

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: April 27, 2023

+ ARB.P. 1230/2021

DAULAT RAM DHARAM BIR AUTO PRIVATE LIMITED & ORS.

..... Petitioners

Through: Mr. Rajiv Bajaj and
Mr. Karan Prakash, Advs.

versus

PIVOTAL INFRASTRUCTURE PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr. Divjyot Singh, Ms. Avsi Malik
and Ms. Aditi Saxena, Advs. for R-1
Mr. Harish Malhotra, Sr. Adv. with
Mr. Harsh Gurbani and
Mr. Abhishek Bose, Advs. for R-2

AND

+ O.M.P.(I) (COMM.) 29/2020

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CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

ARB.P. 1230/2021

1. It is a case where the petitioner Nos. 1 to 3 ('Petitioner Group') are companies duly incorporated under the provisions of the Companies Act, 1956 ('Act of 1956'), have filed the instant petition under section 11 of the Arbitration and Conciliation Act, 1996 ('Act of 1996') with the following prayers:

"PRAYER

That in the light of arbitration agreement existing between the parties, a dispute covered by the arbitration Agreement having arisen and the parties having failed to agree upon the appointment of an arbitrator, it is prayed that this Hon'ble Court may be pleased to:

a. Appoint an Arbitrator and refer the aforementioned dispute to the Ld. Arbitrator for adjudication;

b. Pass such other/further order(s) as this Hon'ble Court may deem fit and proper in the interest of justice."

2. Whereas the respondent No. 1 herein, is also a company duly incorporated under the provisions of the Act of 1956, having its registered office at Plot No.12, Sector-4, Faridabad, Haryana-121004.

3. It is stated that the respondent No. 2 is also a company duly incorporated under the provisions of Act of 1956 and was earlier a part

of the Petitioner Group. However, currently the same is under liquidation and is thus being sued through its Liquidator appointed by the National Company Law Tribunal.

4. Facts leading to the filing of the instant petition (as it relates to the Petitioner Group) are: that the Petitioner Group together with the respondent No.2, each of whom owned a piece of land, handed over the possession of parcel of their lands to the respondent No.3 (which is also a company incorporated under the provisions of the Act of 1956, [‘Original Developer’ herein]) and permitted the latter to develop, construct and complete the building on such lands, i.e., built-up area at projects titled as ‘Royal Heritage’ & ‘Faridabad Eye’ under License No. 78 of 2009 & 33 of 2010, granted by Directorate of Town and Country Planning, Haryana, (‘DTCP’), Haryana, [‘project land’]. While the Petitioner Group and the respondent No.2 provided their piece of land for development and construction of buildings, the respondent No.3, in exchange of same, undertook the obligation to provide 10% share in the built-up area of the project land to the Petitioner Group. It is pertinent to mention here that the respondent No.3, being the Original Developer in respect of the project land has been arrayed as a Pro-forma Party, since the impleadment thereof is necessary for proper adjudication of the present petition.

5. It is also stated, after that the Original Developer undertook the steps to conduct development over the project land by applying for licenses and other necessary compliances.

6. It is stated, the Petitioner Group and the respondent No. 2 companies transferred the development rights over the said project land

to the respondent No.3 through Collaboration Agreements dated June 04, 2007, while retaining the rights, title and interest to the land underneath amongst themselves. It is also stated that as per the Collaboration Agreements, the respondent No. 3 was to have 90% share over the built-up area (FSI) and the remaining 10% share over the built-up area was to be handed over back to the Petitioner Group and the respondent No.2, respectively. That under the aforesaid agreement, the respondent No. 3 was therefore designated as the 'Original Developer'.

7. It is further stated that the respondent No. 3 (in its capacity as the Original Developer, having the development rights under the Collaboration Agreement) thereafter, entered into the Deed of Assignment, dated February 27, 2008 and by virtue of that, the Petitioner Group and the respondent No. 2, being signatories to it, further assigned the development rights to the respondent No.1 for a consideration of ₹6,47,89,944/-. As a result, the respondent No.1 stepped into the shoes of the respondent No. 3 and was thus designated as the 'Assignee Developer'.

8. It is also the case of the Petitioner Group that as per the terms of the Collaboration Agreements, upon completion of the project and the issuance of the necessary Occupation Certificates from the Statutory Body, 10% share in the built-up area (FSI) on the project land was to be handed over back to the original landowners (i.e., the Petitioner Group and the respondent No.2), by the respondent No.1.

9. It is stated that irrevocable power of attorneys were also executed (and duly registered) by the Petitioner Group and the

respondent No.2, on November 05, 2009, in favour of the respondent No. 1, in order to enable it to commence and conclude the proposed project. Moreover, the right of liaising with government departments, licenses, approvals, etc. and the right of appearing before DTCP, Haryana, was also given to the respondent No. 1, in pursuance to the Collaboration Agreements and the Deed of Assignment.

10. It is the case of the Petitioner Group that as per the Deed of Assignment, the consideration of ₹6,47,89,944/- was to be paid by the respondent No. 1 to the respondent No.3, within 90 days of the registration of the Deed of Assignment and on the grant and transfer of statutory licenses by DTCP, Haryana. However, the same still remains unpaid as on date.

11. It is stated that the requisite licenses qua the project land were obtained from the DTCP, Haryana only on December 03, 2009 (License No. 78 of 2009) and on April 21, 2010 (License No. 33 of 2010) due to administrative delays. That, thereafter, the respondent No.1, initiated steps for transfer of the licenses in their name from the respondent No. 3 and accordingly, the same was effected by May 23, 2013.

12. It is stated, thereafter respondent No.3 approached the respondent No.1 for their payment of Rs. 6,47,89,944/- for the assignment of Development Rights, along with the requisite compensation for the delay. That initially, the respondent No. 1 sought some time to make the payment, citing paucity of funds and thereafter, it kept on delaying the payments on one pretext or the other.

13. It is the case of the Petitioner Group that on September 30, 2013, they came to know that the respondent No. 1 was misusing some power of attorneys (whereby the right of appearing and liaising with government departments, licenses, approvals, etc., was given to the respondent No.1) and had already executed illegal and fraudulent sale deeds, whereby the respondent No. 1 through one Kapil Minocha had transferred the project land in its own name. It is their case that the said power of attorney was not even in favour of Kapil Minocha, let alone for the purpose of transferring the whole rights, title and interest in the said lands.

14. It is also the case of the Petitioner Group that the respondent No.1, has cheated them of their land as well as the developed share, as the respondent No.1, has already started selling the flats over which the Petitioner Group as well as respondent No.2, have their share of 10%.

15. That thereafter, the Petitioner Group along with respondent Nos.2 and 3, filed a petition under section 11 of the Act of 1996, bearing, Arb. P. 528 of 2013, before this Court and the same got disposed of on February 25, 2014, with constitution of the Arbitral Tribunal, which ultimately, upon constitution, dismissed the Statement of Claim filed by the Petitioner Group and respondent Nos.2 and 3, vide Award dated August 11, 2019, on the grounds of limitation and the liability having already been discharged by the respondent No.1, herein.

16. It is stated that the afore-said Award is presently lying under challenge before this Court under section 34 of the Act of 1996, having been registered as O.M.P. (Comm.) 522 of 2019. Furthermore, another

petition under section 34 of the Act of 1996, against the same award has also been filed by the respondent No. 2 (under Liquidation) through its Liquidator and the same is registered as OMP (Comm.) 529 of 2019.

