2025:PHHC:051685

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-5999-2022(O&M)
RESERVED ON: 06.03.2025
PRONOUNCED ON: 22.04.2025

Dalbir Singh and Another ....Petitioners

Versus

M/s Krisam Properties Private Limited .....Respondent

CORAM: HON'BLE MR. JUSTICE VIKRAM AGGARWAL.

Argued by: Mr. Aashish Chopra, Senior Advocate with
Mr. Kartik Gupta, Advocate,
Ms. Nitika Sharma, Advocate,
Mr. Sumit Kumar, Advocate and
Ms. Ananya Sharma, Advocate for the petitioners.

Mr. Amit Jhanji, Senior Advocate with
Mr. Animesh Sharma, Advocate,
Ms. Elisa Gupta, Advocate,
Mr. Shradha Deshmukh, Advocate (on Video Conferencing),
Mr. Akshdeep Singh Sidhu, Advocate and
Ms. Shuchi Sodhi, Advocate for the respondent.

VIKRAM AGGARWAL, J

The petitioners (Dalbir Singh and Charanjit Singh @ Charanpal) have preferred the instant petition under Article 227 of the Constitution of India assailing the order dated 23.11.2022 (Annexure P-26) passed by the Court of learned Civil Judge (Junior Division), Gurugram vide which the application filed by the respondent under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act') for referring the matter to Arbitration was allowed.

2. As is evident from the voluminous petition, the parties are engaged in an intense legal conflict for the last number of years. The facts, as stated in the instant petition, are that the petitioners were owners in possession of land measuring 3 Bigha 13 Biswa comprised in Khasra No.446/1/1 (3-13) situated within the revenue estate of village Chakarpur, Tehsil and District

Gurugram. The land is said to be the ancestral property of the petitioners, having been owned and possessed by their forefathers for the last more than 150 years. In 1997, land measuring 8 Biswa-8 Biswansi (hereinafter referred to as the 'initially acquired land') out of the aforesaid land was acquired for the construction of a road. Thereafter, further acquisition of land measuring 2 Bigha 4 Biswa 12 Biswansi (hereinafter referred to as the 'subsequently acquired land') took place. The petitioners were left with land measuring 1 Bigha. It is the case of the petitioners that they have 27.5 % undivided share in land measuring 3.25 acres *qua* which a license had been obtained by the respondent (M/s Krisam Properties Private Limited). It is also the case of the petitioners that they continued to be in possession of the acquired land and as such, they are in possession of the entire land owned by them as is evident from the photographs (Annexures P-2 to P-4).

2.1 On 17.07.2003, the Haryana Shehri Vikas Pradhikaran (for short 'HSVP') exchanged the subsequently acquired land with the respondent and pursuant thereto, license No.85 of 2004 dated 21.07.2004 was granted to the respondent for the development of a commercial colony on land measuring 3.25 acres which included the subsequently acquired land. It is the case of the petitioners that the possession of the total acquired land was never taken over from the petitioners and, therefore, it was not handed over to the respondent.

2.2 ***CWP No.12573 of 2003*** filed by the petitioners challenging the acquisition of land was dismissed on 21.05.2004 whereafter ***SLP No.12297 of 2004*** was filed. Vide order dated 22.07.2004, the Supreme Court of India ordered the maintenance of *status quo* as regards possession and further ordered that no third party interest would be created.

2.3 During the pendency of the SLP, a Memorandum of Settlement dated 07.02.2011 was executed between the parties (Annexure P-5). Broadly,

it was agreed that the petitioners possessed right, title and interest in the licensed land to the extent of 27.5 % or were entitled to 27.5 % share in the sale proceeds. It was also agreed that a site plan (Annexure P-6) would be prepared in respect of 1 Bigha of land which remained after acquisition which would continue to be under the ownership and possession of the petitioners. Upon an application having been moved by the petitioners for disposal of the SLP in terms of the Memorandum of Settlement, the same was disposed of vide order dated 06.09.2011 (Annexure P-7).

2.4 It is the case of the petitioners that they continued to be in possession of the subsequently acquired land since the site plan as agreed was not prepared which would have showed the ownership and possession of the petitioners over the remaining land measuring 1 Bigha. It has also been stated that even no such site plan was prepared at the time of execution of the Memorandum of Settlement and, therefore, is not a part of the certified copy of the SLP also (Annexure P-8).

