adding non-signatory joinder to that list.

IV. COX AND KINGS: RELOCATING THE TEXTUAL BASIS OF THE GROUP OF COMPANIES DOCTRINE

Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc had sourced the Group of Companies Doctrine in the phrase 'claiming through or under', then found in Section 45 of the Act, and subsequently read across to Section 8 after the 2015 Amendment.[22] Because both provisions confer power specifically on 'judicial authorities' (a phrase understood to mean courts rather than tribunals), the doctrinal foundation of non-signatory joinder was, on the Chloro Controls reading, definitionally tied to the referral stage. A tribunal, on this view, could apply the doctrine only derivatively, if the referral court had already found the non-signatory to be bound and directed its inclusion.

Cox and Kings Ltd v SAP India (P) Ltd, decided by a Constitution Bench in 2023, dismantled this premise.[23] The Court held that a non-signatory bound under the Group of Companies Doctrine is not merely a person 'claiming through or under' a signatory within the meaning of Sections 8 and 45; it is a 'party' to the arbitration agreement in its own right, within the meaning of Section 2(1)(h) read with Section 7. Because Sections 2(1)(h) and 7 apply uniformly to arbitral tribunals and referral courts alike (unlike Sections 8 and 45, which by their own terms speak only to 'judicial authorities'), the doctrinal foundation for non-signatory status became, for the first time, textually available to a tribunal deciding its own jurisdiction under Section 16, and not merely to a court exercising Section 11 or Section 8 powers.

Cox and Kings reached this conclusion through the 'always speaking' canon of statutory construction: the proposition that a statute enacted in 1996, when standard commercial practice still assumed a largely bilateral model of contracting, must nonetheless be read to accommodate the complex, multi-entity group structures that now dominate large commercial transactions.[24]

[22] Chloro Controls India (P) Ltd v Severn Trent Water Purification Inc (2013) 1 SCC 641.
[23] Cox and Kings (n 7).
[24] Cox and Kings (n 7) (on the 'always speaking' character of the Arbitration and Conciliation Act 1996).

This is the second premise that ASF Buildtech inherits and extends: not merely that the Group of Companies Doctrine belongs, textually, to a provision available to tribunals, but that the interpretive method by which that relocation was achieved (reading a decades-old statute dynamically, in light of present commercial reality) is itself a legitimate and recurring tool of construction in this field.

V. ASF BUILDTECH: COMPLETING THE INTERPRETIVE CIRCUIT

A. Facts and Procedural History

The dispute arose out of a Works Contract dated 21 November 2016 between Shapoorji Pallonji and Company Private Limited (‘Shapoorji Pallonji’) and ASF Insignia SEZ Private Limited (‘AISPL’), for the development of a Special Economic Zone project. A Novation Agreement and a Letter of Comfort, both dated 17 April 2018, substituted Black Canyon SEZ Private Limited (‘BCSPL’), an associate company within the ASF Group, as co-developer, with the Comfort Letter recording that AISPL and BCSPL were group companies under common management and control. A Settlement Agreement followed on 24 July 2020. When BCSPL initiated arbitration against Shapoorji Pallonji concerning the Settlement Agreement, Shapoorji Pallonji filed a counterclaim naming both AISPL and ASF Buildtech Private Limited (‘ABPL’), the ultimate holding company, holding 81.01% and 100% of the shareholding in BCSPL and AISPL respectively, as additional respondents, invoking the Group of Companies Doctrine on the strength of common branding, a shared registered address, cross-attendance by the same personnel at contract meetings under the ‘ASF Group’ and ‘ASF Project Team’ designations, and the Comfort Letter's acknowledgment of common management.[25]

