$~J1 & J2

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

Reserved on: 17th May, 2025
Date of Pronouncement: 1st September, 2025

\+ **O.M.P. (COMM) 88/2020 & I.As.16586/2010, 903/2014, 12734/2017, 13271/2017, 13273/2017, 13341/2021**

ROGER SHASHOUA & OTHERS .....Petitioners

Through: Mr. A.K. Airi, Sr. Adv with Mr. Gaurav M Liberhan, Mr. Neeraj Gupta, Mr. Arun Rawat, Ms. Akriti Gupta, Mr. Mudit Rahalla, Mr. Vishal Shayak Kumar, Advs. (M: 7428710105) with Mr. Harpreet Singh Chaddha, Nominee director of Stancroft Trust Ltd.

versus

MUKESH SHARMA & OTHERS .....Respondents

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Abhinav Hansaria, Mr. Sarthak Sharma & Mr Sugandh Shahi, Advs. for R-1. (M:8390033667)
Mr. Deepak Kumar Vijay, Adv. for R-3.

J2 AND

\+ **O.M.P.(EFA)(COMM.) 3/2018 & EX.APPL.(OS) 3127/2022, EX.APPL.(OS) 3501/2022, I.A. 5000/2018, I.A. 8544/2018**

ROGER SHASHOUA & ORS. .....Decree Holders

Through: Mr. A.K. Airi, Sr. Adv with Mr. Gaurav M Liberhan, Mr. Neeraj Gupta, Mr. Arun Rawat, Ms. Akriti Gupta, Mr. Mudit Rahalla, Mr. Vishal Shayak Kumar, Advs. (M: 7428710105) with Mr. Harpreet Singh Chaddha, Nominee director of Stancroft Trust Ltd.

versus

MUKESH SHARMA & ORS. .....Judgement Debtors

Through: Mr. Akhil Sibal, Sr. Adv. with Mr. Abhinav Hansaria, Mr. Sarthak Sharma & Mr Sugandh Shahi, Advs. for R-1.
Mr. Deepak Kumar Vijay, Adv. for R-3.

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been done through hybrid mode.

Background:

2. These are two petitions filed on behalf of the Petitioners- Petitioner No.1/Roger Shashoua, Petitioner No.2/Rodemadan Holdings Limited *(hereinafter, 'Rodemadan')* and Petitioner No. 3/Stancroft Trust Limited *(hereinafter*, *'Stancroft')* under Sections 47 and 49 of the Arbitration and Conciliation Act, 1996 *(hereinafter, the 'A&C Act, 1996'),inter alia,* seeking enforcement and execution of two separate foreign awards. The first award being a partial final award dated 5th January, 2010 and the second award being a final award dated 1st August, 2011.

3. The said arbitral awards were passed by the International Chamber of Commerce *('ICC')* International Court of Arbitration *(hereinafter, the 'Arbitral Tribunal')*, in the arbitral proceedings rendered between the Petitioners and the Respondents being, Respondent No. 1/Mukesh Sharma, Respondent No. 2/ITE India Private Limited *(hereinafter, 'ITE')* and the

Respondent No. 3/International Trade Expocentre Limited *(hereinafter, 'ITEL').*

4. Vide the partial final award dated 5th January, 2010 the Arbitral Tribunal passed several directions in respect of shareholdings held by Respondent No.1 and Respondent No. 2 in the Respondent No. 3 company, ITEL. The Tribunal *inter alia* directed that the Respondent No.1 shall transfer to the Petitioners/Claimants all shares held by him in the Respondent No. 3 company.

5. Vide the final award dated 1st August, 2011, the Arbitral Tribunal *inter alia* directed Respondent No. 2 to transfer to the Petitioners/Claimants all shares held by it in the Respondent No. 3 company.

6. The Claimants/Petitioners vide these petitions, *inter alia* seek enforcement and execution of these two arbitral awards. The Respondents object to the enforcement of these Awards on various grounds under Section 45 of the A&C Act.

Facts:

7. On 13th July, 1997 Respondent No.3/ITEL was incorporated. The initial shareholding of the said company vested with, Dr. Vishwanath, Mukesh Sharma, Kiran Sharma, Arvind Jain, Amrit Goyal, Sunil Sharma and O. P. Dhamija. In 1997, ITEL was allotted land located at A-11, Sector-62, Noida by the Noida authority, vide allotment letter dated 20th October, 1997. ITEL paid a sum of Rs. 15,000,000/- as allotment money for the land, through funds infused by Mukesh Sharma in ITEL. The said land was proposed to be used as a convention centre in the Noida area, which is a business hub in the State of Uttar Pradesh.

8. In 1998, Roger Shashoua expressed his interest in ITEL and a Shareholders agreement dated 1st July 1998 was entered into between the parties which is the basis of the present two petitions.

Shareholders Agreement Dated 1st July, 1998

9. The present petitions arise out of a Shareholders Agreement dated 1st July, 1998 *(hereinafter, the 'SHA')* executed between three parties- Roger Shashoua, Mukesh Sharma and the ITEL.

10. In terms of the SHA, Roger Shashoua and Mukesh Sharma agreed that the business of the company, ITEL would be jointly managed and controlled by them. To this effect, Roger Shashoua and Mukesh Sharma agreed that the initial share capital of ITEL would be Rs.50,000,000/-. The same would be held by both the parties, in the following manner:

S. No.	Party	Number of Shares	Percentage
1.	Roger Shashoua	1,500,000	50%
2.	Mukesh Sharma	1,500,000	50%

11. Further, in terms of the SHA, both parties agreed to the composition of the Board with a total number of 6 directors. Roger Shashoua and Mukesh Sharma, both, were given the right to nominate 3 directors each in terms of the SHA.

12. The SHA set out various provisions governing the management and operation of ITEL. It details the composition and powers of the Board, the conduct and procedures for Board meetings, and the functions and responsibilities of the Board. The said agreement also defines the roles and obligations of the parties in relation to ITEL. Importantly, it included a

mechanism to address deadlocks that might arise between the parties on any issue. In addition, the SHA incorporated standard clauses such as confidentiality, dispute resolution, and governing law, thereby outlining the structural and legal framework for the functioning of ITEL.