2.5 In 2018, it came to the notice of the petitioners that a mutation bearing No.1588 had been sanctioned on 08.08.2008 (Annexure P-11) in favour of HSVP reflecting HSVP to be the owner of the subsequently acquired land and the petitioners to be the owner of land measuring 1 Bigha. It is the case of the petitioners that this mutation was not possible since HSVP had exchanged the subsequently acquired land with the respondent in 2003 itself. It is the case of the petitioners that this mutation was never brought to their notice when the Memorandum of Settlement dated 07.02.2011 was executed and further, no notice was served upon the petitioners before effecting the changes in the revenue record.

2.6 The petitioners filed a suit bearing ***Civil Suit No.4930 of 2018***(Annexure P-12) challenging the aforesaid revenue entry and accordingly

seeking a declaration with consequential relief of permanent injunction. Another Civil Suit bearing ***Civil Suit No.1755 of 2021***(Annexure P-13) was filed by the petitioners when they were tried to be forcibly dispossessed and their construction was tried to be demolished. It would be essential to mention here that the present matter arises out of proceedings in ***Civil Suit No.4930 of 2018***. A petition under Section 9 of the 1996 Act (Annexure P-15) was also filed by the petitioners against the respondent and one Rajesh Kumar Garg which was partly allowed on 13.08.2021 (Annexure P-16) and parties were directed not to alienate the disputed land in any manner. Still further, a petition under Section 11 (5) of the 1996 Act (Annexure P-17) had also been moved by the petitioners for the appointment of a Sole Arbitrator *qua* the disputes arising out of the Memorandum of Settlement which was stated to be pending at the time of filing of the present revision petition.

2.7 There are other details about the injunctions having been granted and subsequently vacated but the same are not relevant for the purpose of the decision of the present revision petition.

2.8 In ***Civil Suit No.4930 of 2018***, an application was moved by the respondent under Section 8 of the 1996 Act (Annexure P-24) for referring the parties to arbitration. The same was opposed by way of reply (Annexure P-25). However, vide the impugned order dated 13.11.2022 (Annexure P-26), the said application was allowed, leading to the filing of the present revision petition.

2.9 Notice of motion in the revision petition was issued vide order dated 19.12.2022:

> **"Application of the respondent-defendant under Section 8 of the Arbitration and Conciliation Act, 1996, has been allowed and the PUNJAB AND HARYANA HIGH COURT parties have been directed to approach the Arbitrator vide impugned order**

> **dated 23.11.2022 (Annexure P-26), against which plaintiffs are in this revision.**
>
> **It is contended by learned counsel that learned Trial Court fell in error by failing to notice that the relief sought by the petitioners was regarding correction of the revenue record and partition of the land, which cannot be resolved by the Arbitrator.**
>
> **It is further inter alia contended as per Haryana Land Revenue Act, 1887, under Section 45 if a person considers himself aggrieved as to the right of which he is in possession by an entry in record of rights, he may institute a suit for declaration before the Civil Courts only.**
>
> **Notice of motion for 08.05.2023.**
>
> **In the meantime, status quo regarding the property in dispute shall be maintained."**

3. I have heard learned counsel for the parties.

4. Extensive arguments were addressed by learned Senior counsel representing the parties starting from reference to the statutory provisions, the background, the law on the subject and finally the legality of the matter.

5. In so far as the petitioners are concerned, in essence, the argument is that the issue of challenge to a mutation is not arbitrable and, therefore, under the circumstances, the matter cannot be referred for arbitration. Learned Senior counsel referred to the statutory provisions *viz* Sections 8, 9 and 11 of the 1996 Act, Section 45 of the Haryana Land Revenue Act, 1887 (for short '1887 Act') etc. Reference was made to the contents of the Memorandum of Settlement, the Arbitration Agreement, the order passed by the Hon'ble Supreme Court of India, the contents of the Civil Suit, the relevant mutation and the law on the subject. Specific reference was made to the judgments of the Supreme Court of India in the cases of '***Sukanya Holdings (P) Ltd. Vs. Jayesh Pandya and Another', (2003) 5 SCC 531, 'Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and***

Others', (2011) 5 SCC 532 and '***Vidya Drolia and Others Vs. Durga Trading Corporation', (2021) 2 SCC 1***apart from other judgments.

