

RESERVED JUDGMENT

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

ARBITRATION APPLICATION No. 22 OF 2017

JUDGMENT RESERVED : **23RD DECEMBER, 2022**

JUDGMENT DELIVERED : **03RD MAY, 2023**

Between:

Smt. Neelam Jain. ...Applicant

and

M/s Texla Towers Limited and another. ...Respondents

Counsel for the applicant. : Mr. Abhijay Negi, the learned counsel.

Counsel for the respondents. : Mr. Piyush Garg, learned counsel.

JUDGMENT :

The applicant has preferred the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996, to seek the appointment of an arbitrator to adjudicate the disputes between the parties arising out of their agreement dated 14.10.1992.

2. The brief facts of the case are that the husband of the applicant, namely, Late Shri Satish Chand Jain, and his brothers and sister viz. Shri Sushil Chand Jain, Shri Ramesh Chand Jain and Smt. Saroj Gupta entered into an agreement dated 14.10.1992 with respondent No. 1-M/s

Texla Towers Ltd. through its Chairman, Shri Sardar Raja Singh – respondent no. 2. This agreement contains an arbitration clause, in Clause 19, which provides *“That in case of any dispute or difference arising between the parties during the subsistence of this contract the same shall be settled through Arbitration and the provisions of the Arbitration Act will apply.*

3. After the parties entered into the aforesaid agreement, a follow-up meeting was held on 24.12.1992, wherein Shri Sushil Chand Jain, Shri Satish Chand Jain, Shri Ramesh Chand Jain, and S. Raja Singh participated. The minutes of the said meeting were drawn up and agreed by the said persons. Some of the salient terms recorded in the minutes are as follows :-

“1. That Property No. 13/A, Rajpur Road, Dehradun consisting of Rink Hall on the first floor and New Empire Cinema on the ground floor shall be purchased by Texla Towers Ltd in furtherance and in continuance of agreement dated 14/10/92 between Sardar Raja Singh on the one hand and Sarvshri Sushil Chand Jain, Satish Chand Jain, Shri Ramesh Chand Jain and Smt. Saroj Gupta on the second hand. This would also include the contents of the letter dated 29/9/92.

2. That the following persons shall have shares with percentage of shares as detailed hereunder:

<i>(a) S. Raja Singh</i>	<i>55%</i>
<i>(b) Shri Sushil Chand Jain</i>	<i>9%</i>
<i>(c) Shri Satish Chand Jain</i>	<i>13.5%</i>
<i>(d) Shri Ramesh Chand Jain</i>	<i>13.5%</i>
<i>(e) Smt. Saroj Gupta</i>	<i>9%</i>

3. That Shri Sushil Chand Jain, Shri Satish Chand Jain and Shri Ramesh Chand Jain have nominated the

following persons as share holders of the Company against their respective share as detailed hereunder

(a) Nominee of Shri Sushil Chand Jain Smt. Vimlesh Jain

(b) Nominees of Shri Satish Chand Jain

- 1. Smt. Neelam Jain*
- 2. Shri Sanjay Jain*
- 3. Smt. Rachna Jain*

(c) Nominees of Shri Ramesh Chand Jain

- 1. Smt. Manju Rani Jain*
- 2. Shri Sandeep Jain*

4. That out of the nominees of Shri Satish Chand Jain, Smt. Neelam Jain shall be one of the directors of the aforesaid company.

5. That out of the nominees of Shri Ramesh Chand Jain, Shri Sandeep Jain shall be one of the directors of the aforesaid Co.

6. That Sushil Chand Jain shall be one of the Directors of the Co.”

4. The applicant states that in terms of the Agreement dated 14.10.1992, and the Resolution dated 24.12.1992, five sale deeds were executed by the owners, i.e. the applicant's husband and other co-owners, in favour of respondent no. 1, i.e., M/s Texla Towers Limited in respect of immovable properties.

5. The applicant states that under the Agreement dated 14.10.1992, and the Resolution dated 24.12.1992, 45% of the shares of Texla Towers Limited belong to the applicant's family, and 55% of the shares belong to the

family of Respondent No. 2, and the applicant was also appointed as a director of the respondent-company.