17. It is also primarily the case of the Petitioner Group that the afore-said Arbitral proceedings were only on the aspects of: 1) non-payment of consideration amount of ₹6,47,89,944/- towards the Deed of Assignment on the part of respondent No.1, 2) cancellation of the fraudulently executed sale deeds and 3) for handing over of original title documents qua the project land back to the Petitioner Group.

18. It is also their case that the Petitioner Group had also conducted some inquiries and whilst doing that they came to know, that the respondent No. 1 has already alienated most of the built-up units over the lands owned by the Petitioner Group to some unknown home-buyers and has, in all likelihood, exceeded the 90% of the built-up area allotted to it, in order to frustrate the claims of the Petitioner Group and the respondent No. 2.

19. It is also stated that the respondent No.1 has also failed to call upon the Petitioner Group to inspect and choose the units over which they were entitled to have 10% share in the built-up Area.

20. It is further their case that the respondent No.1 has breached the terms of the Deed of Assignment, by not fulfilling its obligations under the same, specifically, qua not handing over 10% of built-up area to the Petitioner Group, which obligation, the respondent No.1 had assumed while purchasing the Development Rights from the Original Developer or the respondent No.3.

21. That in the light of the afore-said circumstances, the Petitioner Group was constrained to send a Notice under section 21 of the Act of 1996, dated December 21, 2019, to the respondent No.1, demanding that the Authorized Representative of the Petitioner Group be allowed to inspect the built-up units in respect of which the Occupation Certificates have been granted and work out the modalities under which the share of 10% could be allocated to the Petitioner Group and also to hand over the said units along-with the necessary documentations required for transfer thereof. Moreover, it was also demanded by the Petitioner Group that a written declaration to the effect that the Petitioner Group be declared as the rightful owners of the 10% share in the units should also be given in any future agreements, wherein the rights, title and interest falling to the share of the Petitioner Group were already being alienated to some unknown homebuyers. The Petitioner Group, by sending the afore-said Notice to the respondent No.1, had invoked Clause 21 of the Deed of Assignment, which stipulates the Arbitration Clause and the same is reproduced as follows:

"21. Arbitration: Any claim, controversy or dispute arising out of under this Deed not settled by mutual Deed of the parties involved within 30 days after a party is provided written notice for settlement thereof, shall be referred to Arbitration to a sole arbitrator jointly appointed by the parties under the Indian Arbitration and Conciliation Act of 1996. In the event the parties are unable to agree upon a sole Arbitrator, the claim, controversy or dispute shall be referred to a panel of three arbitrators, one of whom shall be appointed by the Original Developers, one by the Assignee Developer and third to be appointed by the aforesaid two arbitrators. The arbitration

proceeding shall be conducted in New Delhi, India and shall be governed by and construed in accordance with the laws of India. The Language of the Arbitration shall be in English. The costs and expenses of the arbitrator(s) and holding the arbitration shall initially be borne in equally by the Assignee Developers and Original Developer. Initially each party will bear its own legal, travelling and other similar costs. However, the arbitrator(s) may in his/ their award, require any party to such costs as the arbitrator(s) think fit, including the costs and expenses of the arbitration, travel, costs and advocate fees. The parties shall be entitled to specific performance all the terms of this Deed."

22. It is further stated that for the purpose of calculation of the share of the Petitioner Group (i.e. 10% of the built-up area), the total saleable built-up area, as per the record available with the concerned local authority, is to the extent of 1,79,597.91 Sq Mts. or 19,29,946.6411 Sq. Ft. That out of the said total built-up area, the Petitioner Group, on the basis of their proportions as to land holding are entitled to a built-up area of 6,01,549.522-Sq. Ft., 3,99,053.582 Sq. Ft. and 71,259.568 Sq. Ft. respectively, which is further trifurcated as follows:

Under OC dated 30.11.2017 (Sq. Feet)	Under OC dated 25.06.2018 (Sq. Feet)	Balance Area for OC Not received (Sq. Feet)	Petitioner's Cumulative Share (Sq. Feet) (10%)
588616.218	34255.74	140690.72	107186.27

The above does not include the share of respondent No.2.

23. That as per the Petitioner Group, the market rate of the units (in respect of which the Occupation Certificates have been received), as advertised on the website of the respondent No. 1 themselves, is

about ₹ 4774/- per Sq. Feet and computing the current market value of the share of the Petitioner Group, it comes out to be of ₹ 52 Crores.

24. So, in light of forgoing facts and circumstances, the Petitioner Group has filed the present petition seeking appointment of a Sole Arbitrator for adjudication of disputes which have arisen between the Petitioner Group and the respondent No.1.

RESPONDENT NO.1'S CASE

25. Whereas, on the other hand it is primarily the case of the respondent No.1 that the dispute(s) sought to be referred to arbitration by way of this instant petition, stand already adjudicated in the earlier arbitration proceedings which took place between the same parties.

26. It is stated that even the claim of the Petitioner Group, specifically qua their 10% share in the built-up area constructed over the lands and/or share in the land underneath, has already been raised before the learned Sole Arbitrator and thus all the disputes between the parties stand adjudicated vide detailed Award dated August 11, 2019. So, it is the case of the respondent No.1 and as contended by Mr. Divjyot Singh, learned counsel appearing on behalf of the respondent No.1 that because of the afore-said reason, the Petitioner Group cannot be allowed to again raise the same dispute in respect to the same subject matter. Thus, it is the case that the present petition is nothing but an abuse of the process of law and thus liable to be dismissed.

27. It is also the case of Mr. Singh, that the Arbitration Clause sought to be invoked by the Petitioner Group does not survive or exist, anymore. It is his submission that the earlier arbitration proceedings initiated before learned Sole Arbitrator, Mr. Justice (Retd.) G.S.

Singhvi, were commenced by the Petitioner Group & respondent Nos.2 and 3 by invoking the same Arbitration Clause stipulated in the Deed of Assignment and in the present petition also, the Petitioner Group is again invoking the same Arbitration Clause of the same Deed of Assignment with respect to the same disputes. So, he submitted that since the Petitioner Group have already availed their remedies for adjudication of disputes by way of arbitration, therefore there is no question of any dispute being again referred to arbitration.