13. The SHA had two important clauses. First, Clause 4.7, which addressed the procedure to be followed in the event of a deadlock between the parties. The said clause is extracted herein for ready reference:

> *"4.7 Deadlock*
> *The Parties agree that in the event of a Deadlock on a particular issue at a Board meeting, such issue shall be referred to the Parties, by the Board, for their decision. The Parties shall discuss such issue and attempt to reach a consensus on such issue. ln the event the Parties reach such a consensus in writing, the same shall be recorded by way of a Board Resolution and ICO shall at all times adhere to such decisions reached by and between the Parties, even pending recording of the same by way of a Board Resolution. Provided however that in the event the Parties fail to discuss the issue within fifteen (15) days from the date on which such issue was referred to them by the Board, or in the event the Parties fail to reach a consensus on such issue within a period of thirty (30) days from the date on which the issue was referred to them the said issue shall be referred to Arbitration in terms of Article 13 as if the negotiation period referred to therein has expired. The award/ decision of the Arbitrator shall be recorded by way of a Board Resolution. It is understood that the Parties and ICO shall at all times adhere to such award/ decision, even pending recording of the same by way of a Board Resolution."*

14. The second clause, Clause 14 of the SHA, captures that in the event of a dispute which has arisen in connection with the validity, interpretation,

implementation or breach of any provisions of the SHA, the parties shall attempt to resolve such dispute within 30 days from a party making a written request. However, if such a dispute is not resolved within the said 30 days, either party may refer the dispute to arbitration. Clause 14 of the SHA reads as under:

> *"14. ARBITRATION*
> *14.1 In the event a dispute arises in connection with the validity, interpretation, implementation or breach of any provision of this Agreement, the Parties shall attempt, in the first instance, to resolve such dispute through negotiations within thirty (30) days from a Party making a written request therefor. In the event that the dispute is not resolved through negotiations, or such negotiations do not commence within thirty (30) days of a written request in this behalf, either Party may refer the dispute to arbitration. Each Party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed The arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris.*
> *14.2 Proceedings in such arbitration shall be conducted in the English language.*
> *14.3 The arbitration award shall be substantiated in writing and shall be final and binding on the Parties.*
> *14.4 The venue of arbitration shall be London, United Kingdom.*
> *14.5 Each Party shall bear its own costs in connection with such arbitration.*
> *14.6 The existence of a dispute between the Parties, or the commencement or continuation of arbitration proceedings shall not, in any manner, prevent or postpone the performance of those obligations of Parties under this Agreement which are not in dispute,*

and the arbitrators) shall give due consideration to such performance, if any, in making their final award."

15. In terms of the SHA, Roger Shashoua and Mukesh Sharma, were each allotted 1,500,000 shares. The authorised share capital of the ITEL was Rs. 50,000,000/-. The paid-up capital of the company was Rs. 30,000,000/- which was equally divided.

16. Clause 12 of the SHA sets out the mechanism governing the transfer of shares by either party. It stipulates that any such transfer, whether in whole or in part, to a third party, shall be subject to the prior written consent of the other shareholder and must adhere to the procedure prescribed therein. Clause 12 of the SHA reads as under:

"12. TRANSFER OF SHARES

12.1 Roger Shashoua or Mukesh Sharma may, at any time during the term of this Agreement, transfer any or all of its shares to a Third Party with the written consent of the other in the manner contained in this Article.

12.2 In the event, either Roger Shashoua or Mukesh Sharma wish to transfer any or all of their shares in accordance with Article 12.1 above, he (Selling Shareholder') shall serve a notice containing all terms and conditions of such transfer to a Third Party (Sale Notice') on the other shareholder (Non Selling Shareholder'), in writing to that effect.

12.3 Upon service of the Sale Notice, the Non Selling Shareholder shall be entitled to purchase all or a part of the shares offered by the Selling Shareholder to such Third Party, upon the terms and conditions offered by/to such Third Party, within a period of thirty (30) days (provided however that to the extent regulatory approvals are required for such purchase, the time taken for obtaining the same shall be excluded from the computation of this period of 30 days), failing which, the Selling Shareholder shall be free to sell the shares to the

Third Party only on terms and conditions specified in the Sale Notice. Provided however that in the event such sale is not completed within a period of thirty (30) days from the date of expiry of the abovementioned period of thirty (30) days then the Selling Shareholder shall be required to comply with the terms of and procedure prescribed in this Article 12.

12.4 The Parties agree that they have not and shall not pledge all or any part of the shares held by them in ICO with any bank or financial institution. Provided however, that if both Parties so agree, a Party may pledge all or a part of the shares held by him in ICO with such bank or financial institution that may have been so agreed to by the Parties."

Shareholding of ITEL:

17. Pursuant to Clause 12 of the SHA, on 30th September, 1999 the shares of ITEL held by Roger Shashoua were transferred to Rodemadan and the shares of ITEL held by Mukesh Sharma were transferred to ITE. Further restructuring of ITEL took place on 29th October, 2003, on which date, ITE was allotted 2,500,000 equity shares against the loan extended by it to ITEL, as proposed by Roger Shashoua himself. In the same meeting, 500,000 shares were issued to the Petitioners' group and Stancroft was allotted 2,000,000 equity shares. For the said allotment, a sum of Rs. 149,000,000/- was paid by the Petitioners.

18. On the whole, as on 29th October, 2003, both groups *i.e.,* the Petitioner/Roger Shashoua and the Respondent/Mukesh Sharma held 4,000,000 shares each. The total paid up share capital of ITEL was 8,000,000 shares.

19. On 14th September, 2004 the ITEL allotted 250,000 shares to M/s HS Oberoi and Co. Pvt. Ltd. on the ground that the said firm had some dues from the ITEL.

20. Thereafter, between the years 2007 to 2013, ITEL underwent a series of restructuring, involving the transfer of shareholding and infusion of funds, which cumulatively altered the shareholding pattern of the company. As per the documents filed by Respondent No.3, dated 3rd January, 2024, the following is the shareholding of ITEL as on 3rd January, 2024:

SHAREHOLDING OF ITECL AS ON DATE

NAME OF SHAREHOLDER	NO. OF SHARES HELD OF RS.10 EACH
Sunil Kr. Sharma	10 shares
Amrit Goyal	10 shares
Kiran Sharma	10 shares
Arvind Jain	10 shares
OP Dhamija	10 shares
Late Dr. Vishwanath	10 shares
Rodemadan Holdings Limited	20,00,000 shares
Stancroft Trust Limited	20,00,000 shares
Mukesh K. Sharma	9,940 shares
Stanford Infraprojects Pvt. Ltd. (earlier known as H.S. Oberoi & Co. Pvt. Ltd.)	37,50,000 shares
Mukesh K. Sharma HUF	490,000 shares
Intel Invofin India Private Limited	50,00,000 shares
Kambridge Enterprises Private Limited	30,00,000 shares
TOTAL	**1,62,50,000 Shares**

Disputes between the Parties:

21. It is the allegation of Respondent No.1/Mukesh Sharma that in 2004, the Petitioner No.1/Roger Shashoua incorporated a company in the name of India Exhibition Management Pvt. Ltd *(hereinafter, 'IEM')* for undertaking activities of organising, designing, planning and setting up exhibition, trade fair, etc. The said company was conducting competing business, as against the interests of Respondent No.3/ ITEL.

22. In April, 2005, ITEL filed a suit being, ***Suit No. 257/2005***, before the Civil Judge, Gautam Budh Nagar, thereby seeking an injunction to restrain IEM from conducting competing business as that of the ITEL. However, the District Court in Gautam Budh Nagar, after noting the arbitration clause between the parties contained in the SHA, referred the matter to arbitration vide its order dated 25th April, 2005.