ABPL and AISPL each filed applications under Section 16 challenging the tribunal's jurisdiction over them. The sole arbitrator dismissed these applications by two orders, dated 23 May 2023 and 17 October 2023, holding that the question of their role in the ASF Group's dealings with Shapoorji Pallonji raised mixed questions of fact and law that could not be resolved without first arraying them as parties. On appeal under Section 37(2), the Delhi High Court upheld the impleadment, while correcting the arbitrator's conflation of the Group of Companies Doctrine with the distinct doctrine of piercing the corporate veil. Only ABPL

[25] ASF Buildtech (n 2) (recording the Comfort Letter dated 17 April 2018 and the common use of the ‘ASF Group’ and ‘ASF Project Team’ designations).

carried the challenge to the Supreme Court.[26]

B. Two Misconceptions

The Court traced the historical judicial reluctance to recognise a tribunal's joinder power to two intertwined misconceptions.[27] The first was the assumption, visible across the Jindal Drilling/Sudhir Gopi/V.G. Santhosam/Arupri Logistics line discussed in Part II, that the Act's silence on joinder amounted to a deliberate withholding of the power from both courts and tribunals, rather than a gap open to interpretation. The second was the SBP-era assumption that any preliminary jurisdictional question, including the identity of the parties bound by the agreement, had to be conclusively settled by the referral court before a tribunal could properly be constituted around the disputed party. Both premises, the Court held, had already been undermined: the first by the general trend toward reading implied and functional powers into arbitral competence, and the second by the very Krish Spinning line traced in Part III.

C. The 'Always Speaking' Reading of Section 16 and Implied Incidental Powers

The interpretive core of the judgment lies in its treatment of Section 16. The Court read the provision through the ‘always speaking’ canon, and held that a power to ‘rule on’ a tribunal's own jurisdiction (including questions concerning the existence and validity of the arbitration agreement) necessarily carries with it the power to give that ruling practical effect.[28] A tribunal that could determine, as a matter of law and fact, that a particular entity is bound by the arbitration agreement, but could not then bring that entity within the proceedings, would possess a power that is jurisdictionally hollow: capable of pronouncement but incapable of consequence. The Court went further, locating the source of a tribunal's jurisdiction not in the subjective consent or agreement of the parties as such, but in the arbitration agreement itself as an objective, legally cognisable instrument: jurisdiction, on this account, arises in a de jure sense from the conclusion of a valid arbitration agreement, in much the same way that the creation of an interest in property brings the jurisdiction of the competent territorial court into existence, regardless of whether that court has yet been called upon to exercise it.[29] Because a non-signatory bound under the Group of Companies Doctrine is, after Cox and Kings, a ‘party’

[26] ASF Buildtech (n 2); see also the impugned judgment of the Delhi High Court in Arb A (Comm) No 4 of 2024, decided 4 July 2024.
[27] ASF Buildtech (n 2) paras 49–50.
[28] ASF Buildtech (n 2) para 117.
[29] ASF Buildtech (n 2) para 141.

to the agreement in this objective sense from the moment the agreement is concluded, the tribunal's jurisdiction over that party likewise exists in principle from that moment, independent of whether it was named at the Section 11 stage.

D. Existence versus Intention

A structurally important move in the judgment is the separation of two distinct inquiries that had previously tended to collapse into one another: the 'existence' of an arbitration agreement, and the 'intention' of a particular non-signatory to be bound by it. The former, the Court held, is the only inquiry appropriate to the referral stage under Section 11(6A): a document-based, prima facie question of whether a formal arbitration agreement exists at all, in writing or by an equivalent means recognised under Section 7. The latter, whether a specific non-signatory manifested through its conduct in the negotiation, performance or termination of the underlying contract an intention to be bound, is a question of consent that is inherently fact-intensive, and is accordingly reserved for the tribunal, which alone has the benefit of pleadings and evidence to resolve it.[30] This distinction operationalises, for the referral stage specifically, the general principle already established in Cox and Kings that mere corporate-group membership is insufficient and that a genuine, evidenced intention to arbitrate must be shown.