28. He contended that the disputes sought to be referred by the Petitioner Group by way of instant petition, do not pertain to the Arbitration Clause stipulated in the Deed of Assignment executed between the Petitioner Group and the respondent No.1. It is his contention that only the Petitioner Group, respondent No.2 and the Original Developer (respondent No. 3 herein) were parties to the Collaboration Agreements. The respondent No.1 was not a party to the Collaboration Agreements. He also contended that the respondent No.1 did not step into the shoes of the Original Developer. In fact, all rights, title, interest in the whole of the project land (including the built-up area to be constructed) were transferred by the Petitioner Group, respondent No.2 and the Original Developer to the respondent No.1 through the Deed of Assignment and Sale Deeds for valuable consideration. He substantiated his argument in the following manner:

(A) that under the Deed of Assignment there was no obligation on the respondent No.1 to transfer 10% of built-up area of the Disputed Property to the Petitioner Group;

- (B) that perusal of Clause 1, 10(d) and Clause 16 of the Deed of Assignment reveals that the entire construction on the Disputed Property belongs entirely and exclusively to respondent No. 1. Moreover, the Deed of Assignment nowhere provides that 10% or any portion of the built-up area/Disputed Property will be transferred back to the Petitioner Group;
- (C) that the Arbitration Clause under the Deed of Assignment provides that any claim/dispute arising out of or under this Deed shall be referred to arbitration. Therefore, only the disputes arising out of or relating to the Deed of Assignment can be referred to arbitration and from the foregoing, it is evident that the disputes sought to be referred to arbitration do not relate to the arbitration agreement which was executed between the parties and therefore, the disputes should not to be referred to arbitration;
- (D) that the Court whilst exercising its jurisdiction under section 11 of the Act of 1996 ought to embark upon an enquiry as to whether the dispute sought to be referred to arbitration pertains to the arbitration agreement invoked or not. Reliance has been placed upon the judgments of the Supreme Court in *Duro Felguera S.A. v. Gangavaram Port Limited (2017) 9 SCC 729* and *M/s Emaar India Ltd. v. Tarun Aggarwal Projects LLP & Anr., Civil Appeal No. 6774 of 2022*, decided on **30.09.2022**, to contend the same.

29. Apart from the afore-mentioned argument, another limb of his argument is that the claims sought to be referred to arbitration are anyway barred by the contours of limitation and hence deadwood. Following submissions have been made to substantiate the same:

(A) that the Petitioner Group has claimed that the cause of action for filing the present petition arose in 2017, when the Occupation Certificate was issued by the competent authority. However, the said contention is without any merit. The issuance of an Occupation Certificate in no manner gives rise to a cause of action for a claim qua the built-up area;

(B) that the cause of action for claiming 10% of share in the built-up area could be said to have arisen on the following dates and events and taking any of the dates as cause of action, the Notice invoking arbitration issued in December 2019 would evidently be hit by the law of limitation:-

(ba) Cause of Action will start from the date, the respondent No.1 had started selling the units belonging to the built-up area-

As per the License No. 78 of 2009, which was issued on December 03, 2009 by the DTCP, Haryana in the name of the Petitioner Group under the Haryana Development and Regulation of Urban Areas Act, 1975 ('HDRUA Act') and Rules made there-under for development of a Group Housing Colony, the respondent No.1 had started selling the units of the built-up area from the year 2013 onwards. Therefore, the cause of action for claiming 10% of the built-up area arose only in the year

2013 and accordingly expired in 2016. Thus, the Arbitration Clause invoked in December 2019 is barred by limitation;

(bb) Cause of Action will start from the date when the Petitioner Group got the knowledge that more than 95% of the built-up area had been sold- that it has been an

established fact that in the order dated March 09, 2016, passed by the Civil Judge (Sr. Division), Faridabad in CS No. 561 of 2016, it was recorded that more than 95% of the units of the group housing complex have already been sold by the respondent No. 1; Therefore, at least from March 09, 2016, the Petitioner Group knew that their alleged share was being sold. Accordingly, limitation for protecting the 10% share started at least in March 2016 and thereby expired in March 2019. Again, the invocation of arbitration was in December, 2019, therefore the same is barred by limitation;

(bc) Cause of action will start from the date of knowledge of the registered Sale Deeds qua the Project Land- that

the sale deeds dated January 11, 2010 qua the whole of the project land were executed in favour of the respondent No.1 by the Petitioner Group. The Petitioner Group claims that they obtained the knowledge about the registered sale deeds on September 30, 2013. It is his submission that even if it is assumed that the Petitioner Group had obtained the knowledge of the registered sale deeds on September 30, 2013, the limitation for invoking arbitration seeking 10% of the built-area arose on September 30, 2013 i.e., when the

Petitioner Group obtained the knowledge that the entire project land was transferred to the respondent No.1. Therefore, the limitation expired in September 2016 and accordingly, the invocation of the arbitration agreement in December, 2019 is barred by limitation; also, during the course of the arguments, the counsel for the Petitioner Group had also contended that the built-area was sold to the respondent No.1 without the land underneath and therefore the execution of the sale deeds is irrelevant. The said contention of the Petitioner Group is belied from the definitions provided under the Haryana Apartment Ownership Act, 1983('Apartment Act') which is applicable to the Group Housing Complex in question. A combined reading of section 2(b) and 2(c) of the Apartment Act, shows that an apartment owner is the owner of not only the apartment but also of the undivided interest in the land on which the building is located.

(C) Reliance has been placed upon the following judgments to demonstrate that the facts of the present case would reveal that the claims sought to be referred for arbitration by the Petitioner Group are ex-facie barred by limitation:

(ca) Bharat Sanchar Nigam Ltd. and Ors. v. Nortel Networks India Pvt. Ltd. (2021) 5 SCC 738;

(cb) Siemens Healthcare Pvt. Ltd. v. Director General Armed Forces Medical Services, Arb. P. 84 of 2022, decided on 05.07.2022;

(cc) V.K. Dewan and Co. v. Delhi Jal Board and Ors., Arb. P. 866 of 2019 decided on ***06.10.2022***.

30. It is also one of the submissions of Mr. Singh that the contention of the Petitioner Group that the claim of 10% in the built-up area was not raised and/or decided in the proceedings previously adjudicated between the parties, is absolutely wrong and misleading. He submitted that the Petitioner Group, in the civil and arbitration proceedings, whilst claiming ownership of the entire project land, had already claimed that they be declared as the owners of at least 10% of the built-up area on the project land. Mr. Singh has substantiated this argument in the following succeeding paragraphs.

31. That in this instant petition, the Petitioner Group has not disclosed about the four civil suits bearing Suit No. 2549,2583,2584 and 561 of 2016 filed by them, before the Civil Judge (Sr. Division), Faridabad seeking identical relief i.e., a decree of declaration to the effect that they be declared as the absolute owners of the properties owned by them as the Land Owners. The said civil suits were dismissed by the Civil Judge (Sr. Division), Faridabad vide detailed order dated February 21, 2019. It is his case that this is a material fact which has been deliberately concealed by the Petitioner Group in the present petition. Therefore, on this ground alone, the present petition deserves to be dismissed.

32. That under the Deed of Assignment, the Petitioner Group had assigned all of their rights, title and interest qua the project land in favour of the respondent No.1. According to him, the transferred rights also included the right to further sell the units after the construction. It

is his case that pursuant to the execution of the Deed of Assignment, sale deeds with respect to the project land have also been executed in favour of the respondent No.1 by the Petitioner Group. So, as per him, the respondent No.1 has become the absolute owner of the project land and therefore, after the sale of lands, the Collaboration Agreements on the basis of which the Petitioner Group based its claim, do not exist anymore.

33. That on October 28, 2013 the Petitioner Group had filed the petition under section 9 of the Act of 1996 bearing OMP No. 1057 of 2013 before this Court seeking direction that the respondent No.1 be restrained from alienating or creating any third-party rights in the land located in Sector 70, Faridabad (part of the project land). However, the said petition was withdrawn by the Petitioner Group with the liberty to move an application seeking interim relief before the Arbitral Tribunal as and when the same is constituted.

34. That subsequent thereto, on filing of the Arbitration Petition, this Court had appointed the Sole Arbitrator to adjudicate upon the disputes which had arisen between the parties herein. Thereafter, the Petitioner Group on April 28, 2014 also filed an Application under section 17 of the Act of 1996 seeking same reliefs as claimed under the withdrawn section 9 petition. The said Application under section 17 of the Act of 1996 was also dismissed by the learned Sole Arbitrator vide detailed order dated July 02, 2014.