5.1 Learned Senior counsel submitted that an application under Order 1 Rule 10 CPC moved by the petitioners to implead HSVP as a party was pending before the trial Court and before deciding the same, the application under Section 8 of the 1996 Act was decided. It was submitted that without deciding the application for impleadment, the application under Section 8 of the 1996 Act should not have been decided.

5.2 It was submitted by learned Senior counsel that the dispute in ***Civil Suit No.4930 of 2018*** would not be covered under the Memorandum of Settlement.

5.3 Learned Senior counsel submitted that the Arbitrator would have no jurisdiction to go into the said issue and the only remedy was to file a civil suit. Learned Senior counsel also referred to the various orders passed by different Courts from time to time in both Civil Suits and other litigations initiated by the parties.

5.4 Learned Senior counsel submitted that though an Arbitrator has been appointed on an application having been moved by the petitioners, there would be no jurisdiction with the Arbitrator to decide the issue of a mutation wrongly having been effected in favour of HSVP.

5.5 It was submitted that in terms of the provisions of Section 45 of the 1887 Act, only a civil suit would be maintainable. He further submitted that the prayer in the civil suit (at Page No.106 of the paper book) was a prayer in *rem* and not in *personam* and, therefore, the matter was not liable to be referred for arbitration.

6. *Per contra*, learned Senior counsel representing the respondent vehemently opposed the submissions made by learned Senior counsel

representing the petitioners. Initiating his arguments, learned counsel referred to the arbitration agreement contained in the Memorandum of Settlement (Page No.74 of the paper book). Reference was made to the suit (Annexure P-12), the pleadings therein especially in paragraphs 8, 9, 10 and 11 thereof (Page No.102 of the paper book). Thereafter, reference was made to the averments made in the petition moved under Section 9 of the 1996 Act (Annexure P-15) and paragraphs 12 to 15 thereof. It was submitted that the averments made in the petition filed under Section 9 were the same as those made in the civil suit. Reference was then made to the petition moved under Section 11 of the 1996 Act (Page No.183 of the paper book). Reference was also made to the contents thereof to submit that in the Section 11 petition also, averments as regards the mutation etc. were made. It was submitted that arbitration proceedings are already going on and that in the statement of claims (Annexure R-6) with ***CM No.18916 of 2023***(averments as regards the mutation were made in paragraph 19), averments as regards ***Civil Suit No.4930 of 2018*** were also made. Learned Senior counsel submitted that under Claim No.1, a declaration was sought that the claimants (petitioners herein) be declared as owners in possession of land measuring 1.39 acres comprised in Khasra No.446/1/1. Learned Senior counsel referred to the provisions of Section 45 of the 1887 Act. Reference was made to Chapter 6 of the Specific Relief Act, 1963 (for short '1963 Act'). Learned Senior counsel referred to the provisions of Sections 34 and 35 thereof. Reference was made to Chapter 4 of the 1887 Act which deals with records. It was submitted that any matter of which an entry is to be made in any record or register under Chapter 4 can also be referred for arbitration. It was further submitted that suits filed under Sections 34 and 35 of the 1963 Act are rights in *personam* and not rights in *rem*.

6.1 It was submitted that under the Memorandum of Settlement, there were only two parties and even in the suit, there were two parties which shows that it was not an action in *rem* but an action in *personam*. Learned Senior counsel also referred to all the orders passed from time to time in various litigations initiated by the parties, the terms of the Memorandum of Settlement including the arbitration agreement, the contents of the civil suit, the application under Section 9, the application under Section 11, the claim statement moved in arbitral proceedings etc. Learned Senior counsel referred to the impugned order and submitted that there is no illegality in the said order warranting interference. It was submitted that it is now well settled that even the issue of arbitrability is to be decided by the Arbitrator and not by the Civil Court. In support of his contentions, learned Senior counsel placed reliance upon the judgments passed by the Supreme Court of India in the cases of '***Sushma Shivkumar Daga Madhurkumar Ramkrishanji Bajaj', 2023 SCC Online SC 1683, 'Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899', (2024) 6 SCC 1, 'Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others', (2011) 5 SCC 532, 'Deccan Paper Mills Company Limited Vs. Regency Mahavir Properties and Others', (2021) 4 SCC 786***and ***'Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others', (1999) 5 SCC 651*** as also the judgment passed by the Bombay High Court in the case of '***Parkash Cotton Mills Pvt. Ltd. Vs. Vinod Tejraj Gowani and Others', (2014) 4 AIR Bom R1.***