E. The Discovery Test

For determining whether that intention exists, the Court reaffirmed and applied the five-factor test first articulated in ONGC Ltd v Discovery Enterprises (P) Ltd: (i) the mutual intent of the parties; (ii) the relationship of the non-signatory to a signatory party; (iii) the commonality of the subject matter; (iv) the composite nature of the underlying transactions; and (v) the performance of the contract.[31] Applying this 'Discovery Test', the Court found that the common branding and registered address of the ASF Group, the cross-attendance of the same personnel at contract meetings under both the 'AISPL' and 'ASF Group'/'ASF Project Team' designations, and the Comfort Letter's express acknowledgment of common management and control between AISPL and BCSPL, cumulatively satisfied the test in respect of ABPL as the Group's ultimate holding entity.

[30]ASF Buildtech (n 2); Cox and Kings (n 7).
[31]ONGC Ltd v Discovery Enterprises (P) Ltd (2022) 8 SCC 42.

F. Section 21 Notice as a Limitation Device, Not a Jurisdictional Gate

ABPL had argued that its impleadment was invalid because it had never received a notice of invocation under Section 21.[32] The Court rejected this, holding that Section 21's function is definitional and temporal: it fixes the date from which limitation runs, and the point from which the referral court's Section 11 jurisdiction may be invoked, rather than a jurisdictional precondition applicable to every eventual party to the reference. Relying on Adavya Projects (P) Ltd v Vishal Structurals (P) Ltd, the Court reasoned that Section 16's competence-competence encompasses the identity of the parties bound by the agreement as one of the jurisdictional questions committed to the tribunal, and that this authority cannot be made conditional on a procedural formality addressed to an entirely different statutory purpose.[33] Once impleaded, a non-signatory retains full recourse to challenge its inclusion under Section 16, and thereafter under Sections 34 and 37, recourse the Court considered adequate to protect against any prejudice arising from the absence of prior notice.

VI. AN INTERPRETIVE METHOD, NOT MERELY A NEW RULE

Read individually, SBP, Vidya Drolia, Krish Spinning, Chloro Controls, Cox and Kings and ASF Buildtech look like six discrete rulings on six discrete questions. Read together, they describe a single, continuous interpretive trajectory. SBP's formalist, text-bound reading of Section 11 (a reading that treated the referral court's power as necessarily encompassing every preliminary issue) was legislatively reversed by the 2015 Amendment; Vidya Drolia's compromise position, which preserved a residual role for the referral court out of an entirely reasonable concern about litigating meritless claims, was itself judicially narrowed by Krish Spinning, applying the same purposive, ‘always speaking’ logic the Constitution Bench had used in the Stamp Duty reference; Chloro Controls' anchoring of the Group of Companies Doctrine in the ‘claiming through or under’ language of Sections 8 and 45 (language confined to ‘judicial authorities’) was corrected by Cox and Kings, which relocated the doctrine to Sections 2(1)(h) and 7, provisions that speak equally to courts and tribunals. ASF Buildtech's distinctive contribution is to apply this same interpretive method to Section 16 itself, and to supply, through the doctrine of implied incidental powers, the textual hook that the joinder power specifically had always lacked: a power to rule on jurisdiction implies a power to make

[32] The Arbitration and Conciliation Act 1996, s 21.
[33] Adavya Projects (P) Ltd v Vishal Structurals (P) Ltd, 2025 INSC 507.

that ruling effective.