35. That during the pendency of the Arbitration proceeding, the Petitioner Group had filed four civil suits and along with those suits, the Petitioner Group had also filed an application under Order 39 Rule

1 & 2 of the Code of Civil Procedure, 1908 ('CPC') and that Application was dismissed by the Court of Civil Judge (Sr. Division), Faridabad vide its order dated August 02, 2017 after specifically holding that the "Plaintiff (petitioner No.1, herein) and its associates company had already assigned all rights in suit property in favour of the Defendant No. 1 (respondent No.1, herein)".

36. That the Petitioner Group after having failed to procure an injunction order, from the Civil Judge (Sr. Division), Faridabad, filed another Application under section 17 of the Act of 1996, before the learned Sole Arbitrator and in the said Application, the Petitioner Group had specifically made a submission qua their alleged entitlement to 10% of the developed area on the project land and concomitantly prayed that the respondent No.1 be restrained from alienating 10% of the developed property and that Application was also dismissed by the learned Sole Arbitrator vide its order dated September 21, 2017. Immediately thereafter, a third Application under section 17 of the Act of 1996 was also moved and the same was also dismissed by the learned Arbitrator.

37. That the Petitioner Group thereafter filed a Review Application under section 33 of the Act of 1996, seeking review of order dated December 23, 2017 passed by the Sole Arbitrator (in the third Application under section 17 of the Act of 1996). The said review Application of the Petitioner Group was also dismissed by the Sole Arbitrator vide order dated December 31, 2017.

38. That the Petitioner Group had even preferred an appeal against the order dated August 02, 2017, whereby the Civil Judge (Sr.

Division), Faridabad had dismissed the Application under Order 39 Rule 1 & 2 of the CPC and the said appeal was also dismissed by the Additional District Judge, Faridabad vide order dated January 18, 2018. He further submitted that the Petitioner Group did not stop there and after that filed a Revision Petition bearing No. 1115 of 2018 before the High Court of Punjab and Haryana and the said Revision Petition was also dismissed by the High Court of Punjab and Haryana vide order dated February 19, 2018.

39. That the four civil suits filed by the Petitioner Group before the Civil Judge (Sr. Division), Faridabad were also dismissed by the Trial Court vide its common order dated February 21, 2019 and the Petitioner Group aggrieved by the Judgment passed by the Civil Judge (Sr. Division), Faridabad, filed four separate appeals against the common judgment and the appeals preferred by the Petitioner Group and respondent No.2 herein against the dismissal of the Suits, have been dismissed by the Additional District Judge, Faridabad.

40. So, in an essence, it is the case of Mr. Singh that the findings of the Judgment of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. and Ors. (supra)*** squarely falls upon the facts of this case as the claims sought to be referred: (i) are not relatable to the Arbitration Clause invoked; (ii) are beyond the period of limitation and (iii) have previously been adjudicated between the same parties in different proceedings. Therefore, he prays before this Court that the present petition be dismissed along with heavy cost.

SUBMISSIONS ON BEHALF OF THE PETITIONER GROUP AND RESPONDENT NO.2

41. Whereas it has been extensively submitted by Mr. Rajiv Bajaj, learned counsel appearing on behalf of the Petitioner Group and Mr. Harish Malhotra, learned senior counsel appearing for the respondent No.2, that the obligation of giving 10% built-up area back to the Petitioner Group became legally ascertainable only on the issuance of the Occupation Certificates (i.e., on November 30, 2017, June 25, 2018 and August 17, 2020) by the DTCP, Haryana and as on date Occupation Certificates in respect of Towers no. 1 and no. 2, are yet to be received by respondent no. 1. Reliance in this regard has been placed on section 264 of the Haryana Municipality Act, 1994.

42. They submitted that the claim of 10% built-up area has never been sought before any Court or Tribunal as the same became legally ascertainable only when the Flats built on the project land received necessary approvals in the form of Occupation Certificates. They substantiated their contention by submitting that only the following claims were raised in the previous arbitration proceedings and the Civil Suits filed before the Civil Judge (Sr. Division), Faridabad, Haryana:

A) The claim of non-payment of ₹6,47,89,944/- to the respondent No.3 herein (Original Developer) was raised in the Arbitral Proceedings before Justice G.S. Singhvi (Retd.);

B) Declarations as to the fraudulent sale deeds and consequential injunctions were sought before the Civil Judge (Sr. Division), Faridabad, Haryana.

43. It is their submission that the reliefs sought in the civil suits were only restricted to the aspects of: Declaration of ownership, injunctions against interference with possession and restraint on

alienation/further creation of charges and mandatory injunction qua handing over of the title documents of the project land.

44. It is also their submission that the present dispute arises out of the respondent No.1 undertaking the obligations of the respondent No.3 (Original Developer) under the Collaboration Agreements by way of Deed of Assignment.

45. They submitted that the respondent No.1 merely stepped into the shoes of the respondent No.3 and was thus, in an essence, required to discharge the following obligations towards the Petitioner Group and the respondent No.2 pursuant to the Collaboration Agreements, Deed of Assignment and General Power of Attorneys:

(A) pay a sum of ₹6,47,89,944/- to respondent No.3 for the assignment of Development Rights on the project land and the retention of 90% built-up area in the project;

(B) handover 10% of the built-up area to the Petitioner Group.

46. Therefore, they submitted that the arbitration sought to be invoked in respect of non-delivery of 10% built-up area in the project land is urgent due to the fact that most of the units have already been sold and the possessions have also been delivered and the same shall surely become infructuous, in case the relief being sought is not granted.

47. It is also their submission that the present petition is not barred by the contours of *res judicata* (constructive as well) or Order II Rule 2 of the CPC.

48. They submitted that the claims sought by the Petitioner Group are well within the period of limitation as the project is yet to be

completed, and even otherwise, before the grant of Occupation Certificate, the units could not have been identified and allocated to the Petitioner Group. So, they contended that the present petition is well within the period of limitation and thus, the same should be allowed and disputes be referred to arbitration.

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49. That the present petition has been filed by the Petitioner Group under section 9 of the Act of 1996 seeking multiple interim measures against the respondent No.1.

50. Specifically, the following interim reliefs have been sought by them from this Court:

“PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:

(a) Restrain the Respondent No.1 from alienating any more units or entering into any Apartment Buyer Agreements or any other sort of agreement in respect of the Built-up area in the projects titled as "Royal Heritage" and "Faridabad Eye" at Sector 70, Faridabad;

(b) Appoint a Receiver and an Expert Valuer to inspect the projects titled as "Royal Heritage" and "Faridabad Eye" at Sector 70, Faridabad and value the share of the Petitioners and furnish the same before this Hon'ble Court in as much as the moulding of relief(s) is to be carried out and further to take into possession the share of the Petitioners in the said project;

Or in the alternative,

(c) Direct the Respondent No.1 to deposit an amount of Rs. 52 Crores by way of FDR with this Hon'ble Court so as to secure the rights of the Petitioners as and when they succeed in the Arbitration Proceedings;

(d) Direct the Respondent No.1 to issue a written

declaration as to the pendency of the dispute over the share of the Petitioners and incorporate the same into the any agreement/transfer documents/sale documents which may be entered into with the potential homebuyers and that a communication be issued to the homebuyers currently in possession of the units;

(e) Pass any other or further orders as may deem fit and proper in the facts and circumstances of the case and in the interest of justice”.