6. It is the case of the applicant that after the execution of the sale deeds, pursuant to the Agreement and Resolution, respondent no. 1 applied for renewal of licence by the Entertainment Department, of the New Empire Cinema Hall, and for the change of name of the licensee to that of M/s Texla Towers Limited, through its Chairman Sardar Raja Singh, and of Shri Sushil Chand Jain. Consequently, a renewed/ amended license was issued to New Empire Cinema Hall in the name of M/s Texla Towers Limited - through its chairman Sardar Raja Singh, and Director Shri Sushil Chand Jain for the period 24.05.1993 to 31.03.1994. The applicant states that, later on, by omission, the name of Sushil Chand Jain was not mentioned in subsequent renewals. Shri Satish Chand Jain expired on 21.11.1997, Shri Sushil Chand Jain expired on 14.05.2009, and Shri Ramesh Chand Jain expired on 26.08.2012.

7. The applicant states that she is the sole surviving director of respondent no. 1 – who represents

the applicant's family, and owns 45% shares of the respondent No. 1, which runs the New Empire Cinema.

8. The applicant states that in terms of the Agreement dated 14.10.1992, a joint bank account was to be opened for the business of the respondent-company, and the same was to be operated by Shri Sushil Chand Jain, Ramesh Chand Jain – on behalf of the applicant's family, and the opposite party no. 2. It was also agreed that the license of the New Empire Cinema shall be taken in the joint names of Sardar Raja Singh and Shri Sushil Chand Jain on behalf of the company, and it was also agreed upon that no cash transaction will be made by any of the Directors of the company, and all bank transactions will be made by cheque/ Bank drafts.

9. The applicant states that since all the three brothers, namely Shri Satish Chand Jain, Shri Sushil Chand Jain and Shri Ramesh Chand Jain have expired, and the applicant is the only surviving director on behalf of family of applicant, the applicant sent a letter dated 07.04.2017 to the Assistant Commissioner, Entertainment Development, Dehradun for adding the name of the applicant in the license of New Empire Cinema as a

Director of M/s Texla Towers Limited, in the place of Shri Sushil Chand Jain.

10. The applicant also sent a letter dated 10.04.2017 to the opposite parties to provide to the applicant the complete bank accounts for the last three years, with the balance sheet of the respondent-company, within 7 days, and to get the name of the applicant added as a director of the respondent-company in the license of the New Empire Cinema, and in the bank accounts. The applicant also requested the opposite parties not to let out any part of the property to any third person, without the consent of the members of the applicant's family.

11. That the applicant sent another registered letter to the opposite parties dated 20.04.2017, for making the compliance of the earlier letter dated 10.04.2017, and to not let out any part of the cinema building to any third party.

12. The applicant states that the opposite parties have not given any response, and have not complied with her directions as mentioned in the letter.

13. The applicant states that, therefore, disputes have arisen between the parties, and the same are covered by the Arbitration Agreement dated 14.10.1992. The applicant, therefore, seeks the appointment of an arbitrator to adjudicate the disputes, which have arisen between the parties.

14. The applicant invoked the arbitration agreement vide registered letter dated 20.04.2017. However, no arbitrator has been mutually appointed in terms of agreement dated 14.10.1992. Consequently, this application has been preferred.

15. The submission of Mr. Negi, learned counsel for the applicant is that the respondents have not seriously disputed the factum of execution of the Agreement dated 14.10.1992. The said agreement contains an Arbitration Clause in Clause 19, which provides the disputes arising between the parties under the said Agreement, shall be adjudicated/ resolved through arbitration. He submits that, since the applicant is the successor-in-interest of one of the parties to the said agreement, namely Shri Satish Chand Jain, the rights under the said agreement, which vested in Shri Satish Chand Jain, have devolved upon her.

16. Mr. Negi submits that, since the meeting dated 24.12.1992 was held between three of the signatories, namely Shri Sushil Chand Jain, Shri Satish Chand Jain and Shri Ramesh Chand Jain on the one hand, and respondent no. 2, who is representing respondent no. 1, on the other hand, in pursuance of the said agreement, wherein further decisions were taken, the applicant is entitled to enforce rights under the Agreement, as well as under the Minutes of Meeting held on 24.12.192, since they were acted upon by the parties to the agreement.

