

\$~5

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

% Judgment delivered on 16th November 2022

+ **ARB.P. 323/2010**

VIKRAM BAKSHI Petitioner

Versus

SONIA KHOSLA & ANOTHER Respondents

Advocates who appeared in this case:

For the Petitioner: Mr. Jay Savla, Senior Advocate with Mr. Anand M. Mishra, Advocate.

For the Respondents: Mr. Deepak Khosla and Mr. Rohan Nandy Advocates

**CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J (Oral)

I.A. No.16577/2021

1. This is an application to bring on record legal heirs of deceased Respondent No.1, Mrs. Sonia Khosla.
2. Mr. Deepak Khosla, who is arrayed as one of the legal heirs, submits that he has no objection to the application being allowed.
3. The application is allowed. The amended memo of parties is taken on record.

ARB.P. 323/2010

1. This is a Petition under Section 11 of the Arbitration and Conciliation Act, 1996 read with Section 15 of the Arbitration and Conciliation Act, 1996 by Mr. Vikram Bakshi, seeking nomination of two arbitrators for the Petitioner as well as for the Respondents together and for the Arbitral Tribunal to appoint a presiding Arbitrator and to continue to hold arbitration proceedings from the stage where the previous Arbitral Tribunal had resigned.
2. The case between the parties has a chequered history prolonging over nearly 15 years.
3. The disputes pertain to a company called Montreaux Resorts (P) Ltd. [hereinafter referred to as 'the company'], which it may be noticed is not a party to this petition. Said company was incorporated on 13.04.2005 with two promoter shareholders i.e., Mrs. Sonia Khosla and Mr. Vini Ahuja. At the time of incorporation, Mrs. Sonia Khosla held 7600 shares i.e., 76% of the authorized and paid up capital and Mr. Vini Ahuja held 2400 shares i.e., 24% of the authorized and paid-up capital.
4. On 21.12.2005, a Memorandum of Understanding (MoU) was executed between Mr. Deepak Khosla, M/s. Montreaux Resorts (P) Ltd., Mr. Vikram Bakshi and Mr. R.P. Khosla. The MoU stipulated establishing a resort-cum-real estate development venture at Kasauli, Himachal Pradesh and its environs as a joint venture project between the Bakshi family, acting through Mr. Vikram Bakshi and the Khosla family, acting through Mr. Deepak Khosla.

5. As per the MoU, the project was to be a joint venture involving the lands contracted to be purchased in the name of the company as well as already purchased in the name of the members of the Khosla family and also contracted to be purchased in the name of the members of the Khosla family, which all were to be assigned in favour of the company.
6. The MoU stipulated that the implementing Special Purposes Vehicle (SPV) for the project would be the company and the shares in the company were to be transferred to the Bakshi family or their nominee upon the payment stipulated in the MoU.
7. The MoU further stipulated that on signing of the MoU, 51% of the existing shareholding in the company would be transferred free from all claims, lien, charges, encumbrances etc. in the name of Mr. Vikram Bakshi or his nominee. Additional 25% share were to be transferred to Mr. Vikram Bakshi and his nominee on payment Rs. 2.5 crores i.e., fourth tranche of payment.
8. The elements of the project stipulated in the MoU envisaged three segments of businesses to be undertaken by the company, a resort/real estate venture at/around village Mashobra, Chattiya, *Tehsil-Kasauli* on about 166 bighas of land, of which 110.49 bighas had already been identified and listed in Annexure-1 thereto. The second segment stipulated a recreational development at/around village Audda on approximately 171 bighas of land and third segment stipulated a cable car to connect the first segment with the second segment.
9. The MoU further described the land already acquired or to be

acquired by the company for the development of the project, which was shown as a total of 337 bighas. The description of the land was detailed in Annexure-1 and Annexure-2 to the MoU.

10. The financial basis of the cooperation stipulated in the MoU was that the Khosla family shall put the land mentioned in the MoU at the disposal of the company and the Bakshi family would enter the company with suitable capital so as to finance the project with this capital supplemented by loans to be organized by Mr. Vikram Bakshi. It further stipulated that the Bakshi family shall pay the Khosla family a sum of 'A' (described hereinafter) plus 5% of the sale proceeds of the intended real estate development only in the Mashobra land (Annexure-1).

11. The Exponent 'A' has also been described in the MoU as market price of 27.10 bighas of land owned by Mr. R.P. Khosla and also the advances paid by the Khosla family and the company towards agreement to sell executed for the lands already listed in Annexure-1 and Annexure-2.

12. At this juncture, for the purposes of clarity, it may be noticed that when the MoU was entered into, certain parcels of land were already owned by Mr. R.P. Khosla and besides that the company had entered into agreements with certain individuals for purchase of parcels of land in the name of the company for which advances had already been paid. The advances for certain parcels of land had been paid by Mr. Deepak Khosla and they were to be purchased in his name and subsequently

assigned to the company.

13. Towards the above component of exponent 'A', Mr. Bakshi had to pay to Mr. Khosla and his family a sum of Rs. 6 crores as an outright payment as well as an advance against the entitlement of 5% on the real estate sales as part of the joint venture agreement.

14. It may further be noted that Annexure-1 pertaining to Mashobra land, was described in para 4 of the MoU as 110.49 bighas of land. Out of which 25 bighas of miscellaneous patches of land was to be acquired and 30 bighas of government land was to be taken on lease. As on the date of the MoU, there was no right created in the said lands, but they had been specifically identified for the purposes of the project.

15. Clause 14, *inter-alia*, stipulated that any additional land in the vicinity of 500 meters of the development of the project, by either party, up to 31.12.2010 would be developed for and on behalf of only the company, unless expressly consented to in writing by Mr. Bakshi to the contrary.