51. It is pertinent to mention here that the facts revolving around both section 11 petition bearing Arb. P. No.1230/2021 and the instant section 9 petition are same. Therefore, the same are not repeated herein and only grounds and submissions qua maintainability of the instant petition, raised and made, by the respective counsel have been stated hereinafter.

PETITIONER GROUP’S SUBMISSIONS ON SECTION 9 PETITION

52. So, it is the case of the Petitioner Group and so contended by Mr. Rajiv Bajaj, learned ounsel appearing on behalf of the Petitioner Group that if the afore-said reliefs, as sought, are not granted then they shall be left with no remedy, as the respondent No.1 shall, alienate the 10% built-up area falling under the share of the Petitioner Group by virtue of the Collaboration Agreements, Deed of Assignment and all other documentations, to unaware homebuyers.

53. That the Petitioner Group, till date, has not been approached by the respondent No. 1 for allocation of their 10% share in the built-up area and on top of the fact that the Authorized Representative of respondent No. 1 has admitted during his Cross-examination in Arb.

No. 264 of 2013, that units exceeding 90%, have already been allotted and Apartment Buyers Agreements in respect of the same have already been executed by respondent No. 1 in favour of some unknown home-buyers.

54. That the counsel of the respondent No.1 had himself submitted before the Court of Civil Judge (Sr. Division), Faridabad, Haryana that units exceeding 90% have been sold and the same fact has been recorded vide Order dated March 09, 2016 in CS No. 561 of 2016 (the suit instituted on behalf of respondent No.2 herein).

55. It is also his submission that this Court is to only see the existence of a prima facie case in favor of the Petitioner Group and the test for ascertaining whether irreparable damage shall be caused or not has also to be taken into account.

56. It is also his case that as per the law laid down by the Supreme Court, the Courts whilst adjudicating petitions under section 9 of the Act of 1996, have to be more liberal than whilst deciding Applications usually filed under Order XXXIX Rules 1 and 2 of the CPC.

57. It is further his case that the cause of action for filing the instant petition arose only on November 30, 2017, when the first Occupation Certificate was received by the respondent No.1 in relation to Tower No.5, 6, 7, 8, 9, 10, 11 and 12 for allotment of 10% of the built-up area to the Petitioner Group. The cause of action further arose on June 25, 2018 when the second Occupation Certificate was received by the respondent No.1 in relation to Tower No. 13, 14, 15 and 16 and it again further arose on December 21, 2019, when the Notice under section 21 of the Act of 1996 was sent to the respondent No.1, urging

that the Authorised Representative of the Petitioner Group be allowed to inspect the built-up units in respect of which the Occupation Certificates have been granted and to work out the modalities under which the share of 10% could be allocated to the Petitioner Group.

58. So, in light of above-mentioned grounds, the Petitioner Group, has filed the instant petition, seeking multiple interim reliefs against the respondent No.1

RESPONDENT NO.1'S SUBMISSIONS

59. On the other hand, in an essence, it is Mr. Singh's primary submission that claims sought to be referred to arbitration by the Petitioner Group: (i) are not arbitrable; (ii) are barred by limitation; and (iii) have already been adjudicated between the parties in previous civil and arbitral proceedings. So, he submitted that when the petition under section 11 of the Act of 1996 is itself not maintainable then on this ground alone, the instant petition should also be dismissed.

60. That Mr. Singh has specifically made the following submissions to substantiate that the Petitioner Group cannot be granted any of the reliefs sought by virtue of the instant petition:

(A) that all the units in the built-area on the Project Property stand already sold to third parties as on date. Therefore, no question arises for restraining respondent No.1 from alienating any more units and/or directing it to incorporate the pendency of the present dispute in the agreements to be executed with third parties;

(B) on the contention of Mr. Bajaj that 10% of the built-up area became legally determinable on issuance of the Occupation Certificate in November 2017, it is his submission that even if it is

assumed that the cause of action for filing the present section 9 petition arose in November 2017, still the petition was filed by them only in January 2020 i.e. more than 3 years after the cause of action arose, as per their own case;

(C) that even after filing the captioned petition belatedly, no urgency was shown by the Petitioner Group for claiming the reliefs sought in the instant petition. It is his case that till date, no Notice qua instant petition has been issued to the respondent No.1. Even, he emphasised upon the following orders passed by this Court in the instant petition to demonstrate the lackadaisical approach on part of the Petitioner Group:

“

<i>Date Of Order</i>	<i>Order passed</i>
04.02.2020	<i>First Date of hearing of the captioned Petition. Although the Respondent No.1 appears on advance notice. Notice on the Petition is not issued by the Hon'ble Court.</i>
11.12.2020	<i>The following order was passed by this Hon'ble Court: “None appears for the petitioner. In the interest of justice, adverse orders are deferred. List on 05.05.2021.”</i>
06.09.2021	<i>The following order was passed by this Hon'ble Court: “1. There is no appearance on behalf of the Petitioner. The Court Master has been informed that Mr. Rajiv Bajaj, counsel for the Petitioner had a doctor's appointment and he will joining after some time. However, despite call, no one has appeared. 2. Re-notify on 16th November, 2021.”</i>
21.04.2022	<i>The following order was passed by this Hon'ble Court:</i>

	<i>"1. Request for adjournment is made on behalf of learned counsel for the petitioner on the ground of medical emergency.</i> <i>2. At request, renotify on 14.07.2022."</i>
14.07.2022	<i>None appeared for the Petitioners. The matter was renotified to 28.07.2022</i>
28.10.2022	<i>The following order was passed by this Hon'ble Court:</i> <i>"1. A request for adjournment is made on behalf of Mr. Rajiv Bajaj on the ground that he is in personal difficulty.</i> <i>2. At his request, renotify on 2nd November, 2022."</i>

(D) that even as on date, the Petitioner Group has not pressed for the reliefs sought in the instant petition on the ground of urgency. Therefore, even after lapse of five years since the cause of action had arisen, no urgency is shown or pleaded by them;

(E) that the Petitioner Group had the knowledge, at least on March 09, 2016, that the respondent No.1 has sold more than 90% of the built-up area of the Project Land. Despite that, they have filed the instant Petition almost four years later (in January 2020) seeking restraint against respondent No.1 from alienating the units;

(F) that it is a settled law that a party who by its inaction/delay in filing necessary proceedings, allows third party rights to accrue, is not entitled to the equitable relief of injunction. Reliance has been placed upon the following judgments to contend the same:

(fa) ***Ambalal Sarabhai Enterprise Limited and Ors. v. KS Infraspace LLP Limited and Ors. (2020) 5 SCC 410;***

(fb) ***Mandali Ranganna and Ors. v. T. Ramachandra and Ors. (2008) 11 SCC 1.***

(G) that it is a settled law that a party seeking relief in a petition filed under section 9 of the Act of 1996, is additionally required to satisfy the Court that the relief(s) being sought cannot await the constitution of an Arbitral Tribunal. Emergent necessity of grant of interim measures is therefore a *sine qua non* for grant of interim measures of protection, as the power of an Arbitral Tribunal to grant interim reliefs under section 17 of the Act of 1996, is akin to granting of interim reliefs under section 9 of the Act of 1996. It is his case that in the present case, the conduct of the Petitioner Group disentitles them from grant of any interim measures at this stage. Reliance has been placed upon the following judgments in this regard:

(ga) *Avantha Holdings Limited v. Vistra ITCL India Limited OMP (I) (Comm.) 177/2020*, decided on **14.08.2020**;

(gb) *Kuber Enterprises v. Doosan Power Systems India Pvt. Ltd. and Ors., OMP(I)(COMM)364/2021& OMP(I)(COMM) 365/2021*, decided on **12.11.2021**.