17. The respondents have opposed this application on several grounds. The respondents contend that the alleged cause of action pleaded by the applicant arose between the period 1992 to 1993. The notice for appointment of an arbitrator has been, allegedly, given on 20.04.2017, and the present petition has been filed in March, 2018. Thus, it is claimed that the present arbitration petition is barred by time. The submission of Mr. Piyush Garg, learned counsel for the respondents is that the name of the predecessor-in-interest of the applicant, namely Shri Sushil Chand Jain, was not included in the license of New Empire Cinema after 31.03.1994. Thus, according to the respondents, the cause of action

arose in favour of Shri Sushil Chand Jain in the year 1994 itself. It is further argued that the applicant had herself sought the complete bank account statements of the respondent no.1-company on 10.04.2017. Thus, the cause of action arose in favour of the applicant, firstly, in 1994 and, thereafter, in the year 2017.

18. The respondents also contend that the claim regarding 45% shares by the applicant, in the respondent company, can be raised only under the Companies Act, 2013, and such dispute cannot be settled through arbitration. Moreover, any claim raised by any person with regard to his shareholding in the company; his claim to become a Director of a company, or; with regard to oppression and mismanagement of a company, can only be raised before the NCLT by virtue of Section 434 of the Companies Act. Such a claim cannot be decided or adjudicated upon by means of an arbitration. The respondents claim that the disputes raised by the applicant are, thus, non-arbitrable disputes.

19. The respondents state that the arbitration agreement is unstamped and unregistered and, therefore, cannot be acted upon. They further submit that the

agreement in question was relating to creation of right, title and interest in immovable property. Such an agreement is, necessarily, registrable as per Section 17 of the Registration Act, as applicable in the State of Uttarakhand. Therefore, the respondents state that, since the agreement dated 14.10.1992 is unregistered, the same has no legal or evidentiary value, and cannot be relied upon.

20. The respondents state that the applicant is guilty of concealment and suppression of material facts, and has concealed previous litigations between the parties. The parties are into litigation since 2003, and the applicant, for the first time, after such lengthy litigation between the parties, is now seeking appointment of an arbitrator, which is now barred by law. It is claimed that the applicant has waived the arbitration agreement by her conduct. The respondents contend that disputes in the aforesaid litigations arise out of the same agreement dated 14.10.1992, and is in respect of the self-same properties. Since the parties have already invoked their remedies before the Civil Court, the arbitration agreement stands waived. Thus, the applicant is estopped from filing an application under Section 11(6) of the Arbitration and

Conciliation Act before this Court to seek appointment of an Arbitrator, as the same is hit by principles of *res judicata*, *constructive res judicata* and *issue estoppel*. To buttress their argument the respondents rely on Section 8 of the Arbitration and Conciliation Act.

21. The respondents contend that there can be no bifurcation of disputes i.e., disputes arising out of one agreement can either be agitated in a civil suit, or in arbitration. They cannot be bifurcated. One dispute arising under the agreement cannot be taken to a Civil Court, and the other be taken to arbitration.

22. The respondents argue that the applicant is basing her claim on the arbitration clause contained in the agreement dated 14.10.1992. The arbitration clause contained in agreement dated 14.10.1992 refers to the dispute or difference arising between the parties during subsistence of the said agreement. The applicant is also claiming her rights on the basis of resolution dated 24.10.1992, which does not contain an arbitration clause. It is argued that it was never intended by the parties to borrow and incorporate the arbitration clause in the subsequent resolution dated 24.12.1992. Thus, claims

arising out of the Resolution/ Minutes of Meeting dated 24.12.1992 cannot be arbitrated.

23. The respondents have raised several other factual pleas in their defence, which touch upon the merits of their defence to the claim that the applicant may raise. They are not relevant for the present purpose, and, therefore, are not being noticed in this judgment.

24. In response to the plea that this application is barred by limitation, the submission of Mr. Negi is that the present Arbitration Application has been preferred within time. Mere non-inclusion of the name of Mr. Sushil Chand Jain in the license after 01.04.1994 did not give a cause of action to the applicant, as that was an act/ omission on the part of the licensing authority.

25. It is further argued that the arbitration agreement was invoked on 20.04.2017, and the Arbitration Application was preferred on or about 12.06.2018.

26. I have considered the submissions of the learned counsels on the aspect of the application being barred by limitation.

27. I may refer to the observations made by the Constitution Bench of the Supreme Court in ***SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618***, wherein the Supreme Court observed that the High Court, while dealing with an application under Section 11(6) of the Arbitration and Conciliation Act, can also decide the question, whether the claim was a dead one; or a long-barred claim that was sought to be resurrected, and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim is made, and whether the claim made comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. It was held

that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal.