16. Mr. Khosla submits that out of the 25 bighas of land in Mashobra which was crucial for the project, 20.5 bighas of land that was identified for the project has been bought by a company called M/s. Ascot Hotels and Resorts Pvt. Ltd. after the MoU was executed. He submits that 99.9% shares of the said company are held by Mr. Vikram Bakshi and the remaining shares i.e., 0.1% shares are held by his family members. Said land was purchased on 12.01.2006. He submits that this was not disclosed to the Respondents prior to entering into the subject

Agreement dated 31.03.2006. He submits that the said land was identified as crucial to the project. He further submits that out of 110.49 bighas of land listed at Annexure-1 to the Agreement which were agreed to be purchased by Mr. Deepak Khosla in his name, the Agreements for purchase were transferred in favour of the company in January, 2006 for which the balance sale consideration has been paid for by the company but title deed have been registered on 01.05.2006 in the name of one Mr. Rajiv Puri, which is witnessed by one of the nominee directors of Mr. Vikram Bakshi.

17. Mr. Khosla further submits that these two parcels of land were very crucial for the project for the reason that these two parcels of land split the entire project into two, making the entire project no longer viable and impossible to perform. He further submits that the above-referred two parcels of land which were crucial for the project today stand in the name of third parties (though *benami*) and those parties are neither parties to the arbitration agreement nor sought to be made parties to the arbitration and as such there can be no complete adjudication of disputes inter se the parties. He submits that since the arbitral proceedings, if any, initiated would not bring a complete closure to the disputes between the parties, the application seeking appointment of an Arbitral Tribunal is liable to be dismissed.

18. It is the case of the Respondents that there were certain disputes which arose between the parties on the workability and modalities of the MoU leading to further discussions and negotiations between the parties, which *inter alia* included certain discussions in January, 2006.

There seems to be some resolution of disputes between the parties leading to entering of the subject agreement being Agreement dated 31.03.2006.

19. It may be noticed that though the MoU was executed between Mr. Deepak Khosla, the company, Mr. Vikram Bakshi and Mr. R.P. Khosla, the Agreement dated 31.03.2006, was executed between Mrs. Sonia Khosla, wife of Mr. Deepak Khosla, Mr. R.P. Khosla, the Company and Mr. Vikram Bakshi.

20. In the recital of the Agreement, it is mentioned that Mr. Vini Ahuja and Mrs. Sonia Khosla were the original shareholders of the company and the present shareholders i.e., as on 31.3.2006 were Mr. Vikram Bakshi (5100 shares) and Mrs. Sonia Khosla (4900 shares), totalling to 10,000 shares. The stipulation with regard to the joint venture project continued to remain the same *vis-à-vis* the land to be acquired at various places, however, the consideration amount was increased from Rs.6 crores to Rs.6.44 odd crores. The Respondent - Mr. Deepak Khosla, who appears in person, and also representing the other Respondents submits that the amount was increased to off set the advances paid by Mr. Deepak Khosla for the agreements which had been entered into by him with third parties as noticed in the MoU.

21. As per the Respondents, disputes arose between the parties immediately after the execution of the Agreement on the alleged breach committed by the Petitioner with regard to timely payments stipulated therein.

22. This is disputed by learned Senior Counsel appearing for the Petitioner contending that since land was not transferred, payment was not made.

23. Learned Senior Counsel for the Petitioner submits that as the Respondents had not performed their part of the obligation, the arbitration clause contained in Agreement dated 31.03.2006, was invoked on 30.08.2007 and an application under Section 11 of the Arbitration and Conciliation Act was filed before this Court being Arbitration Application No.93/2008 seeking appointment of an Arbitral Tribunal.

24. It may be noticed that in the said Petition under section 11 of the Arbitration Act, the company was arrayed as Petitioner No.2.

25. The Arbitration Application No.93/2008 was allowed by an order dated 29.02.2008 with a no objection being given by the Respondents to refer the dispute to arbitration.

26. The wording of the order suggests that a dispute was raised by the Respondents with regard to who should represent the Petitioner No.2 i.e., the Company. According to Petitioner No.1 i.e., Mr. Vikram Bakshi, he was in control of the company, whereas the Respondents had contended that they controlled the Company. The Court in its order dated 29.02.2008, referred to Clause 29 B of the Agreement to note that the Agreement stipulated that Mr. Vikram Bakshi and company are one party. However, these issues were left open for the Arbitrators to decide in terms of the Agreement between the parties and factual position that

would be placed before them.

27. At this juncture, it may be expedient to refer to the factual matrix as to why the dispute was being raised by the Khosla family as to who is in control of the company.

28. The contention of the Petitioner was that the Agreement dated 31.03.2006 stipulated that Mr. Vikram Bakshi held 51% shares in the Company. This is contradicted by the Respondents, who contend that though the Agreement records that Mr. Vikram Bakshi held 51% shares, there was no possibility for Mr. Vikram Bakshi to hold 51% shares on 31.03.2006.

29. Mr. Deepak Khosla submits that documents claiming shareholding of 51% are forged and fabricated documents. He further submits that though Agreement stipulated that two nominee directors were appointed as directors on behalf of the company on 21.12.2005, however, Form 32 nominating them as directors, which was submitted by Mr. Vikram Bakshi to the Registrar of Companies, is a forged and fabricated document.

30. Mr. Deepak Khosla further submits that on the incorporation of the company on 13.04.2005, as noticed hereinabove, there were two shareholders, Mrs. Sonia Khosla (76%), holding 7600 shares and Mr. Vini Ahuja (24%), holding 2400 shares.