(H) that no grounds for passing of an order of attachment before judgment have either been pleaded or made out by the Petitioner Group. Reliance in this regard is again placed on the judgment in the case of *Kuber Enterprises (supra)*.

61. So, on the afore-said grounds, Mr. Singh has argued for the dismissal of the instant petition.

ANALYSIS

62. Having heard the learned counsel for the parties and perused the record, at the outset, it may be stated, this petition has been filed by

the Petitioner Group. A prayer has also been made on behalf of the respondent No.2 for allowing it to participate in the arbitral proceedings as claimant for its own individual share in the built-up area, to avoid multiplicity of litigation. The Notice invoking the Arbitration Clause was sent by the respondent No.2 only on October 19, 2022 i.e., during the pendency of these proceedings. It is not known whether any reply has been sent by the respondent No.1 to the said Notice. In any case, in the absence of substantive petition by the respondent No.2, the afore-said prayer in these proceedings cannot be accepted. Nonetheless, nothing precludes the respondent No.2 to seek reference in accordance with law.

63. The reliance placed by Mr. Malhotra on the judgment of the Co-ordinate Bench of this Court in the case of ***Raghuvir Buildcon Pvt. Ltd. v. Ircon International Limited, (2021) SCC OnLine Del 2491***, in support of his contention that the claim of 10% share in the developed area by the Land Owners has not been settled by former the arbitration proceedings and hence, present arbitral reference deserves to be admitted, would not be applicable in the facts of this case, in view of my above conclusion.

64. Having said that, I first intend to consider the petition filed by the Petitioner Group seeking appointment of the Arbitrator. In this petition, the Petitioner Group has culled out the purpose of seeking the appointment of Arbitrator, i.e., for adjudication of dispute between the Petitioner Group and the respondent No.1, which arises out of the Deed of Assignment, the subject matter of which is the non-delivery of 10% built-up area by the respondent No.1 to the Petitioner Group in

the project titled as “Royal Heritage” under the License No.78 of 2009 and 33 of 2010 granted by DTCP, Haryana.

65. The petition has been contested by Mr. Singh, learned counsel appearing for the respondent No.1 by stating that under the Deed of Assignment (which contains the Arbitration Clause): (i) there was no obligation on the part of the respondent No.1 to transfer 10% of built-up area of the project land to the Petitioner Group. (ii) The perusal of clauses 1, 10 (d) and 16 of Deed of Assignment reveals that the entire construction on the project land belongs entirely and exclusively to the respondent No.1. (iii) Only dispute arising out of or relating to the Deed of Assignment can be referred to the arbitration, so, it follows the dispute for which the reference is sought does not relate to the arbitration agreement which was executed between the parties and therefore, the dispute should not be referred to arbitration; (iv) the Court while exercising jurisdiction under section 11 of the Act of 1996 has to embark upon an inquiry as to whether the dispute for which reference is sought pertains to the arbitration agreement invoked or not; (v) in any case, the claims for which reference is being sought shall be barred by limitation, being, deadwood, inasmuch as (a) the cause of action had arisen on the date, the respondent No.1 had started selling the units belonging to the built-up area in the year 2013 onwards; (b) cause of action would also start from the date when the Petitioner Group got the knowledge that more than 95% of the built-up area had been sold in the year 2016 in terms of order dated March 09, 2016 passed by Civil Judge (Sr. Division), Faridabad; (c) even otherwise, the cause of action would start from the date of knowledge

of the registered sale deed qua the project land in favour of the respondent No.1 and (vi) the issue of 10% has already been adjudicated in the earlier rounds of litigation before the Civil Judge (Sr. Division), Faridabad; the learned Arbitrator and the Additional District Judge, Faridabad.

66. Having noted the broad submissions made by Mr. Singh, before embarking upon to consider the rival submissions, it is necessary to reproduce some of the relevant Clauses of the Collaboration Agreements and also the Deed of Assignment. The Collaboration Agreements were executed between the Petitioner Group, respondent No.2 and the respondent No.3 (herein). The Clause 16 (identical in all the Collaboration Agreements) thereof reads as under:

“16. The Owner and the Developer have agreed to divide the built-up area permitted over the said land (FSI) in the following manner:

OWNER’S SHARE 10%

DEVELOPER SHARE 90%

It is further agreed that any increase in developed area shall be to the benefit of the developer only and Owner shall not make any claim towards the said increase in developed area on any ground whatsoever.”

67. The Deed of Assignment was executed between the respondent No.3, respondent No.1, petitioner No.1, petitioner No.2, petitioner No.3, respondent No.2 and Shri Desh Raj and Shri Tej Pal. The Clauses J, 1, 10 (d) and 16 of the Deed of Assignment read as under:-

“J. The Original Developer has agreed to assign the entire Development Rights on the said Property and the Owners have consented to such assignment to the

Assignee Developer under this Deed at or for the consideration and on the terms and conditions herein below recorded.

1. Pursuant to this Deed, the Original Developer and the Owners hereby grant, convey, transfer and assign to the Assignee Developer, the Development Rights in respect of the said Property together with all right, title interest and obligations in respect of the said property including the rights contained in Collaboration Agreements and in this deed.

(emphasis supplied)

10. The Original Developer / Owners hereto covenant that upon the execution of these presents the Assignee Developer shall, subject to what has been recited and stated hereinabove, be entitled to do the following acts, deeds, and things in relation to the said property without any obstruction or hindrance from the Original Developer / Owners.

d. The Assignee Developer shall be entitled to enter into Deeds to Sell and otherwise transfer the building / s and / or flat / s and also all rights and benefits including by way of TDR in the form of DRC accruing from the said property with the intending purchasers in the proposed building which may be constructed by the Assignee Developer on the said Property and shall also be entitled to do all such acts, deeds and things required in that behalf and also the appropriate all proceeds thereof.

68. Having reproduced the relevant Clauses, it is clear that in terms of Clause 16 of the Collaboration Agreements, the Petitioner Group, the respondent No.2 (on one side) and the developer / respondent No.3 (on the other side) had agreed to divide the built-up area of the project

land in the ratio of 10% and 90%, respectively. Subsequently, vide the Deed of Assignment, the rights in the Collaboration Agreements stood assigned in favour of the respondent No.1. It is clear from Clause 1 of the Deed of Assignment which I have reproduced above, that, the Original Developer and the owners granted, conveyed, transferred and assigned to the Assignee Developer, i.e., the respondent No.1, the development rights in respect of the said property together with all rights, title, interest and obligation in respect of property including the rights contained in the Collaboration Agreements and the Deed of Assignment.

69. If the above stipulation is read in perspective, all rights, title, interest and obligations in respect of the property stood transferred in favour of the respondent No.1, which, shall include the rights under Clause 16 of the Collaboration Agreements.