28. Limitation is a mixed question of fact and law in most cases, and the present case is no exception. The issue of limitation, in my view, in the facts of the present case, cannot be decided at this stage. The correspondence undertaken by the applicant with the respondents in the year 2017, *prima facie*, shows that the cause of action arose in her favour, when the respondents did not comply with her requests to provide her the bank statements and accounts, and when the respondents sought to disregard her rights under the aforesaid agreement. Thus, it cannot be said that the issue of limitation can be decided by me at this stage, and in these proceedings.

29. The next submission of Mr. Garg, learned counsel for the respondents, is that, the claim towards 45% shareholding in the respondent-company, and for being inducted in as a Director of the respondent no.1-

company, can be agitated only before the NCLT and not in Arbitration.

30. The Supreme Court in **SBP & Co.** (supra) drew a distinction between a non-arbitrable claim and a non-arbitrable subject matter. It held that the former may arise on account of scope of the arbitration agreement, and also when the claim is not capable of being resolved through arbitration. On the other hand, generally non-arbitrability of the subject-matter would relate to non-arbitrability in law.

31. The applicant is yet to file her claims. Her notice invoking arbitration dated 20.04.2017 raises grievance with regard to the letting out of the part of the Cinema Hall building to one Bazaar India for opening a retail outlet, and the failure of the respondents to provide accounts. The applicant has stated that disputes have arisen between the parties under the Agreement dated 14.10.1992 and the Resolution dated 24.12.1992. As to what would be the ultimate claims that the applicant may raise, in case disputes are referred to arbitration, is not yet known. As and when the applicant raises her claims, it shall be open to the respondents to raise all their

defences, including to the non-maintainability of any part of the claim, before the Arbitrator. It would be premature for me to assume that the applicant would raise her claim towards her entitlement for 45% shareholding in the respondent-company, or for appointment as a Director of the respondent-company. Even if such a claim were to be raised, it would be for the respondents to raise their objections/ defences, including to the arbitrability of such claims, which shall be examined by the Arbitral Tribunal. In my view, on the basis of the aforesaid assumptions, the present application cannot be rejected at this stage.

32. Section 16 of the Arbitration and Conciliation Act, 1996 vests the Arbitral Tribunal with the power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. Thus, the issue of non-arbitrability of any one or more of the claims that the claimant may raise, would fall for consideration by the Arbitral Tribunal.

33. The submission of Mr. Garg is that prior to institution of the present arbitration application, the applicant herein filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 before the learned

Commercial Court/Additional District Judge, Dehradun. The learned Commercial Court, vide its judgment dated 10.11.2017 dismissed the said arbitration application, and recorded a categorical finding that there is no subsisting arbitration clause between the parties. It is argued that this finding is binding on the parties, and on this Court.

34. Learned counsels have also adverted to Section 11(6A) of the Arbitration and Conciliation Act, which was inserted in the Statute Book by Act 3 of 2016, w.e.f. 23.10.2015. Sub-Section (6A) of Section 11 provides that *the Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.*

35. Sub-Section (6A) was omitted subsequently by Act 33 of 2019, w.e.f 09.08.2019, which has, however, not been notified.

36. In ***Bharat Sanchar Nigam Ltd. & Anr. v. M/s Nortel Networks India Pvt. Ltd., Civil Appeal Nos. 843-844 of 2021***, the Supreme Court observed :-

“27. The 2019 Amendment to Section 11

Section 11 has been further amended by the Arbitration and Conciliation (Amendment) Act, 2019 to promote institutionalization of arbitration in India. The 2019 Amendment Act has deleted sub-section (6A) in Section 11. However, the amended to Section 11 is yet to be notified. Consequently, sub-section (6A) continues to remain on the statute book, and governs the scope of power under Section 11 for the present.”

37. Thus, when the present Arbitration Application was preferred by the applicant, Section 11(6A) existed on the Statute Book, and it still forms part of the Act.

38. It has been argued by Mr. Negi that, in the light of Section 11(6A), this Court is not required to go into any judgment, decree or order of any Court, relied upon by the respondents - to claim that the arbitration agreement does not survive.

39. On the other hand, the submission of Mr. Garg is that the purpose of insertion of Sub-Section (6A) in Section 11 was to legislatively overrule the pre-existing judgment on the scope and power of the High Court, while exercising jurisdiction under Section 11 of the Act. The words “*any judgment, decree or order of any Court*” do not mean that the Court, dealing with an application under Section 11 of the Act, would ignore judgments, decrees and orders *inter se* the parties.