23. ITEL challenged the order of the Civil Judge dated 25th April, 2005 by filing a first appeal before the High Court at Allahabad. However, the same was dismissed by the Court vide order dated 9th May, 2008 in ***FAFO No. 3086/2006***. The same reads as under:

> *"This appeal has been preferred by the plaintiffs-appellants upon being aggrieved by the order passed by the learned Civil Judge (Senior Division), Gautam Budh Nagar dated 25th April, 2005 in Suit No. 257 of 2005 (I.T.E.C. Limited Vs. M/s. India Exhibition), by which the matter was directed to be presented before the competent authority for resolution by arbitration in accordance with the rules.*
> *The contention of Mr. Ravindra Kumar Das and Mr. K.D. Tiwari, learned Counsel appearing for the appellants, is that by disposing of such application and sending the dispute for resolution by arbitration, in effect, the Court below sent the entire matter lock, stock*

and barrel before the competent authority. Therefore, far to say about the application, the suit can not be heard by the Court. It is further contended that at the time of hearing the application under Order XXXIX Rule 1 of the Code of Civil Procedure (hereinafter in short called as the 'C.P.C.') for issuing injunction, the impugned order was passed. The appellants contended before this Court that the appellant no. 1 intended to organise exhibitions and fares, etc. periodically on a land of the plaintiff-appellant no. 2 at NOIDA with the joint venture of one Roger Shashoua, defendant-respondent no. 2 herein. Said Sri Roger Shashoua entered into the business with the plaintiffs-appellants by transfer of 50% share of the company, being plaintiff-appellant no. 1 herein, in his favour. But bypassing such agreement he started doing competitive business in the name of defendant-respondent no. 1 company. Said Sri Roger Shashoua controls a company known as M/s. Expomedia Group Plc., which controls the respondent no. 1 herein i.e. company. Incidentally, it has been submitted that said Sri Roger Shashoua is debarred from carrying business in India by virtue of rejection letter of the Government of India dated 07th July, 2006, conveyed vide letter dated 11th July, 2006, being annexure-2 to the rejoinder affidavit.

Learned Counsel appearing for the appellants relied upon paragraph-36 of the judgement reported in AIR 2006 SC 450 (M/s. S.B.P. & Co. Vs. M/s. Patel Engineering Ltd. and another), which is as follows:

> *"36. It is fundamental to our procedural jurisprudence, that the right of no person shall be affected without he being heard. This necessarily imposes an obligation on the Chief Justice to issue notice to the opposite party when he is moved under Section 11 of the Act. The notice to the opposite party cannot be considered to be merely an intimation to that party of the filing of the arbitration application and the passing of an*

administrative order appointing an arbitrator or an arbitral tribunal. It is really the giving of an opportunity of being heard. There have been cases where claims for appointment of an arbitrator based on an arbitration agreement are made ten or twenty years after the period of the contract has come to an end. There have been cases where the appointment of an arbitrator has been sought, after the parties had settled the accounts and the concerned party had certified that he had no further claims against the other contracting party. In other words, there have been occasions when dead claims are sought to be resurrected. There have been cases where assertions are made of the existence of arbitration agreements when, in fact, such existence is strongly disputed by the other side who appears on issuance of notice. Controversies are also raised as to whether the claim that is sought to be put forward comes within the purview of the concerned arbitration clause at all. The Chief Justice has necessarily to apply his mind to these aspects before coming to a conclusion one way or the other and before proceeding to appoint an arbitrator or declining to appoint an arbitrator. Obviously, this is an adjudicatory process. An opportunity of hearing to both parties is a must. Even in administrative functions if rights are affected, rules of natural justice step in. The principles settled by Ridge v. Baldwin [(1963) 2 All ER 66] are well known. Therefore, to the extent, Konkan Railway (supra) states that no notice need be issued to the opposite party to give him an opportunity of being heard before appointing an arbitrator, with respect, the same has to be held to be not sustainable."

The contentions of the appellants were strongly opposed by Mr. Ravi Kant, learned Senior Counsel, and by Mr. Zafar Naiyar, learned Additional Advocate General in

individual capacity, Mr. Syed Ali Murtaza, learned Counsel appearing for the respondent no. 2, and Sri Yashwant Varma and Ms. Rohma Sayeed, learned Counsel appearing for the respondent no. 1.

According to Mr. Ravi Kant, no question of share holding has been raised in the plaint. Learned Arbitrators have already passed an interim award. Remedy is available under the Arbitration and Conciliation Act, 1996 (hereinafter in short called as the 'Act') itself. He said that Section 2 (1) (c) of the Act says, "arbitral award" includes an interim award.

As referred by both Mr. Ravi Kant and Mr. Yashwant Varma, we have gone through Sections 8 and 16 of the Act, which are relevant for the purpose and quoted hereunder:

"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 so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(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.

(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."

"16. Competence of arbitral tribunal to rule on its jurisdiction.-- (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose-

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

Mr. Ravi Kant has drawn our attention to various judgements. He relied upon 2003 (6) SCC 503 (Hindustan Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums) and contended that the language of Section 8 of the Act is peremptory in nature. Therefore, in cases

where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if, as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator. It is also held therein in view of Section 16 of the Act as well as 2002 (2) SCC 388 [Konkan Rly. Corpn. Ltd. Vs. Rani Construction (P) Ltd.] that if there is any objection as to the applicability of the arbitration clause to the facts of the case, the same will have to be raised before the arbitral tribunal concerned. He further cited JT 2005 (11) SC 155 (Shree Subhlaxmi Fabrics Pvt. Ltd. Vs. Chand Mal Baradia and others) to establish in further that the consistent view taken by the Court, therefore, is that contentious issues should not be gone into or decided at the stage of appointment of an arbitrator and no time should be wasted in such an exercise. The remedy of the aggrieved party is to raise an objection before the arbitral tribunal as under Section 16 of the Act it is empowered to rule about its own jurisdiction. He further cited 2006 (1) SCC 417 [Ardy International (P) Ltd. and another Vs. Inspiration Clothes and U and another] to establish that in the first place, Section 8 of the Act is not intended to restrain the arbitration proceedings before an arbitral tribunal. The situation contemplated by Section 8 can arise only at the first instance of an opponent and defendant in a judicial proceeding, or, at the highest, suo motu at the instance of the judicial authority, when the judicial authority comes to know of the existence of the arbitration agreement. In either event, there is no question of the Court under Section 8 of the Act restraining the arbitral proceedings from commencing or continuing. In fact, Section 8 of the Act is intended to

achieve, so to say, the converse result. In 2007 (3) SCC 686 (Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits & Wovens and others) it was held that Section 8 of the Act is peremptory in nature. From 2007 (5) SCC 295 (Maharshi Dayanand University and another Vs. Anand Coop. L/C Society Ltd. and another) we find that the Court held to the extent that in case of dispute with regard to acceptance of arbitration agreement, the arbitrator at the first instance will decide the same as preliminary issue.