70. So, it means, the dispute in respect of 10% built-up area relates to the Deed of Assignment and as such need to be adjudicated in terms of Arbitration Clause as find mentioned in the said Deed.

71. The reliance placed by Mr. Singh on paragraph 3 of the judgment of the Supreme Court in the case of *Duro Felguera S.A. (supra)*, which is reproduced as under, squarely covers the issue in favour of the Petitioner Group in view of my conclusion in paragraphs 68, 69 and 70, above:-

“3. Section 11(6A) added by the 2015 Amendment, reads as follows:

11(6A) 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.

From a reading of Section 11(6A), 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.” (emphasis supplied)

72. Reliance placed by Mr. Singh upon the judgment of the Supreme Court in the case of *M/s Emaar India Ltd. (supra)*, wherein the Supreme Court in paragraphs 6.3, 6.7, 6.8 and 7 has held as under, shall also not help his case that the disputes are not governed by the Arbitration Clause:-

*“6.3 In the case of **Rajasthan State Industrial Development and Investment Corporation Vs. Diamond and Gem Development Corporation Ltd.**; (2013) 5 SCC 470, it is observed and held by this Court that a party cannot claim anything more than what is covered by the terms of the contract, for the reason that the contract is a transaction between two parties and has been entered into with open eyes and by understanding the nature of contract. It is further observed that thus the contract being a creature of an agreement between two or more parties has to be interpreted giving literal meanings unless there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves. It is further observed that the terms of the contract have to be construed strictly without altering the nature of a contract as it may affect the interest of either of the parties adversely (Para 23).*

(emphasis supplied)

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6.7 On the question, who decides on non-arbitrability of the dispute, after referring to and considering the earlier decisions on the point, more particularly, the decisions in the cases of **Garware Wall Ropes Ltd. Vs. Coastal Marine Constructions & Engg.:** (2019) 9 SCC 209; **United India Insurance Co. Ltd. Vs. Hyundai Engg. & Construction Co. Ltd.;** (2018) 17 SCC 607, and **Narbheram Power & Steel (P) Ltd.** (supra), it is observed and held that the question of non-arbitrability relating to the inquiry, whether the dispute was governed by the arbitration clause, can be examined by the Courts at the reference stage itself and may not be left unanswered, to be examined and decided by the Arbitral Tribunal. Thereafter, in para 153, it is observed and held that the expression, "existence of arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the reference stage would apply the prima facie test. It is further observed that in cases of debatable and disputable facts and, good reasonably arguable case etc., the Court would force the parties to abide by the arbitration Agreement as the Arbitral Tribunal has the primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability. Ultimately in para 154, the proposition of law is crystallized as under:

"154. Discussion under the heading 'Who decides Arbitrability?' can be crystallized as under:

154.1. Ratio of the decision in *Patel Engineering Ltd.* 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 Section 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 (1) of Section 34(2)(b) of the Arbitration Act.

154.3. Rarely as a demurrer the court may interfere at the 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 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)

*6.8 In the case of **Vidya Drolia** (supra), it is specifically observed and held by this Court that 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. It is further observed that 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." It is further observed that the prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage.

(emphasis supplied)

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7. Applying the law laid down by this Court in the aforesaid decisions and considering Clauses 36 and 37 of the Agreement and when a specific plea was taken that the dispute falls within Clause 36 and not under Clause 37 and therefore, the dispute is not arbitrable, the High Court was at least required to hold a primary inquiry/review and prima facie come to conclusion on whether the dispute falls under Clause 36 or not and whether the dispute is arbitrable or not. Without holding such primary inquiry and despite having observed that a party does have a right to seek enforcement of agreement before the Court of law as per Clause 36, thereafter, has appointed the arbitrators by solely observing that the same does not bar settlement of disputes through Arbitration and Conciliation Act, 1996. However, the High Court has not appreciated and considered the fact that in case of dispute as mentioned in Clauses 3, 6 and 9 for enforcement of the Agreement, the dispute is not arbitrable at all. In that view of the matter, the impugned judgment and order passed by the High Court appointing the arbitrators is unsustainable and the same deserves to be quashed and set aside. However, at the same time, as the High Court has not held any preliminary inquiry on whether the dispute is arbitrable or not and/or whether the dispute falls under Clause 36 or not, we deem it proper to remit the matter to the High Court to hold a preliminary inquiry on the aforesaid in light of the observations made by

this Court in the case of **Vidya Drolia** (supra) and in the case of **Indian Oil Corporation Limited** (supra) and the observations made hereinabove and thereafter, pass an appropriate order. (emphasis supplied)

73. Having said that, now I come to the issue whether the claim of 10% share in the built-up area stood settled in terms of the past litigations initiated by the Petitioner Group herein before the Civil Judge (Sr. Division), Faridabad / Additional District Judge, Faridabad and the learned Arbitrator. This submission of Mr. Singh is akin to a plea of *res judicata*. In other words, it is his plea, as the disputes for which reference is being sought stood settled in terms of the past litigation, the disputes cannot be referred to arbitration.

74. On the other hand, Mr. Bajaj in support of his submissions had relied upon the judgment of the Supreme Court in the case of **Indian Oil Corporation Limited v. SPS Engineering Limited, (2011) 3 SCC 507**, to contend that the issue whether the claims are barred by *res judicata*, does not arise for consideration in the proceedings under section 11 of the Act of 1996. In other words, the scope of section 11 of the Act of 1996, does not permit examination on maintainability or tenability of a claim, either on facts or law, as decision on *res judicata* requires consideration of pleadings as also the claims / issues / points and the award in first round of arbitration, in juxtaposition with pleadings and issues / points / claims in second arbitration. So, it shall be left for the Arbitral Tribunal to examine and decide whether the claims stand barred by *res judicata*.

75. I agree with the said submission of Mr. Bajaj as the Supreme

Court, in the afore-said judgment, has in paragraphs, 14 and 16, held as under:

“14. To find out whether a claim is barred by res judicata, or whether a claim is “mala fide”, it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between the parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law, and the claim is patently long time-barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time-barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of

limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.

(emphasis supplied)

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16. The question whether a claim is barred by res judicata, does not arise for consideration in a proceeding under Section 11 of the Act. Such an issue will have to be examined by the Arbitral Tribunal. A decision on res judicata requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of Section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the Arbitral Tribunal to examine and decide whether the claim was barred by res judicata. There can be no threshold consideration and rejection of a claim on the ground of res judicata, while considering an application under Section 11 of the Act.

(emphasis supplied)

76. Though, Mr. Bajaj, has also relied upon the judgments of the Supreme Court in the cases of *Oriental Insurance Co. Ltd. and Another v. Dicitex Furnishing Ltd.*, 2019 SCC OnLine SC 1458 and *Booz Allen and Hamilton INC. v. SBI Home Finance Limited and Others*, (2011) 5 SCC 532, I do not see any reason to refer to those judgments as the judgment of the Supreme Court in the case of *Indian Oil Corporation Limited (supra)* squarely covers the issue in hand. Even, the judgment in *Indian Oil Corporation Limited (supra)*, has been followed by the Co-ordinate bench of this Court in the case of *Parsvnath Developers Limited and Ors. v. Rail Land Development*

Authority, MANU/DE/4281/2018, wherein, this Court in paragraphs 11 and 13, has held as under:

“11. The question whether the claim of the petitioner would be barred by the principles of res judicata or estoppel or by Order II Rule 2 of the CPC are not matters to be considered by this Court while exercising its jurisdiction under Section 11 of the Act. (Indian Oil Corporation Ltd. vs. SPS Engineering Ltd. MANU/SC/0122/2011 : (2011) 3 SCC 507)).