40. On the aforesaid aspect, I find merit in the submission of Mr. Garg. In my view, Sub-Section (6A) of Section 11 cannot be understood to mean that the judgments and decrees rendered *inter se* the parties can be ignored by the Court, while dealing with an application under Section 11 of the Act. For the Court to ignore judgments and decrees *inter se* the parties, may lead to miscarriage of justice, as, in a given case, issues and disputes, which have finally been adjudicated and determined, in relation to the existence of the arbitration agreement, may go unnoticed. Therefore, I am inclined to examine the submissions of Mr. Garg, premised on the earlier litigations referred to by him.

41. It is argued by Mr. Garg that there has been previous litigation between the parties, including Suit bearing Original Suit No. 727 of 2003, “**Shri Sanjay Jain v. Texla Tower Ltd. and others**”; Original Suit No. 93 of 2007, “**Smt. Saroj Gupta v. M/s Texla Tower and others**”; Original Suit No. 276 of 2006, “**Shri Sanjay Jain and another v. Texla Towers Ltd. and others**”; and Original Suit No. 263 of 2014, “**M/s Texla Tower Ltd. v. State of Uttarakhand and others**”, with regard to the

same property, seeking declaration, possession and injunction.

42. I may deal with each of the aforesaid suits/proceedings referred to by Mr. Garg.

43. Original Suit No. 727 of 2003 was instituted by Shri Sanjay Jain, S/o Shri Satish Chand Jain, i.e., the son of the applicant, and the defendants in the said Suit were respondent no. 1 herein, i.e., Texla Towers Ltd., Mussoorie Dehradun Development Authority, State of Uttarakhand, Shri Sushil Chand Jain and Shri Ramesh Chand Jain. The reliefs sought in the said Suit were directed against defendant nos. 1, 2 and 3 i.e., Texla Towers Ltd., Mussoorie Dehradun Development Authority and the State of Uttarakhand. Pertinently, the said Suit does not even whisper about the Agreement dated 14.10.1992, which forms the basis of the present application. No rights were sought to be enforced by the plaintiff-Shri Sanjay Jain, under the aforesaid Agreement dated 14.10.1992 in the said Suit. Therefore, the said Original Suit No. 727 of 2003 can certainly not come in the way of the applicant in pursuing the present application.

44. The next Suit referred to by Mr. Garg is Original Suit No. 276 of 2006 preferred by Shri Sanjay Jain and Shri Ramesh Chand Jain against Texla Towers Ltd., Shri Sushil Chand Jain and Smt. Alka Gupta. In the said Suit, the plaintiffs sought a permanent injunction to restrain defendant no. 1 i.e., Texla Towers Ltd. from trespassing over the open land described in the schedule of the plaint, and using the same. Once again, it is seen that in this plaint as well, there is absolutely no reference to the Agreement dated 14.10.1992, and the plaintiffs did not seek to enforce any rights under the said agreement. Consequently, even this Suit is of no avail to the respondents - to claim that the applicant is not entitled to maintain the present application.

45. Original Suit No. 263 of 2014 is a Suit preferred by respondent no. 1, wherein the State of Uttarakhand, Mussoorie Dehradun Development Authority, Shri Sanjay Jain and one Smt. Radhika Kaarwa were impleaded as defendants. Even this Suit is not premised on the Agreement dated 14.10.1992. The parties to this Suit, as noticed hereinabove, include the State of Uttarakhand and the Mussoorie Dehradun Development Authority, and the first relief sought in the said Suit also relates to the said

defendants. Therefore, in my view, even the aforesaid Suit instituted by the respondent herein can certainly not come in the way of the applicant, in pursuing the present Application.

46. Though the respondents have referred to the filing of another suit - being Original Suit No. 93 of 2007 by Smt. Saroj Gupta against Texla Towers Ltd., the respondents have not placed on record the plaint of the said Suit. Only the order dated 16.09.2008 passed by the First Additional Civil Judge (Senior Division) has been placed on record, which shows that the said Suit was withdrawn by the plaintiff – Saroj Gupta. Therefore, the filing of the said Suit also cannot be a bar to maintenance of the present application.