7. I have considered the submissions made by learned counsel for the parties and have perused the paper book. I have also examined the statutory provisions and the law on the subject.

8. Before adverting to the merits of the case, I deem it appropriate

to refer to the relevant statutory provisions.

9. Section 8 of the 1996 Act lays down as under:

> **"8. Power to refer parties to arbitration where there is an arbitration agreement:**
>
> **(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.**
>
> **(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:**
>
> **[Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]**
>
> **(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.**

10. Sections 34 and 35 of the 1963 Act provide as under:

> **"34. Discretion of court as to declaration of status or right:-**
>
> **Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:**
>
> **Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.**

> **35. Effect of declaration:-**
>
> **A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees."**

11. Sections 45 and 127 of the 1887 Act provide as under:

> **"45. Suit for declaratory decree by persons aggrieved by an entry in a record.-**
>
> **If any person considers himself aggrieved as to any right of which he is in the possession by an entry in a records-of-rights or in an annual record, he may institute a suit for a declaration of his right under Chapter VI of the Specific Relief Act, 1877.**
>
> xxx xxx xxx
>
> **127. Power to refer to arbitration:-**
>
> **(1) Any Revenue-officer may, with the consent of the parties, refer to arbitration any dispute arising before him in any matter under this Act.**
>
> **(2) A Collector or any Assistant Collector of the first grade may, without the consent of the parties refer to arbitration any dispute before him with respect to -**
>
> **(a) any matter of which an entry is to be made in any record or register under Chapter IV ;**
>
> **(b) any matter relating to the distribution of an assessment under section 56;**
>
> **(c) the limits of any estate or of any holding, field or other portion of an estate; or**
>
> **(d) the property to be divided at a partition or the mode of making a partition."**

12. Coming to the law on the subject, the basic judgment on the issue of arbitrability of a dispute is the judgment of the Supreme Court of India in the case of ***'Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and Others'*** (supra) wherein the scope and nature of the arbitrability of a dispute was examined. It was held that when a suit is filed by one of the parties to an arbitration agreement against the other parties to the said agreement and if an application under Section 8 of the 1996 Act is filed, the

Court would have to decide five questions. On the basis of the contentions raised before the Supreme Court of India, the Supreme Court of India framed four questions for its consideration:

> **"19. Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under Section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:**
>
> **(i) whether there is an arbitration agreement among the parties;**
>
> **(ii) whether all the parties to the suit are parties to the arbitration**
>
> **(iii) whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;**
>
> **(iv) whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and**
>
> **(v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.**
>
> **20. On the contentions urged the following questions arise for our consideration:**
>
> **(i) Whether the subject-matter of the suit fell within the scope of the arbitration agreement contained in Clause (16) of the deposit agreement?**
>
> **(ii) Whether the appellant had submitted his first statement on the substance of the dispute before filing the application under Section 8 of the Act?**
>
> **(iii) Whether the application under Section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit?**
>
> **(iv) Whether the subject-matter of the suit is "arbitrable", that is, capable of being adjudicated by a private forum (Arbitral Tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under Section 8 of the Act?**

13. In the present matter, we would primarily be concerned with question No.4 framed by the Supreme Court of India and the findings thereon:

> **"32. The nature and scope of issues arising for**

consideration in an application under Section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under Section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application under Section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under Section 34 of the Act, relying upon sub-section (2)(b)(i) of that section.

33. But where the issue of "arbitrability" arises in the context of an application under Section 8 of the Act in a pending suit, all aspects of arbitrability will have to be decided by the court seized of the suit, and cannot be left to the decision of the arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an a application under Section 8 of the Act, to refer the parties to arbitration, if the subject-matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

(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, 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 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.