31. He submits that at the incorporation of the Company there were two Share Certificates issued by the company bearing Share Certificate

No.1 (7600 shares) and Share Certificate No.2 (2400 shares). He submits that Agreement dated 31.03.2006 notes that Mr. Vikram Bakshi holds 5100 shares and Mrs. Sonia Khosla holds 4900 shares. He submits that this factum was incorporated in the Agreement believing the representation of the nominee directors of Mr. Vikram Bakshi who had been allegedly nominated on the Board of Directors on 21.12.2005.

32. He submits that this recital in the Agreement is ex-facie false for the reason that as on 31.03.2006, there were only two Share Certificates issued by the company i.e., Share Certificate No.1 (7600 shares) and Share Certificate No.2 (2400 shares).

33. He submits that for Mr. Vikram Bakshi to hold 5100 shares on 31.03.2006 and Mrs. Sonia Khosla to hold 4900 shares, the Share Certificate No.1 would have had to be split into two certificates i.e., 2700 shares and 4900 shares and then 2700 shares of Mrs. Sonia Khosla and 2400 shares of Mr. Vini Ahuja (totalling to 5100 shares) would have had to be transferred to Mr. Vikram Bakshi.

34. He submits that the documents relied upon by the Petitioner in several proceedings show that the Share Certificates were split in a meeting of Board of Directors allegedly held on 31.03.2006 at 10 A.M. into two; bearing Share Certificate No.3 (5100 shares) and Share Certificate No.4 (2500 shares) both in the name of Mrs. Sonia Khosla.

35. Mr. Khosla further submits that as per the Agreement executed on 31.03.2006, Mr. Vikram Bakshi is shown to hold 5100 shares and Mrs. Sonia Khosla 4900 shares. He submits that as per the above

narration and the splitting of shares in the meeting held on 31.03.2006, would have meant that there would be three Share Certificates as on the said date i.e. Share Certificate No. 2 of 2400 shares in the name of Mr. Vini Ahuja and Share Certificates No. 3 and 4 of 5100 shares and 2500 shares respectively in the name of Mrs. Sonia Khosla.

36. He submits that by no permutation or combination, the shareholding could be Mr. Vikram Bakshi, 5100 shares and Mrs. Sonia Khosla, 4900 shares as on 31.03.2006. He further submits that as per the stand of Mr. Vikram Bakshi, Share Certificate No. 4 of 2500 shares have been further split into two on 14.06.2006 i.e., Share Certificate No. 5 of 1250 shares and Share Certificate No. 6 of 1250 shares. He submits that Share Certificate No.3 (of 5100 shares) is dated 20.06.2006 and the share transfer deed for transfer of the said Share Certificate No. 3 in favour of Mr. Vikram Bakshi, as produced before the earlier Arbitral Tribunal is shown to have been executed on 08.02.2006 prior to it even coming into existence.

37. He submits that the date of 08.02.2006 has been affixed on the Transfer Deed for the reason that a share transfer deed has limited validity of 2 months from the date of its issuance. The Share Transfer Deed was issued on 15.12.2005. He submits that this ex-facie shows that the documents relied upon by the Petitioner to claim his shareholding as well as the control of the company are forged and fabricated documents.

38. It is further contended that by no permutation or combination,

Mr. Bakshi could have held 5100 shares and Mrs. Sonia Khosla 4900 shares as on 31.03.2006. He submits that even as on 20.06.2006, (since the Share Certificate No.3 was issued on 20.06.2006), Mrs. Sonia Khosla is admittedly shown as having 5100 shares as per Share Certificate No.3.

39. He further submits that Share Certificates No.5 and 6, which were issued after splitting Share Certificate No. 4 of 2500 shares into two are both dated 14.06.2006, prior to the date on which Share Certificate No.4 had been issued. He however submits that though Share Certificate No.4 has never seen the light of the day, it is being presumed that the same would be dated either of the same date as that of Share Certificate No.3 or later and since Share Certificate No.3 is dated 20.06.2006, Share Certificate No.5 and 6 could not have been executed or issued on 14.06.2006. He submits that this ex-facie shows that the claim of the Petitioner is false and fabricated for the reason that forged and fabricated minutes of meeting dated 14.06.2006, relied upon by Mr. Vikram Bakshi records that Share Certificate of 2500 shares was produced on 14.06.2006 and split into two and handed over to Mrs. Sonia Khosla in the same meeting.

40. He submits that the minutes of meeting dated 14.06.2006 pre-supposes that Share Certificate No.4 which was split, existed on the date of the meeting i.e. 14.06.2006. He submits that Share Certificate No.4 could not have, even as per the showing of Mr. Vikram Bakshi, existed on 14.06.2006, for the reason that Share Certificate No.3 is dated 20.06.2006.

41. Learned Senior Counsel for the Petitioner submits that a payment of Rs.1.94 crores made to Mr. R.P. Khosla *inter alia* included the payment towards the transfer of shares which corresponded with the dates of the share transfer. He submits that thereafter, Mr. Vikram Bakshi infused Rs.4.27 crores into the company from his sources. This is disputed by Mr. Khosla, who submits that this amount has not been infused by Mr. Vikram Bakshi but was allegedly taken as loan from M/s. Ascot Hotels and Resorts Pvt. Ltd. and now the refund of that amount has become time barred.

42. Learned Senior Counsel for the Petitioner submits that there is an admission by Mrs. Sonia Khosla in CP 114/2007 filed by her that Mr. Vikram Bakshi holds 5100/6350 shares, out of the 10,000 shares. This is disputed by Mr. Deepak Khosla.

43. It is further disputed by Mr. Deepak Khosla that Mrs. Sonia Khosla was present in the alleged Board meeting dated 14.06.2006 as she was not in the country, which it is submitted is evidenced from the immigration stamp on the passport of Mrs. Sonia Khosla, which shows that she was out of the country.