Mr. Das, learned Counsel appearing for the appellants, contended that no arbitration agreement has been executed at all. However, on a query of the Court, he said that principally he agreed but no formal documentation was made. In such circumstance, we have gone through the arbitration clause as in the Shareholders Agreement dated 01st July, 1988, which is as follows:

> *"14. Arbitration*
> *14.1 In the event a dispute arises in connection with the validity, interpretation, implementation, or breach of any provision of this Agreement, the Parties shall attempt, in the first instance, to resolve such dispute through negotiations within thirty (30) days from a party making a request therefore. In the event that the dispute is not resolved through negotiations, or such negotiations do not commence within thirty (30) days of a written request on this behalf, either Party may refer the dispute to arbitration. Each party shall nominate one arbitrator and in the event of any difference between the two arbitrators, a third arbitrator/umpire shall be appointed. The arbitration proceedings shall be in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris."*

We find from such clause that scope and ambit is very wide to cover not only breach of any part of the agreement but also validity, interpretation and implementation thereof. Therefore, under no stretch of imagination it can be said that when a person has principally agreed to the terms and a dispute arose about validity and/or interpretation and/or implementation thereof, the same will be considered by a Civil Court de hors the law of arbitration. It has to be decided by the arbitrator or arbitrators, who was/were directed to hear out the same, in respect of any dispute regarding validity, interpretation or implementation. On a further query, the Court has come to know that the appellants have submitted to the jurisdiction of the arbitrators and participated in the proceedings to get a decision on the preliminary point of jurisdiction and become unsuccessful. The award goes against the appellants. In AIR 1960 SC 1156 [The Printers (Mysore) Private Ltd. Vs. Pothan Joseph] it has been held upon going through the arbitration agreement that when it provides that if the interpretation or application of the contract any difference of opinion arose between the parties, the same shall be referred to the arbitration. The words "interpretation or application of contract" are frequently used in arbitration agreements and they generally cover disputes between the parties in regard to the construction of the relevant terms of the contract as well as their effect, and unless the context compels a contrary construction, a dispute in regard to the working of the contract would generally fall within the clause in question. According to us, although the judgement was delivered on the repealed Act i.e. Arbitration Act, 1940 but the principle is directly applicable herein more prudently when the question of jurisdiction

can also be decided by the arbitrator/s himself/themselves as per the new Act i.e. Arbitration and Conciliation Act, 1996.

On an incidental question about grant of injunction the Supreme Court in 2006 (4) SCC 227 [Percept D'Mark (India) (P) Ltd. Vs. Zaheer Khan and another] held that an agreement, which is incapable of specific performance, will be inequitable if it is directed to be enforced. It can only be compensated in terms of money. Mr. Yashwant Varma upon adopting the arguments of Mr. Ravi Kant contended before this Court that the injunction is refused on the ground of carrying on business. Therefore, such injunction can not be granted in the manner as prayed for.

However, we are not concerned whether order of injunction can be granted or not to be granted by the Civil Court on merit. We are only concerned as to whether the Civil Court rightly returned the proceeding for arbitration or not. ***According to us, when the appellants have principally agreed in terms of agreement subject to formal documentation and the clause of agreement is wide enough to cover the question of validity, interpretation and implementation and when the appellants have already submitted to the jurisdiction of the arbitrators and when a preliminary award is passed against them, the appeal arising out of suit and/or proceeding is infructuous in nature. If the appellants are aggrieved at all by the award, it is open for them to challenge the same before the appropriate Court of law. It is also open for them to apply for interim measure before an appropriate Court of law in the appropriate circumstance. Even if the setting aside proceeding goes against them, they have a right to appeal. But under no circumstances the appeal pending before us can***

be held to be sustainable. Hence, it is dismissed accordingly, however, without imposing any cost.*"*

24. Subsequently, on 26th May, 2005 the Petitioners invoked the arbitration clause, Clause 14 of the SHA, in accordance with the ICC rules. The request for arbitration was sent to the Respondents by the ICC Secretariat. However, in June, 2023 all the three Respondents applied to the ICC Court of Arbitration seeking dismissal of the arbitration proceedings on the ground that the arbitration agreement did not exist.

25. In July 2005, the Respondent No. 2 filed a suit before the Delhi High Court, being, ***CS(OS) 926/2005*** seeking a declaration that there did not exist a valid arbitration clause between the parties. On 12th July, 2005, an *ex parte* order was granted by the Court in ***CS(OS) 926/2005*** to the effect that the Petitioners would not commence any arbitration proceedings against the Respondent No. 2/ITE. This *ex parte* injunction was vacated on 20th December, 2005 by the ld. Single Judge of this Court in the following terms:

> *"35. I have given deep thought to the rival contentions of the parties.*
> *36. In my considered view, an important aspect to be kept in mind in so far as the factual matrix is concerned is the very premise on which the Shareholders Agreement dated 1.7.1998 was arrived at. A bare perusal of the clauses referred to above and the recital shows that the concept was of two groups. Clause 12.3 in fact provided that in case of any one party wanting to exit and transfer the shareholding to the third party, the party wanting to continue would have peremptory rights in respect of the shares. Such shareholding of the two parties may be held in individual names or in name of different companies fully controlled by one group or the other.*

37. It is not in dispute that the plaintiff company is really a company of Mukesh Sharma. However, a technical plea is sought to be taken that the company is a separate juristic entity and thus is not bound by the arbitration clause contained in the shareholders agreement. It has already been noticed that there is no dispute about the fact that a company is a separate juristic entity and has to be managed by the Board of Directors. However, if the corporate veil was to be lifted, it would be found that the plaintiff company is nothing else but a part of the group of defendant No.1. An important aspect is that this was envisaged even at the stage of entering into the Shareholders Agreement. Thus, consciously the phraseology "permitted assigns" has been used while defining all the entities which have entered into the agreement. I fail to appreciate as to how a conclusion could be drawn in a different manner by the portion after the initial definition of the parties. No doubt, Roger Shashoua and Mukesh Sharma are referred to as the parties but any assigns of theirs would be included.

38. Learned counsel for the plaintiff had referred to Article 12 of the Agreement dealing with transfer of shares. A reading of the said clause in fact supports the statement of defendants No.3 to 5 that what is envisaged is really only two groups. This consists of the two persons entering into the agreement and any shares transferred to the nominees and assigns of these two persons. A transfer to a third party is envisaged only in terms of the different sub-paras of clause 12 which gives the peremptory right. The distribution of shareholding shows that it is to the nominees and assigns that the shareholding has been given for the two parties to maintain the 50% each balance. As the shareholding has increased, defendant No.1 and defendant No.3 took steps in their commercial wisdom to give shares not in individual names but to different entities which were their permitted assigns. Thus, the reliance placed by

defendant No.3 to 5 on the judgment of the apex court in Ram Baran Prasad case (supra) is apposite to the present case.