47. Mr. Garg has also placed heavy reliance on the order dated 10.11.2017 passed by the 3rd Additional District Judge, Dehradun in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 initiated by the applicant. Mr. Garg has argued that the learned 3rd Additional District Judge dismissed the said application by holding that the scope and purpose of the Agreement dated 14.10.1992 was only to agree upon the properties,

which were to be transferred by the owners, including the predecessor-in-interest of the applicant, in favour of respondent no. 1, and since the transfer of the properties had taken place, the said Agreement has worked itself out. The agreement being a concluded transaction, no dispute could be referred to arbitration under the Arbitration Agreement contained in the Agreement dated 14.10.1992.

48. Reliance placed by Mr. Garg on the aforesaid order dated 10.11.2017 is opposed by Mr. Negi on the ground that, while dealing with an application under Section 9 of the Arbitration and Conciliation Act, the learned Judge could not have gone into the merits of the case of the parties, and, in any event, the findings returned by the learned Judge in an application under Section 9 of the Arbitration and Conciliation Act, are only tentative, and founded upon *prima facie* appreciation of facts. Thus, those findings are, in any event, not final and binding on the parties. It is only in arbitral proceedings that the final determination of the rights and obligations of the parties to the agreement can be made. He submits that an appeal being AO No. 237 of 2018 titled *Smt. Neelam Jain v. M/s Texla Towers Ltd.* has been preferred

by the applicant before this Court, which is pending consideration.

49. The order dated 10.11.2017 passed by the learned 3rd Additional District Judge in the petition preferred by the applicant under Section 9 of the Arbitration and Conciliation Act has been placed on record and perused by me. The said petition, under Section 9 of the Act, had been preferred by the applicant to seek a restraint against the respondents from renting or transferring the suit property, and for appointment of a receiver in relation to the suit property.

50. A perusal of the order dated 10.11.2017 shows that the same has been rendered only on a prima facie appreciation of the case of the parties. The said findings are not founded upon any evidence, since, proceedings under Section 9 of the Arbitration and Conciliation Act are not a Civil Suit, and are interlocutory in nature. The learned 3rd Additional District Judge has proceeded on the assumption that the only purpose and objective of the Agreement dated 14.10.1992 was the transfer of certain properties by the owners, including the predecessor-in-interest of the applicant, in favour of the respondent-

company. However, this understanding of the learned 3rd Additional District Judge, prima facie, is not made out on a plain reading of the said agreement. I may notice one of the recitals of the said agreement, where the second party is the respondent-company, i.e. Texla Towers Limited acting through its Chairman S. Raja Singh. The said recital reads :-

“AND WHEREAS the second party has approached the first party for starting business enterprises/ establishment / construction of building or any other business of any nature as may be mutually decided between the first and the second party.”

51. So, it was not merely an agreement to transfer immovable property for consideration, as the learned 3rd Additional District Judge concluded. The agreement provided that the Second Party shall pay Rs. 35 lakhs to the First Party to acquire 55% shares in the schedule property. Clause 5 of the agreement provided that upon payment of Rs. 35 lakhs, the First Party and the Second Party shall be in joint possession of the schedule property, and they will not enter into any agreement till the subsistence of the agreement in question with any other party. Clause 7 provided that the Second Party shall develop, carry out renovation in consultation with the First Party and shall keep proper accounts for the expenses

incurred for such purposes. Clause 8 provided that in case any construction is to be done, whether in the form of raising a multi-storeyed building or any other business requiring construction work in the said building or otherwise, the same shall be commenced after the plans are duly approved and sanctioned by the Mussoorie Dehradun Development Authority, Dehradun. Clause 11 restrained both parties from mortgaging the schedule property. Clause 13 provided that change of business, terms of contract or any other matter concerning the business in the schedule property shall be done by mutual consent of the First and Second Party. The parties agreed to operate a joint account, to be operated by Shri Sushil Chand Jain and Shri Rakesh Chand Jain on behalf of the First Party, with the Second Party (Clause 14).

52. The aforesaid Clauses, prima facie, show that the agreement was not merely an agreement for transfer of a share in the schedule property by the owners in favour of respondent no. 1. The agreement contemplates joint running of the business, with the defined shares of the owners collectively as 45%, and respondent no. 1 as 55%. The obligations cast under the said agreement, prima facie, continue to bind the parties even after the

transfer of the 55% share in the schedule property in favour of respondent no. 1-company.