44. It is further contended by the Respondents that not only the record of alleged Board Meeting dated 14.06.2006, but records of other alleged meetings are forged and fabricated where Mrs. Sonia Khosla is shown as present. He refers to alleged meeting dated 30.09.2006.

45. Insofar as meeting dated 30.09.2006 is concerned, an inquiry was directed to be conducted by the Registrar General of this Court on

15.02.2010 in CrI. Misc. Company No.3/2008. It is pointed out that a report has been submitted by the Registrar General on 30.05.2010, opining that Mrs. Sonia Khosla had left the country on 14.09.2006 and returned only on 03.10.2006. He submits that her presence which is shown in the alleged meeting dated 30.09.2006 is ex-facie a fabrication of the minutes of the said Board Meeting.

46. Mr. Khosla further submits that a complaint under Section 200 of the Code of Criminal Procedure has been filed before the Court of learned Additional Chief Metropolitan Magistrate, Saket being CC No. 2028/2017 under section 193, 196, 197, 918, 199, 200, 202, 209, 467, 468, 471, 474, 477-A IPC read with sections 107, 108 and 120B in which by order dated 22.06.2017 *inter-alia* Mr. Vikram Bakshi and his two nominee directors have been summoned. He fairly concedes that a challenge was raised to the summoning order by one of the parties summoned and there is stay of the said order. He submits that though there is a stay of the summoning order by the High Court, however, since the stay order has continued beyond a period of six months in view of the judgment of the Supreme Court in *Asian Resurfacing of Road Agency Pvt. Ltd. Vs. CBI (2018) 16 SCC 299*, the stay is deemed to have been vacated.

47. This is disputed by learned Senior Counsel for the Petitioner. However, for the purposes of the present petition, this issue is not germane.

48. Mr. Khosla further submits that another complaint was filed in

which an order under Section 156 (3) Cr.P.C. was issued by the Court of Additional Chief Metropolitan Magistrate, Saket on 04.02.2011 in which, though FIR No.165/2008 dated 12.07.2008, police station Lodi Colony was registered under section 409, 467, 468, 471, 420, 120-B IPC etc., the police has filed a cancellation report and on a protest petition filed by him, notices have been issued. He further submits that another criminal complaint has been filed which is pending before the Court of learned Additional Chief Metropolitan Magistrate, Saket in which warrants have been issued under Section 94 Cr.P.C. for seizure of the share transfer form relied upon by Mr. Vikram Bakshi. He further submits that there is another FIR being No.100/2007, dated 15.11.2007 police station – Kasauli, under sections 409, 420, 423, 463, 467, 468, 471, 477-A, 34, 120-B IPC, etc. in which a cancellation report was filed by the police authorities and on a protest petition filed by him, summons have been issued to Mr. Vikram Bakshi and others. He also fairly states that the said proceedings have also been stayed by the High Court of Himachal Pradesh.

49. He further submits that there is another petition instituted under Section 200 Cr.P.C. in which summons have been issued on 09.09.2019. He submits that there are two other complaints bearing no. CC No. 511998 of 2016 under sections 621 and 628 Companies Act (1956), further read with Section 409, 463, 464, 465, 467, 468, 469, 471, 472, 474, 477, 477-A, 420, 191, 192, 193, 196, 197, 198, 199, 200, 201, 120-B read with Section 34 IPC. and CC No. 511999 of 2016 under sections 621 and 628 Companies Act (1956), further read with Section

409, 463, 464, 465, 467, 468, 469, 471, 472, 474, 477, 477-A, 420, 191, 192, 193, 196, 197, 198, 199, 200, 201, 120-B read with Section 34 IPC which are pending before the Court of learned ACMM, Special Act, Tis Hazari in which pre-summoning evidence is being recorded.

50. He also points out that there is an FIR registered on the complaint of Mr. Vikram Bakshi against Mrs. Sonia Khosla being FIR No. 499 of 2010 on 09.05.2010 under sections 406, 416, 420, 463, 464, 467, 477A and 120-B of IPC. It is pointed out that there is stay of proceedings by the High Court of Allahabad by order dated 26.05.2011.

51. Mr. Deepak Khosla further submits that in view of the fact that the issues between the parties involve not only civil disputes but also disputes having grave criminal issues as well as issue of fabrication and forgery, the disputes are not arbitrable or referable to arbitration. He further submits that a fraud was played on the Respondents *inter alia* in executing the Agreement inasmuch as it was not disclosed that there were breaches committed to the MoU and also with regard to the factual matrix of the shareholding as on the date of the Agreement i.e., 31.03.2006.

52. He further submits that resolving the disputes with regard to the shareholding as well as directorship of a company are exclusively within the jurisdiction of the National Company Law Tribunal and in terms of Section 430 of the Companies Act, 2013, no civil court has any jurisdiction to entertain any suit or proceedings in respect of any matter which the Tribunal is empowered to determine. He submits that since

the above issues are within the exclusive jurisdiction of the National Company Law Tribunal and the jurisdiction of civil court is ousted and consequently said disputes cannot be referred to arbitration. Reference is drawn to the judgment of the Supreme Court in *Vidya Drolia and Others Vs. Durga Trading Corporation*, (2021) 2 SCC 1.

53. Apart from the above contentions, Mr. Khosla submits that the agreement is null and void as the same stipulated construction of a project which is beyond the scope the objects of the company as enumerated in the Memorandum of Association of the company. He relies on the decision of the Supreme Court in *A.L. Mudliar*, AIR 1963 SC 1185.

54. Mr. Khosla further submits that since title to the shares of a company are title in rem, the dispute being a dispute in rem cannot be referred to arbitration and any finding returned on the shareholding of a company would be a finding in rem which is not arbitrable.