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. 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 the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

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.

37. It may be noticed that the cases referred to above relate to actions in rem. 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

> **individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)**
>
> **38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."**

14. The aforesaid judgment was affirmed by the judgment of a Three Judges bench in the case of '***Vidya Drolia and Others Vs. Durga Trading Corporation'*** (supra). A fourfold test was laid down for determining when claims in or subject matter of a dispute are not arbitrable:

> **"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:**
>
> **76.1. (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.**
>
> **76.2. (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.**
>
> **76.3. (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.**
>
> **76.4. (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).**

76.5. 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.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd.: (SCC p. 669, para 35).”

15. The Supreme Court of India returned the following findings in **Vidya Drolia’s** case (supra):

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

154.1. Ratio of the decision in Patel Engg. 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 Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably “non-arbitrable" and to cut off the

> **deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.**

16. In the case of ***'Magic Eye Developers Private Limited Vs Green Edge Infrastructure Private Limited and Others', (2023) 8 SCC 50***, the Supreme Court of India was examining the jurisdiction of the referral Court at the pre-referral stage. It was held that pre-referral jurisdiction of the Court under Section 11 (6) of the 1996 Act is very narrow and primarily two inquiries have to be made, the primary inquiry being about the existence and validity of an arbitration agreement and the second being with respect to non-arbitrability of the dispute. It was held that in so far as the first issue is concerned, as the same goes to the root of the matter, the same has to be conclusively decided by the referral Court at the referral stage itself. However, no opinion was expressed as regards the non-arbitrability of the dispute. The Supreme Court of India again summarized the law as regards non-arbitrability of a dispute in the case of '***Emaar India Limited Vs. Tarun Aggarwal Projects LLP and Another', (2023) 13 SCC 661.*** Reliance was primarily placed upon the judgment in ***Vidya Drolia's*** case and it was held as under:

> **"21. In *Vidya Drolia*, 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.

22. 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 the 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.

23. 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 Vidya Drolia and in Indian Oil Corpn. and b the observations made hereinabove and thereafter, pass an appropriate order.

24. In view of the above and for the reasons stated above the present appeal succeeds. The impugned judgment and order passed by the High Court appointing the arbitrators in terms of Clause 37 of the Addendum Agreement dated 19-4-2011 is hereby quashed and set aside. The matter is remitted to the High Court to decide the application under Sections 11(5) and (6) of o

> **the Arbitration Act afresh and to pass an appropriate order after holding a preliminary inquiry/review on whether the dispute is arbitrable or not and/or whether the dispute falls within Clause 36 of the addendum agreement or not.**
>
> **25. The present appeal is accordingly allowed. No costs."**

17. In the case of '***Lombardi Engineering Limited Vs. Uttarakhand Jal Vidyut Nigam Limited', (2024) 4 SCC 341,*** a Three Judge Bench of the Supreme Court of India has affirmed the decision in ***Vidya Drolia's*** case:

> **"29. Following the general rule and the principle laid down in Vidya Drolia, this Court has consistently been holding that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. In Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd. 14, Sanjiv Prakash v. Seema Kukreja15 and Indian Oil Corpn. Ltd. v. NCC Ltd. 16. the parties were referred to arbitration, as the prima facie review in each of these cases on the objection of non-arbitrability was found to be inconclusive. Following the exception to the general principle that the Court may not refer parties to arbitration when it is clear that the case is manifestly and ex facie non-arbitrable, in BSNL v. Nortel Networks (India) (P) Ltd. 17, Secunderabad Cantonment Board v. B. Ramachandraiah & Sons 18 and B & TAG v. Union of India, arbitration was refused as the claims of the parties were demonstrably time-barred."**

18. It would also be apposite to refer to the terms and conditions of the Memorandum of Settlement executed between the parties when the matter was pending before the Supreme Court of India and the Arbitration agreement contained therein:

> **<u>MEMORANDUM OF SETTLEMENT</u>**
>
> **This memorandum of settlement executed on 7th day of February, 2011 between**
>
> **A. Dalbir Singh and Charanjit Singh alias Charanpal both sons of Sh. Sukhbir Singh R/o village Chakkarpur, District Gurgaon (hereinafter referred to as Party No. 1); and**
>
> **B. Krisam Properties Pvt. Ltd. Through Mr. P.D. Goyal, 11 Andnd Lok, New Delhi Managing Director (hereinafter referred to as Party No.2); and**
>
> **C. Mr, Rakesh Kumar Garg, S/o Sh. Devi Das Garg, R/o G-15,**

Maharani Bagh, New Delhi (hereinafter referred to as Party No.3)

And whereas

A. The party No.l were the original owners of agriculture land comprised in Khewat No.36, Khata No.45, Khasra No 446/1, MIN in 03 Bigha, 04 Biswas 12 Biswansi, Khata Tehsil and District Gurgaon, Haryana.

B. State of Haryana issued notification No. LAC (G) and 97/455 u/s. 4 of Land Acquisition Act proposing to acquire 2 Bigha, 4 Biswa, 12 Biswansi of Land comprised in Khewat No, 35/32 Khata No.48, Khasra No, 446/1/1 situated in the revenue estate of Village Chakarpur, Tehsil and District Gurgaon, Haryana,

C. The First Party to Agreement challenged the notification dated u/s 4 and also a subsequent notification dated issued under Section-6 of Land Acquisition Act by way of being Writ Petition No. 12093 of 2000 which was dismissed as withdrawn by an order dated 24.1.2003 by the High Court of Punjab and Haryana,

D. During this period on a representation of Party No.2, Huda transferred the land measuring 1.39 acres, which Incidentally also formed part of the land which belong to party no. 1. The party no. 2 was directed to submit the lay out plan of the area further development.

E That Haryana Urban Development Authority thereafter on an application, as revised from time to time granted license u/s 3 of Haryana Development and regulation of urban area act, 1975 was the development of commercial colony was the land measuring 3.25 acres and duly said down various other terms for the said license in accordance with law,

F. The party no. I at this stage filed a writ petition being CWP No. 12573 of 2003 challenging both the notifications under Section-4 and 6 of the Land Acquisition Act in Hon"ble High Court of Punjab and Haryana at Chandigarh and also challenged an order dated 17.7.2003 whereby the party no. 2 was granted the said land which was approved an exchange of its own land.

G. Meanwhile M/s Huda issued a letter dated 21.7.2004 ordering that the letter of intent dated 20.8.2003 which was kept in abeyance, stands revived and the party no.2 was directed to deposit an amount of Rs. 1,62,50,000/- (One Crore Sixty Two lacs Fifty Thousand only) towards differential in license fee besides a

Bank Guarantee of Rs.6.76 lacs on account of External Development Charges (edc). The party No.2 complied with the direction and Huda consequentially executed an agreement dated 21.7.2004 in respect of the said property Inter-alia with the possession of the said land for the purpose of converting it into a commercial colony.

H. The said writ petition No. 12573 of 2003 was contested by the party no.2 as well as State of Haryana and was dismissed by a judgment/order dated 21.5.2004. The said judgment/order dated 21.5.2004 of the High Court of Punjab and Haryana was further challenged before Hon'ble Supreme Court of India by way of SLP No. 12297 of 2004 (now Civil Appeal No. 12297 of 2004):

I. The above mentioned SLP being SLP no. 12297 of 2004 came up for hearing on 22.07.2004. The Hon'ble Supreme Court passed the following order:-

"Issue notice in the special leave petition as also on the prayer for grant of interim relief.

Until further orders, it is directed that status quo in the matter of possession shall be maintained and no third party interest shall be created.

On prayer, dasti service is permitted in addition."

<u>TERMS OF SETTLEMENT</u>

In view of the fact and circumstances parties to the settlement have mutually and amicably resolved all their disputes and differences and have settled amongst themselves on the following terms and conditions:-

a. All rights, title, interest in the said property and /or of the sale proceeds of (the said property shall be shared amongst all the parties herein in the manner hereinafter.

i. Krisam Properties Pvt. Ltd. (Party No.2) 50 %

ii. Dalbir Singh and Charanjit Singh alias Charanpal Singh (Party No.1) 27.5% Jointly.