39. It is also relevant to note that in pursuance to the notice issued by the ICC, the plaintiff itself has filed an application under Article 6 of the Rules of ICC calling upon the Tribunal to rule on its jurisdiction. It cannot be said that the arbitral tribunal is without competency to rule on its jurisdiction arising from the validity of the arbitration agreement. The observations of the Supreme Court in Kvaerner Cementation India Ltd. case (supra) are important where the apex court has emphasised the important object with which the said Act was enacted and jurisdiction was conferred under Section 16 of the Act on the arbitral tribunal to rule on its own jurisdiction including ruling on any jurisdiction with respect to the existence and the validity of the arbitration agreement. It was held that the civil court would have no jurisdiction to go into the question.

40. The conduct of the parties including the communications exchanged and pleadings filed also substantiates this view. The letter dated 1.9.2004 cannot be explained away by stating that it was written by Mr. Mukesh Kumar in his personal capacity. The reference to the word "I" was only a manner of addressing and the same is apparently on behalf of the plaintiff. The pleadings before the ICC also show that the stand of the plaintiff was that there could be transfer of shares to bodies corporate without any consideration. This was so since the plaintiff itself understood that it was an assign. The subsequent effort to explain the same away by the affidavit dated 24.11.2005 cannot be accepted since the nature of alleged consideration was adjustment of loans and that appears to be a matter of internal financial adjustment of one group inter se the individuals and the companies representing the said group.

41. In so far as the scope of enquiry under Section 45 of the Act is concerned, the observations in Shin-etsu

Chemical Co. Ltd. case (supra) are of great importance. Section 45 of the said Act reads as under:

> *"45. Power of judicial authority to refer parties to arbitration. Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

42. The Supreme Court observed that only a prima facie examination has to take place and a summary decision arrived at on the objections raised on the alleged nullity, voidness, inoperativeness or incapability of the arbitration agreement. In case a request to refer the matter to arbitration is to be rejected, at that stage, the court would afford full opportunity to the parties to lead evidence. Thus, at a pre-reference stage, it was held that what was contemplated was only a prima facie view for making the reference leaving the parties to full trial either before the arbitral tribunal or before the court at a post-award stage.

43. In view of the aforesaid position, it is not necessary to go into greater detail into the submission of the learned counsel for the defendant No.3 to 5 that it a mere suit for declaration to the effect that there exists no arbitration agreement is not contemplated under section 45 of the Act and what is contemplated is a suit which is otherwise maintainable in law but the subject matter of suit is such that the same falls within the domain of determination of arbitration agreement falling under Section 44 of the said Act. It may, however, be observed that the Supreme Court in Kvaerner Cementation India Ltd. case (supra)has laid great emphasis on the principle of the arbitral tribunal ruling on its own

jurisdiction including the ruling on any objection with respect to the existence or validity of the arbitration agreement for which civil court would have no jurisdiction.

*44**. If the facts of the present case are considered within the aforesaid parameters, it cannot be said that the plaintiff is totally outside the purview of the arbitration clause. This is on the reading of the shareholders agreement. It is, however, to be kept in mind that the consideration of these aspects arise from the view to be taken both on the Interlocutory Application for stay of the plaintiff and the application filed by defendant No.3 to 5 under Section 45 of the said Act. The present case is not one where this court can come to the conclusion that the agreement is null and void or inoperative as in Bharti Televentures Ltd. case (supra). There is also thus no question of the bifurcation of any claim which will invite the ratio of Sukanya Holdings Pvt. Ltd. case (supra). Such an eventuality would only arise if it was held that the claim qua the plaintiff was not arbitrable**.*

*45. **I am thus of the considered view that in so far as the interim application for stay is concerned, there is no prima facie case made out. Nor only that, the plaintiff himself has moved an appropriate application before the ICC which would consider the validity of the agreement qua the plaintiff.***

*46. **The said application is thus liable to be rejected. Ordered accordingly. Interim orders stand vacated**.*

47. I am also of the considered view that the application filed by defendant No.3 to 5 under Section 45 of the Arbitration Act is liable to be allowed and the matter in issue is liable to be considered by the ICC including the application filed by the plaintiff.

48. In view of the aforesaid, the suit also does not survive for considering being merely a suit for declaratory relief and is accordingly disposed of.

49. Defendants No. 3 to 5 shall also be entitled to costs from the plaintiff quantified at Rs.20,000/-."

26. In the meantime, in accordance with the rules of ICC, the Arbitral Tribunal was constituted with the nominees of both parties and finally the Chairperson of the said Tribunal was also appointed on 30th December 2005. The terms of reference were signed on 27th February, 2006 by the Respondent No. 1 and 3, however, the Respondent No. 2, chose not to participate.

27. The order passed by the ld. Single Judge dated 20th December, 2005 was appealed in 2006 by the Respondent No. 2, in ***RFA (OS) 9/2006***. On 21st February, 2006, an interim order was granted by the Division Bench in ***RFA (OS) 9/2006*** thereby restraining the arbitration proceedings against Respondent No.2/ITE.

28. During the pendency of the said appeal in the High Court, the Arbitral proceedings between the parties continued, except *qua* Respondent No. 2.

29. On 18th September, 2009, the Division Bench of this Court, in ***RFA(OS) 9/2006*** dismissed the appeal filed by Respondent No. 2 against the order dated 20th December, 2005 and *inter alia,* held that the appeal was not maintainable. Thereafter, on 13th November, 2009, a Review petition was also filed by the Respondent No. 2 seeking review of the order dated 18th September, 2009, however, the same was also dismissed by the Division Bench of this Court on 16th November, 2009.

30. In the meantime, the Respondent No. 1 and the Respondent No. 3 had raised an issue of jurisdiction before the Arbitral Tribunal. On this aspect, the Arbitral Tribunal rendered a partial award on jurisdiction on 12th February 2007 *(hereinafter, 'Award No.1')*. The Arbitral Tribunal vide Award No. 1

inter alia held that the SHA and the arbitration clause contained therein are conclusive documents and are binding upon the signatory parties.

31. While the arbitral proceedings between the parties continued, it is stated that the Respondent No. 1 transferred 490,000 shares to Mukesh Sharma (HUF) on 7th October, 2006. Further, on 7th December, 2007 ITE India Pvt. Ltd. transferred 3,500,000 shares to HS Oberoi and Co. Pvt. Ltd.

32. The Arbitral Tribunal passed an Award on Costs on 15th November, 2007 *(hereinafter, 'Award No.2')*, thereby, deciding on the costs incurred by the parties in relation to the arbitration proceedings. In Award No. 2, the Arbitral Tribunal *inter alia* passed a costs award against Mukesh Sharma/Respondent No. 1 and awarded costs in favour of the Petitioners.