55. Mr. Deepak Khosla further submits that though Mr. Deepak Khosla was a party to the MoU in his individual name, however, in the Agreement dated 31.03.2006, he has not been arrayed as a party. He submits that 2400 shares which were owned by Mr. Vini Ahuja have been purchased by him in his individual capacity and there is no challenge to the purchase of those shares which stand in his individual name. He submits that Mr. Deepak Khosla has been arrayed only as a legal heir of Mrs. Sonia Khosla in these proceedings and has not been arrayed in his independent capacity. In view of this, he submits that the

claim of Mr. Vikram Bakshi for purchase of the remaining shareholding of the company is now impossible to be performed and further, as noticed herein above, in the absence of necessary parties, the disputes are not arbitrable as it does not bring completeness or closure to the disputes between the parties. He submits that time barred claims have also been raised by Mr. Vikram Bakshi.

56. Learned Senior Counsel for the Petitioner submits that the statement of objects of formation of the company are very widely worded in the Memorandum of Association. He submits that the object of real estate would also be read as implicit in the objects and in any event, this is a dispute which is determinable by the Arbitral Tribunal.

57. Mr. Khosla further submits that by order dated 26.04.2010 in CCP No.11/2009, Mr. Vikram Bakshi as well as his two nominee directors were restrained from transacting any business affairs of the company. Per contra, Learned Senior Counsel for the Petitioner submits that by order dated 16.11.2010 in OMP 613/2010, Mr. Deepak Khosla has been restrained from *inter alia* representing the company. It is the contention of both parties that the respective orders, though were initially extended have not been extended thereafter and have lapsed.

58. Mr. Khosla further submits that this petition is time barred inasmuch as the claim pertains to the year 2006 and this petition having been filed in 2010 is barred by limitation. This is disputed by learned Senior Counsel for the Petitioner, who submits that the date of invocation would have to be seen and also the fact that an Arbitral

Tribunal was earlier constituted which is now not functional because the members had recused.

59. Learned Senior Counsel for the Petitioner submits that the Arbitral Tribunal, which was constituted by order dated 29.02.2008 continued till 20.03.2009, when the members recused. He further submits that the National Company Law Tribunal noticing that several civil issues were arising, had by order dated 31.05.2021 in CP 144/2016 referred the parties to arbitration. It is fairly conceded that the Respondents had filed an appeal before the National Company Law Appellate Tribunal, which by order dated 25.08.2022 in Company Appeal 32 of 2022 has set aside the order of the NCLT, referring the parties to arbitration. The order of NCLAT has further been appealed before the Supreme Court and the Supreme Court by order dated 23.09.2022 in Civil Appeal No.6491/2022 has stayed the order of the National Company Law Appellate Tribunal.

60. Mr. Khosla submits that the averments in the CP are being misread, misconstrued and read out of context as there is no categorical admission. The stand is that 5100 shares are allegedly transferred by Mrs. Sonia Khosla and Mr. Vini Ahuja, which is factually incorrect and the company petition has been withdrawn with liberty to file afresh after making correction and a corrected petition has already been filed.

61. Learned Senior Counsel for the Petitioner submits that an Arbitral Tribunal was earlier constituted, which has recused and as such the Petitioner is seeking re-constitution of the Arbitral Tribunal and

principles of non-arbitrability as laid down in *Vidya Drolia (Supra)* would not be applicable to a Tribunal which is sought to be re-constituted. He further submits that appointment of the Arbitral Tribunal was disputed by the Respondents by way of filing an application for recall which was rejected and as such the petition is liable to be allowed and Arbitral Tribunal re-constituted.

DECISION

62. The dispute between the parties revolves around the shareholding of the company; the directors and the Board of Directors meeting insofar as the Company is concerned as well as the control of the Company which would really be dependent upon the percentage of shares held by the respective parties and they being directors or their nominee being directors in the Board of Directors.

63. The whole controversy *inter se* the parties is dependent on the determination of the dispute of the alleged transfer of shares of the Company as also the directors of the Company. The entire premise of the claim of the Petitioner Mr. Vikram Bakshi is based on the shareholding and directorship of the company.

64. As noticed hereinabove there are not only several civil proceedings, but several Company Petitions and Company Appeals as well criminal proceedings pending between the parties on various issues before different fora.

65. The facts noticed herein above are not disputed by either party,

except where dispute is spelt out hereinabove.

66. Insofar as the various dates of the share certificates, share transfer forms as relied upon by parties, are concerned they ex-facie show that there are discrepancies in the share transfer forms. The following list of dates would further highlight the discrepancies.

1.	13.04.2005	The Company is incorporated. Paid up and subscribed capital is 10,000 Shares. Two shareholders and two share certificates. Share Certificate # 1 (7600 shares) – Sonia Khosla. Share Certificate # 2 (2400 shares) - Vini Ahuja
2.	15.12.2005	Share Transfer Deed purchased
3.	08.02.2006	Share Certificate # 3 (5100 Shares) – allegedly transferred to Vikram Bakshi by use of the Share Transfer Deed purchased on 15.12.2005.
4.	31.03.2006	Board decides to split Share Certificate # 1 into two. 5100 Shares – Sonia Khosla 2500 Shares – Sonia Khosla
5.	14.06.2006	Board decides to Split Share Certificate # 4 into two. 1250 Shares 1250 Shares
6.	20.06.2006	Share Certificate # 3 (5100 Shares) issued for the first time Sonia Khosla

7.	20.06.2006	Though share certificate # 4 is not available but it is assumed to have been issued for the first time on the same date as Share Certificate # 3 as both came into existence on splitting of Share Certificate # 1. In any event it could not have been issued prior to Share Certificate # 3.
----	------------	--

67. The above undisputed chronology shows that Share Certificate # 3 was allegedly transferred on 08.02.2006 whereas, it was issued for the first time only on 20.06.2006. Share Certificate # 4 was split into two on 14.06.2006 whereas, it was issued for the first time on 20.06.2006.