53. Thus, the reasoning adopted by the 3rd Additional District Judge, while passing the order dated 10.11.2017, *prima facie*, appears to be flawed.

54. The submission of Mr. Garg that the Agreement dated 14.10.1992 was superseded by the Resolution/ Minutes of Meeting dated 24.12.1992, and that, with the execution of the five Sale Deeds, the Agreement dated 14.10.1992 stood exhausted, is an argument on merits, which does not fall for my consideration in these proceedings. Even otherwise, the same has no bearing on the maintainability of the present application under Section 11(6) of the Act.

55. At this stage, I may refer to the judgment of the Supreme Court in ***Vidya Drolia*** (supra). A three Judge Bench of the Supreme Court decided a reference made to it, as doubts were raised on the view expressed in ***Himangni Enterprises v. Kamaljeet Singhy Ahluwalia, (2017) 10 SCC 706***. The issues considered by the Supreme Court in ***Vidya Drolia*** (supra) were the following: -

“2. A deeper consideration of the order of reference [Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406] reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely:

2.1. (i) Meaning of non-arbitrability and when the subject-matter of the dispute is not capable of being resolved through arbitration.

2.2. (ii) The conundrum — “who decides” — whether the court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.

2.3. The second aspect also relates to the scope and ambit of jurisdiction of the court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”).

56. After detailed discussion of earlier decisions rendered by the Supreme Court on the subject, in paragraph no. 154 of the judgment, the Supreme Court observed as follows: -

“154. Discussion under the heading “Who Decides Arbitrability?” can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-

arbitrability. The court has been conferred power of “second look” on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. **The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable” and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.”**

(emphasis supplied)

57. In his concurrent judgment, N.V. Ramana, J. (as

His Lordship then was) held as follows: -

“236. Having established the threshold standard for the court to examine the extent of validity of the arbitration agreement, as a starting point, it is necessary to go back to *Duro Felguera* [*Duro Felguera, S.A. v. Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , which laid down : (SCC p. 759, para 48)

“48. ... From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.”

At first blush, the Court seems to have read the existence of the arbitration agreement by limiting the examination to an examination of its factual existence. However, that is not so, as the existence of arbitration agreement does not mean anything unless such agreement is contractually valid. This view is confirmed by Duro Felguera case [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , wherein the reference to the contractual aspect of arbitration agreement is ingrained under Section 7 analysis. A mere agreement is not legally binding, unless it satisfies the core contractual requirements, concerning consent, consideration, legal relationship, etc.

238. *At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not (sic) be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above. Therefore, the rule for the court is “when in doubt, do refer”.*

240. *Courts, while analysing a case under Section 8, may choose to identify the issues which require adjudication pertaining to the validity of the arbitration agreement. If the court cannot rule on the invalidity of the arbitration agreement on a prima facie basis, then the court should stop any further analysis and simply refer all the issues to arbitration to be settled.*

242. *We are cognizant of the fact that the statutory language of Sections 8 and 11 are different, however materially they do not vary and both sections provide for limited judicial interference at reference stage, as enunciated above.*

244. *Before we part, the conclusions reached, with respect to Question 1, are:*

244.1. *Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*

244.2. *Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.*

244.3. *The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid*

arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. *The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. “when in doubt, do refer”.*

244.5. *The scope of the court to examine the prima facie validity of an arbitration agreement includes only:*

244.5.1. *Whether the arbitration agreement was in writing? Or*

244.5.2. *Whether the arbitration agreement was contained in exchange of letters, telecommunication, etc.?*

244.5.3. *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

244.5.4. *On rare occasions, whether the subject-matter of dispute is arbitrable?*

58. In the light of the aforesaid legal position elucidated by the Supreme Court in **Vidya Drolia** (supra), I have no hesitation in rejecting the submission of Mr. Garg that the present application, under Section 11 of the Arbitration and Conciliation Act, should be rejected on any of the grounds taken by the respondents. As aforesaid, the existence of the agreement between the parties, is not in serious doubt. The applicant is the widow of (Late) Shri Satish Chand Jain, one of the parties to the said agreement, and rights, which vested in (Late) Shri Satish Chand Jain under the said agreement now inhere in the applicant. There is no challenge to the territorial jurisdiction of this Court to entertain the present

application. From the submissions of Mr. Garg, it cannot be said that the subject matter, namely the disputes under the Agreement dated 14.10.1992 are demonstrably “non-arbitrable”. The submission of Mr. Garg with regard to non-arbitrability are argumentative; cannot be conclusively decided in these summary proceedings, and; arise from contested facts. The disputes under the said Agreement have been hanging fire for decades, and clearly the endeavour of the respondent is to avoid an adjudication on those disputes. Thus, the respondent, prima facie, appears to be interested in delaying the resolution of the disputes.