Framed this way, the deeper significance of ASF Buildtech is not that Indian arbitration law now recognises a tribunal's joinder power (though it does) but that a particular style of reasoning about arbitral competence has, over two decades, displaced an older and more restrictive one. The Jindal Drilling/Sudhir Gopi/V.G. Santhosam/Arupri Logistics line of authority proceeded from the premise that an arbitral tribunal, being a creature of private agreement rather than an organ of the state, possesses only those powers expressly conferred upon it, and that any doubt should be resolved against an expansion of its authority. ASF Buildtech, building on Cox and Kings and Krish Spinning, proceeds from something closer to the opposite premise: that an arbitral tribunal is a statutory creature performing a statutorily assigned adjudicatory function, and that it possesses whatever incidental powers are functionally necessary to discharge that function effectively, whether or not those powers are separately spelled out. This is not a small doctrinal adjustment. It is a change in the default interpretive posture toward the entire Act, and its implications will likely extend well beyond non-signatory joinder to any future dispute about whether a tribunal possesses a particular procedural or remedial power that the text does not expressly mention.

VII. CRITICAL ASSESSMENT: DOES THE DISCOVERY TEST RELOCATE THE MINI-TRIAL PROBLEM?

A. The Evidentiary Breadth of the Test

The premise underlying ASF Buildtech's efficiency rationale is that moving the joinder inquiry from the referral court to the tribunal shrinks the burden of litigating non-signatory status, because the tribunal, unlike the referral court under Section 11(6A), is permitted to conduct a full evidentiary inquiry. But this reasoning proves too much: it is precisely because the Discovery Test invites a full evidentiary inquiry into the mutual intent of the parties, the commonality of subject matter across a series of related contracts, the composite nature of the transactions, and years of conduct in performance that the inquiry so closely resembles the ‘mini-trial’ Section 11(6A) was designed to keep out of the referral stage in the first place. Relocating that inquiry to the tribunal does not shrink it; it changes only its venue and its timing, from before the constitution of the tribunal to within the arbitral record itself, and from a proceeding not ordinarily reviewable in detail to one that is fully available for scrutiny under Sections 34 and 37.

The case's own procedural history illustrates the point. The sole arbitrator required two separate, reasoned orders (dated 23 May 2023 and 17 October 2023) to dispose of the Section 16 objections. The Delhi High Court's Section 37 review of those orders traversed extensive factual material concerning the ASF Group's internal correspondence, meeting minutes, and Comfort Letter. And this entire sequence preceded, rather than replaced, a further round of appellate litigation culminating in a lengthy Supreme Court judgment devoted almost entirely to the single question of whether ABPL could be impleaded at all. Whatever pendency ASF Buildtech saves in future cases by removing the Section 11 stage from this sequence, the underlying factual inquiry (common branding, shared personnel, Comfort Letters, meeting minutes) does not disappear; it simply moves one stage downstream, where it remains available to be relitigated on appeal from the eventual award.

B. Entire Agreement Clauses and the Limits of Conduct-Based Consent

A second difficulty concerns the relationship between the Discovery Test's reliance on conduct external to the four corners of the contract (pre-contractual meeting minutes, post-contractual emails, and informal communications under a shared corporate banner) and the entire-agreement or non-reliance clauses that are now standard in sophisticated commercial contracts of the kind at issue in ASF Buildtech. Indian courts have historically given effect to such clauses to exclude reliance on communications and conduct outside the four corners of the written instrument, as the Bombay High Court did in Neelkanth Mansions and Infrastructures (P) Ltd v Urban Infrastructure Ventures Capital Ltd.[34] ASF Buildtech does not squarely address how a tribunal applying the Discovery Test should treat an entire-agreement clause in the underlying contract, or a disclaimer of reliance on pre-contractual representations, when the very factors the test asks it to weigh (mutual intent inferred from negotiation history, commonality inferred from correspondence) are the kinds of extraneous material such clauses are typically drafted to exclude. This is not a fatal gap, but it is a doctrinal seam left open by the judgment, and one likely to generate its own satellite litigation as parties begin drafting arbitration clauses specifically to pre-empt Discovery Test findings.