68. Further, it is also not in dispute that there is a report of the Registrar General of this Court which shows that Mrs. Sonia Khosla was not in the country on the date when she is shown to be present in a meeting of Board of Directors.

69. There is ex-facie cloud raised by the Respondent in the manner in which shares have been allegedly transferred in favour of Mr. Vikram Bakshi.

70. Though in a petition under Section 11, this Court is not called upon to finally adjudicate upon the merits of the contention of either party, however reference may be had to the judgment of the Supreme Court in *Vidya Drolia (Supra)* upon which reliance is placed by both the parties.

71. In *Vidya Drolia (Supra)*, two aspects were considered by the Supreme Court, one was with regard to the meaning of 'non-arbitrability' and when the subject matter is not capable of being

resolved through arbitration and the second being as to ‘who decides’ i.e., whether the Court at the reference stage or the Arbitral Tribunal.

72. In paragraph 15, the Supreme Court has referred to the concept of non-arbitrability as laid by the Supreme Court in *Booz Allen & Hamilton Incorporated Vs. SBI Home Finance Ltd.* (2011) 5 SCC 532 and the same is extracted hereinunder:-

“15. Non-arbitrability is basic for arbitration as it relates to the very jurisdiction of the Arbitral Tribunal. An Arbitral Tribunal may lack jurisdiction for several reasons. Non-arbitrability has multiple meanings. Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to three facets of non-arbitrability, namely : (SCC p. 546, para 34)

- “(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).*
- (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the “excepted matters” excluded from the purview of the arbitration agreement.*
- (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal,*

or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of an arbitration agreement, will not be “arbitrable” if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal.”

73. Supreme Court has also referred to a paper written by John J. Barcelo III, titled “*Who Decides the Arbitrator's Jurisdiction?*”, wherein he has divided the facets related to non-arbitrability into seven categories as under:-

“16. John J. Barcelo III, in his paper titled “Who Decides the Arbitrator's Jurisdiction? Separability and Competence-Competence in Transnational Perspective” [Vanderbilt Journal of Transnational Law, Vol. 36, No. 4, October 2003, pp. 1115-1136.] , in the context of transnational commercial transactions, has divided facets relating to non-arbitrability into seven categories:

“Stage 1 [Stage 1 is the referral stage.] is crucial concerning whether arbitration is allowed to go forward efficaciously or is obstructed by court intervention. At Stage 1, a party opposing arbitration may raise any of a series of legal issues requiring court, rather than arbitrator, decision. These may include any or all of the following claims : (1) the container contract is invalid (for a reason that would not directly invalidate the arbitration clause); (2) no arbitration agreement came into existence between the parties; (3) an existing arbitration agreement is either formally invalid (for example, not in writing) or materially invalid (for example, violative of mandatory law); (4) a disputed issue is not within the scope of the

arbitration agreement; (5) mandatory law prohibits a disputed issue, though within the scope of the parties' arbitration agreement, to be arbitrated (a special type of material invalidity respecting a specific issue fraught with public policy concerns, such as (formerly) antitrust or securities fraud); (6) some precondition for permissible arbitration has not been met (for example, a time-limit on initiating arbitration); (7) the party seeking arbitration has waived its right to arbitrate or is estopped from claiming that right."

74. In *Vidya Drolia (Supra)*, the Supreme Court has further held that arbitration being a matter of contract, parties are entitled to fix boundaries as to confer and limit jurisdiction and legal authority of the arbitrator. An Arbitration agreement could be comprehensive and broad to include any dispute or could be confined to specific disputes.

75. Further, the Supreme Court referred to the judgment in *Sukanya Holdings Private Ltd. Vs. Jayesh H. Pandya*, (2003) 5 SCC 531, wherein the Supreme Court upheld the rejection of an application under Section 8 on the ground that there is no provision in the Arbitration Act to bifurcate and divided the causes of party i.e., subject matter of the suit/judicial proceedings and parties to arbitration agreement. A 'matter', it was interpreted would indicate the entire subject matter of the suit should be subject to arbitration agreement. It held that bifurcation of subject-matter or causes of action in the suit is not permissible and contemplated. Further, that the parties to the suit should be bound by the arbitration agreement, as there was no provision in the Arbitration Act to compel third parties who have not exercised the option to give up the right to have access to courts and be bound by the

arbitration clause. It has further held that this would violate party autonomy and consensual nature of arbitration.

76. Supreme Court further held that bifurcation in such cases would result in a suit being divided into two parts, one being decided by the Arbitral Tribunal, and the other by the court or judicial authorities, which would defeat the entire purpose and inevitably delay the proceedings and increase cost of litigation, cause harassment and on occasions give rise to conflicting judgments and orders by two different fora. It has been further held that cause of action in relation to the subject-matter relates to the scope of the arbitration agreement and whether the dispute could be resolved by arbitration.

77. The parties to this Petition are Mr. Vikram Bakshi on the one side and Mrs. Sonia Khosla and Mr. R.P. Khosla on the other. One the demise of Mrs. Sonia Khosla her legal heirs have been impleaded. Mr Deepak Khosla the husband of Mrs. Sonia Khosla has been impleaded only as a legal heir and not in his individual capacity.

78. The contention of Mr. Deepak Khosla is that part of the shareholding i.e., 2400 shares which were held by Mr. Vini Ahuja have been purchased by him in his individual name and Mr. Deepak Khosla has not been arrayed as a party to these proceedings in his individual capacity and has only been arrayed as a legal heir of Mrs. Sonia Khosla.