33. The hearings continued before the Arbitral Tribunal and the partial final award was rendered on 5th January, 2010 *(hereinafter 'Award No. 3')*. Since, the Division Bench had lifted the injunction *qua* the Respondent No.2, the Arbitral Tribunal sought responses from both sides as to whether the claims are to be now pursued against Respondent No. 2. The stand of the Petitioners was that, if the Respondent No.1 complied with the directions given in Award No.2, it won't press its claim against the Respondent No.2, subject to the Petitioners being permitted to avail of the remedies against the Respondent No.2. However, the stand of the Respondent No. 1 was that the Arbitral Tribunal was *functus officio* as the partial final award/Award No. 3 had been delivered.

34. This objection of Respondent No. 1 was rejected by the Arbitral Tribunal on 1st February 2010 on the ground that since no relief was granted qua the Respondent No. 2 in the Award No. 2, the Tribunal was not *functus officio*.

35. The Respondents then challenged the judgement of the ld. Single Judge dated 20th December, 2005 as also of the Division Bench dated 18th September 2009, vide ***Special Leave Petition (C) No 22318-22321/2010***. The same was dismissed in the following terms:

> *"Though a letter on behalf of the petitioner has been circulated seeking adjournment, keeping in view the decision rendered in Roger Shashoua and Others vs. Mukesh Sharma and Others (2017) 14 SCC 722, we think it appropriate that the petitioner, if so advised, may raise all its objections under Section 48 of the Arbitration and Conciliation Act, 1996, which are pending before the High Court of Delhi. If such objections are raised, the High Court shall deal with the same in accordance with law.*
> *With the aforesaid observation, the special leave petitions stand disposed of. There shall be no order as to costs."*

36. In the meanwhile, the Respondents continued to hold Board meetings and on 8th April, 2010, issued 30 lakh shares to Hyderabad Trade Expo Centre, which, according to the Petitioners, was done without informing them.

37. The petition, being ***O.M.P. 255/2010*** was then filed seeking enforcement of the partial final award dated 5th January 2010/Award No. 3. In this petition, vide order dated 12th May, 2010 *status quo* was directed in respect of the shareholding of ITEL. The said order reads as under:

> *"**IA No 6266/2010 (under Section 151 CPC)***
> *Allowed, subject to all just exceptions.*
> *Accordingly, application stands disposed of.*
> ***OMP No. 255/2010 and IA No. 6264/2010***
> *Issue notice to the respondents by ordinary process, registered AD and approved courier, returnable for 14th September, 2010. Dasti notice in addition.*

In the meantime, respondent Nos. 1 and 2 are directed to maintain status quo with regard to their share holding in respondent No. 3 company.
Let provisions of Order 39 Rule 3 CPC be complied within a period of one week from today.
Dasti."

38. On 15th June, 2010 the Respondent No. 3 filed an application before the District Judge, Gautam Budh Nagar, U.P. in ***Misc. Case No. 33/2010***, thereby challenging the Award No. 3. The said challenge was dismissed on 6th July 2011. An appeal against the same was filed before the Allahabad High Court which was dismissed on 13th March, 2013.

39. An application, being, ***I.A. No. 16585/2010*** in ***O.M.P. 255/2010*** was also filed by the Respondent No. 3 before this Court in December, 2010, thereby objecting to the enforcement of the Award No. 3. Further, in the said petition, another application, being, ***IA No. 16586/2010*** was filed by the ITE on 6th December, 2010, objecting to the enforcement of the Award No. 3.

40. In the meanwhile, the Arbitral Tribunal proceeded, despite the objections raised by the Respondents and pronounced the final award on 1st August 2011 *(hereinafter, 'Award No. 4')*.

41. Thereafter, the Respondent No. 2, on 29th October, 2011, filed ***O.M.P. 914/2011*** before this Court, seeking setting aside of Awards passed by the Arbitral Tribunal, including Award No. 4.

42. On 12th January, 2012 however, the Respondent No. 3 filed an application in ***O.M.P. No. 255/2010*** alleging that there had been a substantial change in the shareholding pattern of ITEL, since 2004. Pursuant to this, several orders were passed by this Court in ***O.M.P. No. 255/2010,*** *inter alia* directing the Respondent No. 1 to disclose the changes in the shareholding

pattern of ITEL as also to ensure participation of the Petitioners group of shareholders in the management of ITEL.

43. In respect of change in the shareholding pattern of the ITEL, in April, 2013, a petition was filed by the Petitioners before the Company Law Board, New Delhi Bench, being, ***CP No. 66 (ND)/2013***. Vide order dated 19th August, 2013 in this petition, a *status quo* was granted with respect to the shareholding of ITEL, in the following terms:

> *"29. Prima facie I am of the view, there is a triable case before this bench in the pleadings of the petitioners, and I have not found any merit on the maintainability issued by the respondents.*
> *30. I have noticed the petitioners stashed everything into this petition seeking reliefs over the issues already considered by the Tribunal, sought a relief to invalid every meeting held so far, the reliefs are not appearing specific. If the petition, as it is, is to be taken up, then conflicting opinions will come up raising serious issues such as resjudicata and estoppels.*
> *31.* ***For the reasons stated above, the respondents' side are hereby directed to maintain status quo over the shareholding, board pattern, and fixed assets of the company subject to the execution proceedings pending over the award passed by Arbitral Tribunal on 5-1-2010 pending disposal of the company petition****.*
> *32. The petitioners' side is hereby directed to file amended company petition separating the pleadings and reliefs covered under section 397 &398 of the Companies Act from the reliefs' generic in nature and the reliefs already granted by Arbitral Tribunal."*

44. On 7th June, 2016, this Court in ***O.M.P. 914/2011***, *inter alia* decided on the challenge made by the Respondent No. 2 under Section 34 of the A&C Act, 1996 to the arbitral awards dated 5th August, 2011, 27th February, 2007,

17th November, 2007 and 19th January, 2010 (dated 5th January, 2010). Vide judgment on the said date, the Court *inter alia* held that the petitions challenging the arbitral award under Section 34 of the A&C Act, 1996 are maintainable. The relevant portion of the judgment dated 7th June, 2016 is extracted hereunder:

> *"56. Insofar as the submission of Mr. Dayan Krishnan on the non-maintainability of petitions under Section 34 of the Act of 1996 is concerned, the said plea is rejected in view of my discussion made above."*

45. However, the said judgment was set aside by the Supreme Court vide judgment dated 4th July, 2017 in ***S.L.P. (Civil) Nos. 22616-22618 of 2016.*** The Supreme Court in this judgment, *inter alia* held that Part I of the A&C Act, 1996 would not apply to the Award No. 3, as the said award is an international award. It was further held that petitions filed by the Respondents challenging the arbitral awards herein under Section 34 of the A&C Act, 1996, would not be maintainable. The relevant portion of the judgment is extracted hereunder:

> *"70. It is apposite to note that the said decision has been discussed at length in Union of India v. Reliance Industries Limited. The Court, in fact, reproduced the arbitration clause in Singer Company (supra) and referred to the analysis made in the judgment and noted that notwithstanding the award, it was a foreign award, since the substantive law of the contract was Indian law and the arbitration law was part of the contract, the arbitration clause would be governed by Indian law and not by the Rules of International Chambers of Commerce. On that basis the Court held in Singer Company (supra) that the mere fact that the venue chosen by the ICC Court or conduct of the arbitration proceeding was London, does not exclude the operation of the Act which dealt with the domestic awards under*

the 1940 Act. The two-Judge Bench in Reliance Industries Limited quoted para 53 of Singer Company (supra) and thereafter opined:

> *"13. It can be seen that this Court in Singer case did not give effect to the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent jurisdiction, the 1996 Act, while enacting Section 9(a) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1961 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India. 14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part II of the Arbitration Act, 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."*

71. We respectfully concur with the said view, for there is no reason to differ. Apart from that, we have already held that the agreement in question having been interpreted in a particular manner by the English courts and the said interpretation having gained acceptation by this Court, the inescapable conclusion is that the courts in India have no jurisdiction.

72. In view of the aforesaid analysis, we allow the appeals and set aside the judgment of the High Court of Delhi that has held that courts in India have jurisdiction, and has also determined that Gautam Budh Nagar has no jurisdiction and the petition under Section 34 has to be filed before the Delhi High Court. Once the courts in India have no jurisdiction, the aforesaid conclusions are

to be nullified and we so do. In the facts and circumstances of the case, there shall be no order as to costs."

46. The Respondent No. 3/ITEL thereafter, filed a Review petition, being, ***RP (C) 353-354/2018*** against the judgment dated 4th July, 2017. However, the Supreme Court, vide order dated 19th March, 2018 dismissed it in the following terms:

"We have carefully gone through the Review Petitions and the connected papers, but we see no reason to interfere with the order impugned. The Review Petitions are, accordingly, dismissed."

47. The judgment passed by the ld. Single Judge of this Court dated 20th December, 2005 *(supra)* was challenged by the Respondent No. 2/ITE ***vide SLP (Civil) No. 22318-22321/2010***. The Supreme Court, in the order dated 19th March, 2018 in this petition, held that any objections *qua* the arbitral awards by the parties, under Section 48 of the A&C Act, 1996 shall be considered by the High Court. The relevant portion of the order dated 19th March, 2018 is extracted hereunder:

"Though a letter on behalf of the petitioner has been circulated seeking adjournment, keeping in view the decision rendered in Roger Shashoua and Others vs. Mukesh Sharma and Others (2017) 14 SCC 722, we think it appropriate that the petitioner, if so advised, may raise all its objections under Section 48 of the Arbitration and Conciliation Act, 1996, which are pending before the High Court of Delhi. If such objections are raised, the High Court shall deal with the same in accordance with law.
With the aforesaid observation, the special leave petitions stand disposed of. There shall be no order as to costs."

48. The Petitioners then filed the present petition, being, ***O.M.P. (EFA) 3/2018*** seeking enforcement of the final award/Award No.4.

Conclusion on Chronology of events

49. The above chronology of events shows that several proceedings have been filed in India, both before the Delhi High Court and the District Court, Gautam Budh Nagar, by the Respondents seeking injunctions against the arbitral proceedings. However, all such proceedings finally culminated and came to an end. The only disputes remaining to be adjudicated pertain to the enforcement of Award No. 3 and Award No. 4, and the objections raised thereto by the Respondents.

50. It needs to be noted that the Respondent No. 1 and Respondent No. 3 have all along participated in the arbitral proceedings. Respondent No. 2 had initially obtained an injunction. However, after the said injunction was vacated, the Respondent No. 2 has also been heard and then the final award has been passed.

The Arbitration Proceedings:

51. Clause 14 of the SHA, captures that in the event of a dispute which has arisen in connection with the validity, interpretation, implementation or breach of any provisions of the SHA, the parties shall attempt to resolve such dispute within 30 days from a party making a written request. However, if such a dispute is not resolved within the said 30 days, either party may refer the dispute to arbitration.

52. Due to the disputes that arose between the parties as also in terms of Article 4 of the ICC, the Petitioners on 26th May, 2005, invoked arbitration.

On 27th May, 2005, a copy of the request for arbitration was sent to the Respondents by the ICC Secretariat. However, on 23rd June, 2005, the Respondents applied to the ICC for dismissal of the arbitration proceedings on the ground of non-existence of the arbitration agreement.

53. Thereafter, on 2nd September, 2005 the ICC Court of Arbitration held that the arbitration proceedings should proceed pursuant to Article 6(2) of the ICC rules. The said rule provides that by agreeing to arbitration under the Rules, the parties have accepted that arbitration shall be administered by the Arbitral Tribunal itself. Therefore, the Arbitral Tribunal could decide on its own jurisdiction.

54. The ICC Court constituted the following arbitral tribunal:

- Mr. Harish Salve, ld. Senior Counsel as a co-arbitrator by the Respondents.
- Mr. Andrew Onslow, KC as the Nominee of the Petitioner.
- Mr. David AR Williams, KC was confirmed as the chairman of the Arbitral Tribunal on Thereafter, on 30th December, 2005.

55. A preliminary conference was held in London on 27th February, 2006, in which Terms of Reference *('TOR')* were signed on behalf of the Claimants/Petitioners, Mr. Mukesh Sharma/Respondent No. 1 and on behalf of the ITEL/Respondent No. 3. The TOR was not signed by ITE/Respondent No. 2. Further, on 13th July, 2006, the TOR were approved by the ICC Court pursuant to the ICC Rules.

Summary of the awards passed by the Arbitral Tribunal:

I. AWARD NO.1 - Arbitral award dated 12th February, 2007

56. The primary contention considered by the Arbitral Tribunal was whether ITEL was denied the opportunity to be heard at the jurisdictional hearing. This was based on the written submission filed by the ITEL on 7th April, 2006 contending that the Arbitral Tribunal lacked jurisdiction.