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13. In view of the above, I see no impediment in appointing a nominee Arbitrator for the respondent to adjudicate the disputes that are sought to be raised by the petitioners in relation to the abovementioned Development Agreement. In such proceedings, all objections of the respondent shall remain open and it would be for the Arbitral Tribunal to decide the same, may be as primary issues.”

77. Moreover, in a recent judgment of the Co-ordinate bench of this Court, between the same parties as in ***Parsvnath Developers Limited and Ors.***, tilted as ***Parsvnath Developers Limited and Ors. v. Rail Land Development Authority***, bearing ***Arb. P. 710/2019***, decided on ***May 19, 2020***, the Court in paragraph 36, has held as under:

“36. Reading of Section 11(6A) and the judgments of the Supreme Court, as mentioned above, leaves no doubt that the law on the scope of examination by the Court in a petition under Section 11 is no longer res integra. At this stage, the scope and power is restricted only and only to examining the existence of the Arbitration Clause and not even its validity. Therefore, the objection raised by the Respondent requiring this Court to examine whether the disputes sought to be raised are overlapping with the claims in the earlier arbitrations between the parties and/or are barred by principles of Order II Rule 2 CPC cannot be sustained in law. These are issues which clearly

fall in the domain of the Arbitral Tribunal and would be decided if and when raised by the Respondent before the Tribunal.”

(emphasis supplied)

78. Now, the question that remains to be decided is whether the claim qua 10% of the built-up area is barred by limitation on the grounds already stated above. According to Mr. Singh, the initial cause of action arose in favour of the Petitioner Group against the respondent No.1, in the year 2013, when the latter started selling the units belonging to the built-up area. Alternatively, he stated that the cause of action also arose when the Petitioner Group got the knowledge that more than 95% of the built-up areas have been sold in the year 2016 and it again arose from the date of knowledge of the registered sale deed qua the project land in favour of the respondent No.1. It is also his submission that 100% of the built-up area has been sold.

79. Reliance has also been placed by Mr. Singh on the judgment of the Supreme Court in the case of ***Bharat Sanchar Nigam Ltd. and Ors. (supra)***, particularly on paragraphs 37 and 38 of the said judgment, to contend that the claims sought to be referred to be adjudicated by way of arbitration are *ex facie* barred by limitation.

The aforesaid paragraphs are reproduced as under:

“37. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engineering (supra).

It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-

barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the Rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.

38. Applying the law to the facts of the present case, it is clear that this is a case where the claims are *ex facie* time barred by over 5 ½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 04.08.2014. The notice of arbitration was invoked on 29.04.2020. There is not even an averment either in the notice of arbitration, or the petition filed Under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable Section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.”

(emphasis supplied)

80. Reliance has also been placed upon the judgments of the Coordinate Bench of this Court in the cases of ***Siemens Healthcare Pvt. Ltd. (supra)*** and ***V.K. Dewan and Co. (supra)***, to also contend that the claims are *ex facie* barred by limitation and should not be referred to arbitration.

81. It is apposite to mention here that this Court in ***Siemens Healthcare Pvt. Ltd. (supra)*** was dealing with the facts where the respondent therein had terminated the contract with the petitioner therein in the year 2015 and there was a lull between 2015 and May 14, 2021, when the counsel of the petitioner had finally sent the legal Notice dated October 25, 2021, calling upon the respondent to discharge its liability. So, it was in those circumstances, this Court,

whilst relying upon the judgment of the Supreme Court in *Bharat Sanchar Nigam Ltd. and Ors. (supra)*, had rejected the petition filed by the petitioner being barred by limitation.

82. More so, in *V.K. Dewan and Co. (supra)*, this Court, had rejected the petition seeking appointment of the arbitrator, in the facts that the respondent therein had issued the completion certificate to the petitioner therein in the year 2005, when the cause of action had first accrued. Thereafter, the matter was referred to the sole Arbitrator in the year 2005 and the petitioner by way of letter dated January 14, 2008, withdrew the claims filed before the Arbitrator, who passed the award imposing cost.

83. The petitioner with respect to the same disputes / claims again issued a second Notice dated July 26, 2019, for referring them to arbitrator. In the light of the facts, this Court has held that the withdrawals of the claims by the petitioner before the arbitrator did not stop the limitation period in any manner and as such the claims were held to be barred by limitation.

84. On the other hand, the submission of Mr. Bajaj, learned counsel for the Petitioner Group is primarily that the cause of action had accrued in favour of the Petitioner Group only when the Occupation Certificates were issued by the DTCP, Haryana and according to him, the Occupation Certificates were issued in 2017, 2018 and 2020 and the Notice invoking arbitration was issued in 2019, i.e., within three years of the issuance of the Occupation Certificates and as such the claim(s) has been raised well within limitation and are not deadwood.

85. The stand of the parties is at variance with each other. An issue of limitation is a mixed question of law and fact. To decide the issue, it is to be seen, when exactly the cause of action had first arisen to make a claim in that regard. The claim of the Petitioner Group is for 10% of the built-up area. It is to be seen, whether the Petitioner Group could have raised a claim at the time of execution of the sale deeds in respect of the project land or at the time of completion of construction of the project land or at the time of grant of Occupation Certificates qua the built-up area on the project land. It also need to be decided as to whether all the claims are barred by limitation or only some shall be barred. This makes me to say, the claims of the Petitioner Group are not *ex facie* stale claims, for this Court, while exercising jurisdiction under section 11 of the Act of 1996, to refuse appointment of an Arbitrator. More so, the Supreme Court in its judgment in ***Bharat Sanchar Nigam Ltd. and Ors. (supra)*** has culled out the law that the rule is to refer the claims in case of slightest of doubt.

86. In view of my above discussion, the petition under section 11 of the Act of 1996 needs to be allowed. I accordingly appoint Justice Rajiv Sahai Endlaw, former Judge of this Court as the learned Arbitrator to adjudicate the dispute(s) which have arisen between the Petitioner Group and the respondent No.1, in respect of 10% of the built-up land.

87. The learned Arbitrator shall fix his fee in consultation with the counsel for the parties. All the contentions of the parties are left open to be decided by the learned Arbitrator. The learned Arbitrator shall

give his disclosure in terms of section 12 of the Act of 1996.

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88. Since, I have appointed learned Arbitrator for adjudication of the disputes between the Petitioner Group and the respondent No.1, appropriate shall be that this petition under section 9 of the Act of 1996 is treated as an application under section 17 of the Act of 1996 to be decided by the learned Arbitrator in accordance with law.

89. The petitions are accordingly disposed of.

90. Let a copy of this order be sent to Justice Rajiv Sahai Endlaw (Retd.) by the Registry on his following address:

**17, Babar Lane,
Bengali Market,
New Delhi - 110001**

91. Liberty is with the counsel for the parties to send a copy of this order to the learned Arbitrator for his information.

V. KAMESWAR RAO, J

APRIL 27, 2023/aky/jg