79. In the present case, since Mr. Deepak Khosla has been arrayed as a party only as a legal representative, his alleged individual rights in the shareholding of the company cannot become subject matter of the

arbitration proceeding. This is further highlighted from the fact that Mr. Deepak Khosla is not a party to the arbitration Agreement.

80. Admittedly, when the Company was incorporated on 13.04.2005, Mr. Vini Ahuja held 2400 shares. There is no averment in these proceedings by Mr. Vikram Bakshi that he has purchased the shares of Mr. Vini Ahuja. No share transfer form executed by Mr. Vini Ahuja in favour of Mr. Vikram Bakshi has been produced.

81. Further, it is not in dispute that part of the land which was identified in the Agreement for the project is owned by third parties i.e., M/s Ascot Hotels and Resorts Pvt. Ltd. and one Mr. Rajiv Puri, who are both not parties to the arbitration Agreement or arrayed as parties in these proceedings, nor have they given their consent to joining for arbitration.

82. A word of caution at this juncture may also be added that even if they had given their consent to join the arbitration proceedings at the asking of Mr. Vikram Bakshi, same would be inconsequential in the absence of a consent from the other party to the Agreement i.e., Mr. R.P. Khosla and the legal heirs of Mrs. Sonia Khosla.

83. It is submitted by Mr. Deepak Khosla that the shareholding of the Company stands increased far beyond the original 10000 shares, which is disputed by learned Senior Counsel for the Petitioner, however, for the purposes of this Lis, same is not germane.

84. The Supreme Court in *Vidya Drolia (Supra)* further referring to

Booz Allen & Hamilton Incorporated (Supra) has held that every civil or commercial dispute either contractual or non-contractual which can be decided by a Court is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of Arbitral Tribunal is excluded either expressly or by necessary implication and adjudication of certain categories of proceedings are reserved by the Legislature exclusively for public Fora, as a matter of public policy.

85. The Supreme Court has further noticed that the cases which are excluded from adjudication and are reserved by the Legislature for public fora are cases relating to action in rem. It is held that a right in rem is a right exercisable against the world at large as contrasted from a right in personam, which is an interest protected solely against specific individual. This, it has been held, in view of the fact that action in rem referred to actions determining the title to property and the rights of property not merely against themselves, but also against all persons at any time claiming an interest in that property.

86. In *Vidya Drolia (Supra)*, the Supreme Court once again referring to *Booz Allen & Hamilton Incorporated (Supra)* drew a distinction between action in rem and action in personam. It also extracted examples of non-arbitrable disputes as under:-

“36. The well-recognised examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up

matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

87. In *Vidya Drolia*, the Supreme Court also referred to the decision in *A. Ayyaswamy Vs. A. Paramasivam*, (2016) 10 SCC 386, wherein the Supreme Court held that in addition to various classes of disputes which are generally considered by the Courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinary civil court and such disputes are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. If the jurisdiction of a civil court is excluded by conferment of exclusive jurisdiction on a specified court or Tribunal, as a matter of public policy, such dispute would not be capable of resolution by arbitration.

88. Reference may be had to provisions of Section 430 of the Companies Act, 2013 which reads as under:-

“430. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or

under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.”

89. As noticed hereinabove, the dispute in the present case pertains *inter alia* to shareholding, Board meetings, share transfer, the validity of share transfer, which are within the exclusive domain of the National Company Law Tribunal where the jurisdiction of the civil court has been specifically excluded.

90. Reference may also be had to paragraphs 48 to 50 of *Vidya Drolia*, which read as under

“48. A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment “settles the destiny of the res itself” and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] By contrast, a judgment in personam, “although it may concern a res, merely determines the rights of the litigants inter se to the res”. [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] Distinction between judgments in rem and judgments in personam turns on their power as res judicata, [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992).] i.e. judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. Use of expressions “rights

in rem” and “rights in personam” may not be correct for determining non-arbitrability because of the interplay between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam. Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to the statement by Mustill and Boyd that the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem. Arbitration by necessary implication excludes actions in rem.

49. *Exclusion of actions in rem from arbitration, expositis the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on “the parties” to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The Arbitral Tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has erga omnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralised mode of dispute resolution is unsuitable when the subject-matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration*

agreement between two or more parties would be limpid and inexpedient in situations when the subject-matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise. [Prof. Stavros Brekoulakis, “On Arbitrability : Persisting Misconceptions and New Areas of Concern” essay in the edited collection, *Arbitrability : International and Comparative Perspectives* (Kluwer, 2009) pp. 19-45.]

50. Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. [Ajar Raib, “Defining Contours of the Public Policy Exception — A New Test for Arbitrability”, *Indian Journal for Arbitration Law*, Vol. 7 (2018) p. 161.] For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject-matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as distinguished from commercial activities, economic adventures and welfare activities. [Common Cause v. Union of India, (1999) 6 SCC 667 : 1999 SCC (Cri) 119 and Agricultural Produce Market Committee v. Ashok Harikuni, (2000) 8 SCC 61.] Similarly, decisions

and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.”

(underlining supplied)

91. Supreme Court has held that Arbitral Tribunals are not courts of law or established under the auspices of States and cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has *erga omnes* effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement.

92. As noticed hereinabove, neither Ascot Hotels and Resorts Pvt. Ltd., nor Mr. Rajiv Puri or Mr. Deepak Khosla (in his individual capacity) or Mr. Vini Ahuja, who is alleged to have transferred his shares to Mr. Deepak Khosla are bound by the arbitration clause and any adjudication by the Arbitral Tribunal on the shareholding or the ownership of the land identified for the project is likely to affect their rights and liabilities. Clearly, the subject matter of dispute requires a collective adjudication before one Court or forum.