C. The Standard of Review for Jurisdictional Facts

A third and related difficulty concerns the standard of review that a Discovery Test finding will

[34]Neelkanth Mansions and Infrastructures (P) Ltd v Urban Infrastructure Ventures Capital Ltd (2018) SCC OnLine Bom 5970.

attract on a Section 34 or Section 37 challenge. Ordinary contractual interpretation by an arbitrator is reviewed deferentially: as the Bombay High Court held in NOD Bearing (P) Ltd v Bhairav Bearing Corpn, so long as the arbitrator's construction of an agreement reflects a possible view, a reviewing court will not substitute its own interpretation merely because another view was available.[35] But a finding that a particular non-signatory is bound by an arbitration agreement is not, in substance, an ordinary contractual finding on the merits; it is a foundational jurisdictional fact that determines whether the tribunal had any authority over that party at all. Indian courts have traditionally been less deferential in reviewing findings that go to the existence of jurisdiction than in reviewing findings that go to the merits of a dispute properly within that jurisdiction, precisely because an error on the former question is not merely wrong but ultra vires. If that traditional distinction holds for Discovery Test findings, and nothing in ASF Buildtech suggests otherwise, then impleadment findings may in practice attract closer post-award scrutiny than ordinary contractual findings, which would further undercut the pendency-reduction rationale that the ‘one-stop forum’ framing is meant to capture.

None of this suggests that ASF Buildtech was wrongly decided, or that the allocation of the joinder inquiry to the tribunal is the wrong institutional choice. The point is narrower: the efficiency gains claimed for the decision rest on an empirical assumption, namely that a fact-intensive, conduct-based, multi-factor test will generate fewer or shorter downstream disputes once moved from the referral court to the tribunal, an assumption that the judgment itself does not test, and that the case's own nearly decade-long procedural history gives some reason to doubt.

VIII. A COMPARATIVE INSTITUTIONAL LENS: JOINDER BY RULE RATHER THAN BY IMPLICATION

It is worth noting that jurisdictions with a mature institutional-arbitration culture have generally not needed to resolve the joinder question through statutory implication at all. The Singapore International Arbitration Centre's Rules (Rule 7 under the 2016 edition, now Rule 18 under the 2025 edition) allow both existing parties and non-parties to apply for joinder, either to the SIAC Court before the tribunal is constituted or to the tribunal itself thereafter, on a threshold showing that the additional party is prima facie bound by the arbitration agreement; critically,

[35] NOD Bearing (P) Ltd v Bhairav Bearing Corpn (2019) SCC OnLine Bom 366.

the institution's own screening decision is expressly stated to be without prejudice to the tribunal's later, fuller ruling on its own jurisdiction over the joined party.[36] The Hong Kong International Arbitration Centre's Administered Arbitration Rules contain a closely analogous two-stage mechanism under Article 27, again distinguishing a low, threshold-level joinder decision from the tribunal's separate and later power to rule definitively on jurisdiction.[37]

The comparative point is not that India should simply import SIAC or HKIAC rules; ad hoc arbitration, without any equivalent of the SIAC Court to perform an initial administrative screening, remains the norm for much of Indian domestic arbitration, and any institutional analogy has to be adapted accordingly. The point is rather that these institutions solved the joinder problem by separating two questions that ASF Buildtech's Discovery Test currently answers in a single step: a low-threshold, prima facie question of whether a party should be brought into the proceeding at all, and a separate, higher-threshold, fully evidenced question of whether that party is, on the merits, bound by the arbitration agreement. By asking the tribunal to determine both questions simultaneously, through a single multi-factor test applied once, ASF Buildtech's framework does not distinguish a preliminary joinder decision from a final jurisdictional ruling, a distinction that both SIAC and HKIAC treat as fundamental. This absence of institutional gatekeeping is, in effect, one reason the Indian question had to be litigated as one of default statutory power in the first place: where a mature set of institutional rules would ordinarily supply the joinder mechanism by agreement at the time of contracting, Indian courts and tribunals have had to construct an equivalent mechanism by judicial implication.