59. The submission of Mr. Garg, that the agreement dated 14.10.1992 being unregistered, cannot be acted upon, or looked into for any purpose, has no merit. The said agreement does not purport to transfer any immovable property by itself. The said agreement was, therefore, not required to be registered, and it can be looked into by the Court. The said Agreement was engrossed on Stamp Paper of Rs. 100, as is evident from the copy placed on record. Therefore, it cannot be said that the said Agreement is not duly stamped.

60. A similar argument was raised before the High Court for the State of Telangana at Hyderabad on behalf of the respondent in *M/s Meenakshi Solar Power Pvt. Ltd. v. M/s. Abhyudaya Green Economic Zones Pvt. Ltd. and Ors.* (Arbitration Application No. 55 of 2020). The High Court examined the said plea on merits, and accepted the same, resulting in dismissal of the application under Section 11(6) of the Act. The Supreme Court allowed the Civil Appeal preferred against the judgment of High Court being Civil Appeal No. 8818 of 2022 in ***M/s Meenakshi Solar Power Pvt. Ltd. v. M/s. Abhyudaya Green Economic Zones Pvt. Ltd. and Ors.***, vide its judgment rendered on 23.11.2022. The Supreme Court noticed its earlier decision in ***National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267***, wherein it enumerated the issues, which the Chief Justice/ Court is bound to decide; the issues which he may choose to decide or leave it to the Arbitral Tribunal to decide; and the issues, which would be left to be determined by the Arbitral Tribunal, while dealing with an application under Section 11(6) of the Act.

61. The Supreme Court in ***National Insurance Co. Ltd.*** (supra), *inter alia*, observed as follows: -

“22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.

22.3. The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).

(ii) Merits or any claim involved in the arbitration.”

62. The Supreme Court, went on to observe as follows:-

“16. In Vidya Drolia (supra), it has been further observed in relation to the aforesaid three categories in Boghara Polyfab Pvt. Ltd. (supra). The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to a more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, the question or issues are relating to whether the cause of action relates

to action in personam or rem; whether the subject-matter of the dispute affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions or by necessary implication non-arbitrable as per mandatory statutes. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide.”

63. Thus, the aforesaid submissions of Mr. Garg, even otherwise, cannot be dealt with by this Court, while dealing with the present Arbitration Application.

64. Mr. Garg has placed reliance on ***Indian Oil Corporation Limited v. NCC Limited, 2022 SCC OnLine SC 896***. He has laid special emphasis on paragraph no. 89 of this judgment, wherein the Supreme Court observed as follows: -

“89. Having heard the learned counsel appearing for the respective parties and in the facts and circumstances of the case, the issue/aspect with regard to “accord and satisfaction” of claims is seriously disputed and is debatable. Whether, in view of the acceptance of Rs 4,53,04,021 by the respondent NCCL which was released by IOCL on the offer/letter made by the respondent NCCL dated 2-11-2016 there is an instance of “accord and satisfaction” of the claims is a good and reasonably arguable case. It cannot be said to be an open and shut case. Therefore, even when it is observed and held that such an aspect with regard to “accord and satisfaction” of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549]. Therefore, in the facts

and circumstances of the case, though it is specifically observed and held that aspects with regard to “accord and satisfaction” of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to “accord and satisfaction” of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of sub-section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to “accord and satisfaction” of the claims.”

65. There can be no quarrel with the proposition laid down by the Supreme Court in the aforesaid judgment. However, in the facts of the present case, the same is not attracted for the reasons indicated hereinabove.

66. For the aforesaid reasons, I allow this application and appoint Hon’ble Mr. Justice Rajiv Sahai Endlaw, retired Judge, Delhi High Court having Mobile No. 9717495002, to act as the sole Arbitrator to adjudicate the disputes between the parties arising out of their

Agreement dated 14.10.1992. The Arbitral Tribunal shall be entitled to fix its fee.

67. Consequently, pending application(s), if any, stands disposed of accordingly.

VIPIN SANGHI, C.J.

Dt: 03rd May, 2023
Rahul