93. Further, it has been held that an arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject-matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable

award is not possible. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise. Further, as per the Supreme Court implied legislative intention to exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and such courts or tribunals and vested with exclusive jurisdiction.

94. Coming to the allegation of fraud and fabrication in *Vidya Drolia*, the Supreme Court referring to the decision in *A. Ayyaswamy (Supra)*, made a distinction between serious allegations of forgery and fabrication of documents as opposed to a plea of fraud, where fraud is alleged against the arbitration provision itself or is of such a nature which permeates the entire contract.

95. As noticed hereinabove, there are two allegations raised by Mr. Deepak Khosla, one is with regard to a fraud allegedly played by Mr. Vikram Bakshi at the time of entering into the Agreement and that the Agreement is not enforceable. Insofar as this argument is concerned, it may be noticed that the said fraud does not satisfy the test of 'serious allegation of fraud' but may amount to a fraud which is of a general nature, which would be arbitrable.

96. However, as noticed hereinabove, the allegation with regard to forgery and fabrication of Share Certificates, share transfer forms, Board meetings, which are germane for the purpose of determining the

very right of Mr. Vikram Bakshi are allegations that satisfy the test of ‘serious allegations of fraud’ specially in view of the chronology of the dates in respect of the share transfers as noticed hereinabove.

97. Reference may also be had to various proceedings of criminal nature, which are pending inter se the parties, which show that serious allegations of fraud and fabrication are pending adjudication before several criminal forums not only in Delhi but also in Uttar Pradesh and Himachal Pradesh and as such, the test as laid down by the Supreme Court in *Vidya Drolia (Supra)*, that serious allegations of fraud are non-arbitrable, is satisfied in the facts and circumstances of the case.

98. Reliance placed by learned Senior Counsel on the judgment of the Supreme Court in *Avitel Posts Studioz Ltd. Vs. HSBC PI (Mauritius) Ltd.*, (2021) 4 SCC 713 is misplaced. In the said case, the Supreme Court made a distinction between serious allegation of forgery and fabrication as opposed to simple allegation. As noticed hereinabove, the allegations in the present case raised by Mr. Khosla are not simple allegations of fraud, but there are serious allegations of forgery and fabrication of documents, which prima facie seems to be borne out from chronology of dates relating to issuance and transfer of Share Certificates is concerned.

99. The Supreme Court in *Vidya Drolia (Supra)* has laid down a four-fold test for determining, when subject matter of a dispute in an arbitration Agreement is not arbitrable as under:-

“76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

(5) These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

(6) However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd. [Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651] : (SCC p. 669, para 35)

“35. ... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes

relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman [Keir v. Leeman, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst [Soilleux v. Herbst, (1801) 2 Bos & P 444 : 126 ER 1376] , Wilson v. Wilson [Wilson v. Wilson, (1848) 1 HL Cas 538] and Cahill v. Cahill [Cahill v. Cahill, (1883) LR 8 AC 420 (HL)]).”

100. The Supreme Court has further held that intra-company disputes are not arbitrable and have to be addressed by a centralized forum. Clearly, there are intra-company disputes emanating in the present case which are not arbitrable and have to be addressed by a specialized forum i.e., National Company Law Tribunal.

101. The other question considered by the Supreme Court in *Vidya Drolia (Supra)* was ‘as to who decides non-arbitrability’. Answering this, the Supreme Court has held that issue of non-arbitrability can be raised at three stages. First, before the Court on an application for reference under Section 11, secondly, before the Arbitral Tribunal and thirdly, at the stage of challenge to the award. The Supreme Court has held that while considering an application under Section 11, it is permissible for the Court to weed out manifestly and ex-facie non-existent, invalid arbitration agreements and non-arbitrable disputes and

the nature of facet of non-arbitrability could also determine the nature and level of scrutiny by the court at referral stage. Supreme Court has further held that as a demurer, the Court may interfere at Section 11 stage when it is manifestly and ex-facie certain *inter alia* that disputes are non-arbitrable. Clearly, in view of the facts narrated hereinabove.

102. In view of the above, since the disputes that are subject matter of these proceedings are non-arbitrable the parties cannot be referred to arbitration.

103. Further, contention of learned senior counsel for the Petitioner, that Petitioner is merely seeking re-constitution of the Tribunal and not a fresh Tribunal is also misplaced for the reason that when the Arbitral Tribunal was initially constituted, these issues were not raised before the Court and the final authoritative pronouncement of the Supreme Court has now been rendered in *Vidya Drolia (Supra)*. Further, the Supreme Court in *Vidya Drolia (Supra)*, has held that at the stage of Section 11, this Court would be entitled to interfere where the disputes are manifestly and ex-facie non-arbitrable and decline to refer the parties to arbitration. It may also be noticed that the Company which was a party to the earlier Petition Is not even arrayed as a party to these proceedings and on that ground also this petition cannot be treated as a petition for merely reconstitution of the earlier appointed Arbitral Tribunal.

104. For the reasons stated afore-stated, I am of the view that the disputes in the present case are non-arbitrable and cannot be referred to

arbitration. Accordingly, the petition is dismissed.

I.As. 9468-73/2011, 9719/2011, 12231/2011, 13004/2011, 13813/2011, 13872-75/2011, 16767-68/2011, 19240/2011, 21231/2011, 3854-57/2012, 12200-01/2020, 16578/2021, 16642-43/2021

1. In view of the disposal of the petition, these applications have become infructuous.
2. Accordingly, these applications are dismissed as infructuous.

CRL. M.As. 10395/2011 & 10398/2011

List on 20.01.2023 for further directions.

SANJEEV SACHDEVA, J.

NOVEMBER 16, 2022/NA

Note: Though the judgment was dictated in open court on 16.11.2022 it has been checked and released on 28.11.2022.