IX. TOWARD A BOUNDED STATUTORY JOINDER PROVISION

The Supreme Court itself observed that the absence of any express joinder provision, in either the existing Act or the proposed Arbitration and Conciliation (Amendment) Bill 2024, is a significant gap, and urged the Department of Legal Affairs to address it, noting that uncertainty of this kind is detrimental to commercial confidence.[38] This article's comparative analysis suggests a specific shape for that reform. Rather than a bare provision simply authorising ‘impleadment’ (which would leave the Discovery Test's breadth, and the two difficulties

[36]SIAC Arbitration Rules 2016, r 7; SIAC Arbitration Rules 2025, r 18.
[37]HKIAC Administered Arbitration Rules 2018, art 27.
[38]ASF Buildtech (n 2) para 170 (urging the Department of Legal Affairs, Ministry of Law and Justice, Government of India, to address the power of impleadment or joinder while the Arbitration and Conciliation (Amendment) Bill, 2024 remains under consideration).

identified in Part VII, entirely untouched), the Bill could adopt a two-stage architecture modelled loosely on the SIAC and HKIAC rules: a low threshold, prima facie standard, sufficient for an initial decision (necessarily made by the tribunal itself, given the absence of an Indian equivalent to the SIAC Court in most domestic arbitrations, though an appointing institution could perform this role in institutional arbitrations) to bring a non-signatory into the proceeding; and a separate, express preservation of that non-signatory's right to a full merits determination of its 'veritable party' status under Section 16, reviewable under Sections 34 and 37 on the ordinary standard applicable to jurisdictional objections.

Codifying these two stages separately, rather than leaving a single multi-factor test to discharge both functions at once, would offer three advantages over the present position. First, it would give arbitration drafters and their clients textual notice of the standard for joinder, rather than requiring them to reconstruct that standard from a lengthy judgment and the case law it collects. Second, it would clarify, prospectively, how an entire-agreement or non-reliance clause interacts with the joinder inquiry, a question the Bill could resolve as a matter of legislative policy rather than leaving it to arise as a doctrinal seam in future litigation. Third, and most directly relevant to the pendency concerns that motivated ASF Buildtech in the first place, it would allow the low-threshold joinder decision to proceed quickly, without requiring the tribunal to resolve, at the outset, the full evidentiary question that currently attracts the possibility of prolonged post-award review.

X. CONCLUSION

ASF Buildtech resolves a genuine and long-standing conflict in Indian arbitration law, and its central doctrinal holding, that an arbitral tribunal may implead a non-signatory found to be bound by the arbitration agreement without a prior direction from the referral court, is a coherent extension of principles already established in Cox and Kings, Krish Spinning, and the Stamp Duty reference. Its more durable contribution, however, lies in the interpretive method by which that holding was reached: a deliberate, and now well-established, willingness to read the Act's silences through the 'always speaking' canon and a doctrine of implied incidental powers, rather than through the older presumption that an arbitral tribunal possesses only what the text expressly confers. That method completes a two-decade migration in Indian arbitration jurisprudence, and its implications will likely be felt well beyond the specific question of non-signatory joinder.

At the same time, the decision's stated ambition, namely a genuine reduction in the pendency historically associated with non-signatory disputes, rests on an empirical premise that the judgment does not itself test: that the Discovery Test's fact-intensive inquiry into mutual intent, commonality, and conduct will generate less downstream litigation once relocated to the tribunal than it generated at the referral stage. The demonstrated tendency of Indian courts to apply a less deferential standard of review to jurisdictional facts than to ordinary merits findings, the unresolved relationship between the Discovery Test and entire-agreement clauses, and the case's own decade-long procedural history all suggest that this premise deserves scrutiny rather than acceptance. Until Parliament legislates a more clearly bounded, two-stage joinder framework of the kind found in the rules of leading arbitral institutions, the 'one-stop forum' achieved by ASF Buildtech may, in a meaningful share of future disputes, prove to be the first stop in the litigation rather than the last.