iii Mr. Rakesh Kumar Garg (Party No. 3) 22.5%

b. All expenses relating to construction of boundary wall, security, maintenance and/or any other incidental expenses in furtherance of upholding right, title and interest of the parties shall also be shared in the same proportion as stated in Para.

c. All the parties have also agreed without any demur, protest, voluntarily that all their disputes and differences stand settled and consequentially the aforesaid Special Leave Petition being SLP No. 12297 to 2004 (Civil Appeal No.12297 of 2004)

shall be withdrawn by the party No.1 unconditionally. An appropriate application for withdrawal shall be filed by Party No. 1.

d. The Party No.1 and 3 has also instituted civil and criminal actions which are pending in District Court Gurgaon the Party No.1 and 3 undertakes to withdraw all the aforesaid cases within 60 days of this agreement. It is agreed that no cause of action survives to continue with the cases as listed below.

1. Dalbir Singh Vs Narendra Kumar Agarwal & Others Criminal case 72/03.

2. Dilbir Singh Vs Narendra Kumar Agarwal Civil Case 557/03

3. Upvan Properties Pvt. Ltd. Vs Dalbir Singh & Others Civil recovery suit no. 179/05.

4. Uchit Properties Pvt. Ltd. Vs Raghubir Singh & Others 180/05 Civil recovery suit no. 180/05.

e.It is stated that the total approved area dated 20.08.2003 granted in respect of 3.25 acres of land in Sector-27, Gurgaon. It includes 1.39 acres of land of party No. 1. Balance 0.85 acres land of party No. 2 out of licence will remain with party No. 2. Party No. 1 & 3 Will have no claim, right title over the balance 0.85 acres land belonging to party No.2.

f. It is further agree that there existed 0.625 acres of land which form part of the khasra446/1/1, as per party No. 1 did not form part of the acquisition and is also not part of the license dated 20.8.2003 in favour of party no.2. It is agreed that party No. 1 shall continue to have all right, title and Interest whatever it holds on the said 0.625 acres as also bounded in red to the site plan (schedule A) to this agreement. Party no.2 and 3 shall have not any right, title and interest over the said land.

g. It is undertaken by party No. 1 that an encroachment on the small portion of property shall be removed immediately on the execution of this agreement so that the property comes in the hand of the parties herein absolutely and without any encumbrances of any kind and in the proportioned mentioned above.

h. All the parties to agreement shall also mentioned by way of application to the Hon'ble Court for appropriate direction to Huda to not to count the period of status quo as a part of the validity period of the license so as to ensure that license for development is activated for the further development.

> **i. Party No.3 will arrange NOC in respect of any agreement made by him with respect to the property if any, whenever required.**
>
> **j. All the parties agree that they shall execute any additional or further document and/or perform all such acts which may be necessary to giving complete effect to this agreement and/or any matter incidental thereto.**
>
> **k. All the parties to agreement will strictly comply with agreement and will not deviate from terms and condition settled in MOU.**
>
> **l. In case of any difference/dispute, the matter will be referred to sole Arbitrator appointed by the Hon'ble Chief Justice of India in accordance with Arbitration and Conciliation Act, 1996 as amended."**

19. The issue which, therefore, arises for consideration before this Court is as to whether the challenge to the mutation in favour of HSVP can be raised before the Arbitrator or is filing of a civil suit the remedy for the same.

20. In the considered opinion of this Court, the challenge to the mutation can very well be laid in the arbitration proceedingswhich have already commenced and there would be no necessity of filing a civil suit, especially keeping in view the fact that there is an arbitration agreement between the parties. The reasons for arriving at the said conclusion are as under:

20.1 The parties are in a long-drawn litigation as regards land mentioned in the opening part of the judgment, the disputed land being a part of the same. A memorandum of settlement was arrived at between the parties before the Supreme Court of India on 07.02.2011 and various terms and conditions were laid down which are evident from a perusal of the same. The memorandum of settlement duly mentions about the shareholding of the petitioners, respondent and Sh. Rakesh Kumar Garg. It also mentions that all civil and criminal actions would be withdrawn. Detailed provisions have been

made in the said memorandum about the rights and interests of the parties to the said memorandum. The memorandum of settlement also contained an arbitration agreement as per which the parties had agreed that all disputes would be referred for arbitration. That being so, the petitioners cannot be permitted to now wriggle out of the same.

20.2 The petitioners themselves preferred a petition under Section 9 of the 1996 Act. They also preferred a petition under Section 11 (6) of the 1996 Act for the appointment of an Arbitrator which was duly allowed. In all petitions *viz* the petition under Section 9 of the 1996 Act, Section 11 (6) of the 1996 Act, the claim statement filed before the Arbitrator and other petitions, the dispute as regards the mutation in question has been raised. Under the circumstances, I do not see as to how the learned Arbitrator would not have the jurisdiction to deal with the same. In the considered opinion of this Court, the law on the subject as also the provisions of Section 16 of the 1996 Act make it manifestly clear that the Arbitrator would have the jurisdiction to decide about the arbitrability of the dispute as well.

20.3 Be that as it may, this Court is of the further considered opinion that the dispute in question is a dispute in *personam* and not a dispute in *rem*. It is essentially a dispute as regards a mutation of a parcel of land in which other parties are not concerned nor would it have any effect on the rights of other parties. The land in question is duly a part of the Memorandum of Settlement and all rights and interests of the parties to the said memorandum would be determined in accordance with the terms and conditions laid therein. When the exchange of land itself is in question and the matter is pending before the Arbitrator, the consequential mutation would also be decided in terms of the findings recorded as regards the exchange of the land. That being so, the filing of a civil suit would not be permissible and the matter would be

liable to be referred for arbitration.

20.4 Further, Section 127 of the 1887 Act itself provides for arbitration. Once there is a provision for arbitration in the Act itself, it is incomprehensible as to why the learned Arbitrator would not be in a position to decide the issue.

20.5 The Supreme Court of India has clearly laid down that there has to be very less interference at the stage of Section 11 (6) and Section 8 of the 1996 Act especially after the amendments of 2015 and 2019 which have minimized the role of the Courts.

20.6 In the considered opinion of this Court, the present case does not clear the fourfold test laid by the Supreme Court of India in ***Vidya Drolia's*** case and by no stretch of imagination can it be said that the issue raised in the civil suit is manifestly non-arbitrable.

20.7 The learned trial Court rightly held that to uphold the object, intent and purpose of the 1996 Act, the interpretation which favours the inclusion of the Act should be preferred instead of the interpretation, which ousts the applicability of the Act. Parties should not be permitted to abuse the process of law by instituting multiple litigations with a view to frustrate the settlement arrived at between them.

20.8 The Supreme Court of India once again considered the issue in the case of ***Sushma Shivkumar Daga Madhurkumar Ramkrishanji Bajaj*** (supra). While referring to the judgments in the case of ***Booz Allen and Hamilton Inc.*** and ***Vidya Drolia*** (supra), the Supreme Court of India referred to the provisions of Section 16 of the 1996 Act and held that all jurisdictional issues including the existence and the validity of arbitration clause can be gone into by the Arbitral Tribunal. It was further held that after the 2015 amendment, primarily the Court only has to see whether a valid arbitration

agreement exists. Additionally, the clear non-arbitrability of cases such as where a party to the agreement is statutorily protected has also to be seen by the Court and short of this narrow field, the scope of judicial scrutiny at the stage of Section 11(6) or Section 8 is extremely limited.

It needs to be mentioned here that the learned trial Court erroneously rejected the plaint under Order 7 Rule 11(d) CPC, whereas no application under Order 7 Rule 11 CPC had been moved and the application moved was only under Section 8 of the 1996 Act. In any case, merely stating that the plaint was being rejected would not be of any consequence once the application had been moved only under Section 8 of the 1996 Act. This aspect was required to be clarified, for, an objection could have been raised (though not raised during the course of arguments) that since the plaint had been rejected, the only remedy was to file an appeal against the impugned order. The ultimate conclusion which this Court arrives at is that the impugned order does not suffer from any illegality or jurisdictional error warranting interference by this Court.

21. That being so, the present revision petition is found to be bereft of merit and the same is accordingly dismissed.

(VIKRAM AGGARWAL)
JUDGE

Pronounced on:22.04.2025
Prince Chawla/vcgarg

Whether speaking/reasoned Yes/No

Whether reportable Yes/No