57. The Arbitral Tribunal after considering the factual background as also the procedural history recognised that ITEL as an entity was not present in the jurisdiction hearing which took place on 26-28th July, 2006 as also on 13th October, 2006 in London. However, the Tribunal observed that even though ITEL as an entity was not present, both groups of shareholders of ITEL, were duly represented. Further, the Arbitral Tribunal considered the fact that the ITEL was duly represented by advocates while signing the TOR and presenting its objections *qua* jurisdiction (accompanied by a witness statement of ITEL). It was further observed that even at a later stage, intimation of the jurisdictional hearing was sent to ITEL and duly received. However, ITEL chose not to participate. Thus, the Arbitral Tribunal concluded that the Respondent No. 3 has not been denied an opportunity of being heard. The relevant portion of the observations made by the Arbitral Tribunal are extracted hereunder:

> *"26. In this situation:*
> *(1) While recognising that there was no appearance on ITEC at the jurisdiction hearing, the Tribunal will proceed to determine both Mr Sharma's and ITEG's jurisdictional objections, and to decide the representation issues between the Claimants and both of Mr Sharma and ITEC. Having signed the Terms of Reference (by Mr Choudhry), and having made written*

submissions through Menon & Associates and having both before and after that firm's departure made written submissions by itself, and having had notice of the jurisdiction hearing, ITEC has elected not to appear at it. No objection was taken by the Claimants to Mr Choudhry signing the Terms of Reference for ITEC, nor was there any objection to the written submissions on jurisdiction of 7 April 2006 being signed by Mr Sharma as ITEC's authorised signatory, while those of 16 June 2006 were submitted in an email which stated that it was transmitted by ITEC's authorised signatory. The Tribunal holds that in these circumstances ITEC is bound by the Tribunal's findings on the issues for decision at the jurisdiction hearing.

(2) The Tribunal records that it has carefully considered the alternative approach available to it namely to confine this Award to a ruling on the legal representation issue and to reserve any decision with respect to jurisdiction over ITEC to a further Award after ITEC has been provided with an opportunity to have its arguments as to jurisdiction presented to the Tribunal by duly authorised counsel. It considers that such an approach would be unduly artificial and formalistic, inconsistent with its obligations to proceed expeditiously, and unnecessary, especially since (as noted in paragraph 24 above) ITEC itself presented extensive pre-hearing written submissions in relation to jurisdiction and at the hearing all possible aspects on jurisdiction which could have been presented by authorised counsel on its behalf were presented by counsel for Mr Sharma. ***In the Tribunal's view any contention that ITEC itself has not had a reasonable opportunity to present its case could not be sustained. Finally it must be stressed that ITEC will have every opportunity to participate in the substantive proceedings which will follow this Award on jurisdiction and representation.***

> *(3) It bears repetition that although as a juridical entity ITEC is entitled to a representation apart from its shareholders, the shareholders of ITEC are themselves locked in a battle which impinges on the management of ITEC and the functioning of its Board of Directors.* ***The two groups of shareholders have been heard on their respective contentions. At best, if represented at the hearing, ITEC would have either remained neutral or supported one or other contention. In the Tribunal's view, this is another reason for regarding the procedure followed by the Tribunal so far as sufficiently complying with principles of fairness and natural justice****."*

58. A partial award as to the jurisdiction of the Arbitral Tribunal was then passed by the said Tribunal on 12th February, 2007. In this award, the Arbitral Tribunal *inter alia* decided on whether the parties herein are subject to the arbitration agreement, as contained in the SHA. The issues determined by the Arbitral Tribunal in this award, are as follows:

> *"The issues for determination*
> *27. The issues presently for determination by the Tribunal are as follows:*
> *(1) whether the SHA, and thereby the arbitration agreement, was concluded as a binding contract between Mr Shashoua and Mr Sharma; and, if so:*
> *(2) whether ITEC was a party to the arbitration agreement:*
> *(3) whether Rodemadan became a party to the arbitration agreement;*
> *(4) if Rodemadan became a party to the arbitration agreement, whether this was in substitution for Mr Shashoua, so that Mr Shashoua no longer has any right to claim under it;*
> *(5) whether Stancroft became a party to the arbitration agreement;*

(6) whether the Tribunal lacks jurisdiction because of non- compliance with conditions precedent to the reference to arbitration: and
(7) whether Mr Sharma was authorised to retain legal representatives for ITEC."

59. On these issues the Arbitral Tribunal gave the following findings:

(i) The Arbitral Tribunal concluded that the SHA is a binding contract between Mr. Roger Shashoua, Mr. Mukesh Sharma and ITEL. The reasoning given by the Tribunal, *inter alia,* was that the phrase, ***'permitted assigns'*** in the recitals portion of the SHA, included nominees of either of the parties as also any shareholders coming into ITEL. This reasoning is in line with the observations made by the ld. Single Judge in the order dated 20th December 2005 which observed that SHA primarily consisted of two groups *i.e.,* the Petitioners' group and the Respondents' group.

(ii) The Tribunal examined the conduct of parties, post signing of the SHA and concluded that there was correspondence between the parties at the relevant point in time.

(iii) Rodemadan was a permitted assignee of the Petitioner No. 1. The argument of the Respondent No. 1 that the Petitioner No. 1 was divested of the right to enforce the SHA due to the nomination of Rodemadan was rejected. The Tribunal observed that the assignment to Rodemadan was only an equitable assignment and the assignor would continue to be a party of the arbitration.

(iv) Similarly, Stancroft being a permitted assignee of the Petitioner No. 1, also became a party to the arbitration proceedings.

60. The summary of conclusions in Award No.1 is as under:

"Summary of Conclusions - Award as to Jurisdiction

157. The Tribunal, having carefully considered the oral and documentary evidence and the oral and written submissions of the parties and given due weight thereto, and rejecting all submissions to the contrary, hereby makes issues and publishes this Award as to Jurisdiction and FINDS, AWARDS, AND DECLARES AS FOLLOWS:

(1) It finds that the SHA, and thereby the arbitration agreement contained in clause 14.1 of the SHA, was concluded as a binding contract between the First Claimant and the First Respondent.

(2) It finds that the Third Respondent became a party to the arbitration agreement on execution of the SHA.

(3) It finds that the Second Claimant became a party to the arbitration agreement on the transfer to it of the First Claimant's shares in the Third Respondent.

(4) It finds that, following the transfer of shares to the Second Claimant, the First Claimant remained a party to the arbitration agreement.

(5) It finds that the Third Claimant became a party to the arbitration agreement on the issue to it of shares in the Third Respondent.

(6) It finds that it was not a condition precedent to the right to bring arbitration proceedings that the parties should have previously attempted to resolve the dispute through negotiations.

(7) Taking into account the findings in (1)-(6) above, the Tribunal rejects all the objections made by the First and Third Respondents to the effect that it lacks substantive jurisdiction.

(8) The Tribunal finds that the First Respondent was not authorised to retain legal representatives to act for the Third Respondent.

(9) All other decisions, including any decisions with regard to costs, are reserved for a further or final award.

Costs

158. The costs of, and incidental to, these proceedings as to jurisdiction are reserved for consideration and determination in a separate Award."

II. AWARD NO.2 - Arbitral award dated 15th November, 2007

61. A Costs award was passed by the Arbitral Tribunal on 15th November, 2007. Vide this award, the Tribunal decided three applications for costs filed by the Petitioner. On the basis of the submissions made by the parties the Arbitral Tribunal upheld the applications for costs. The same read as under:

"*76. The Tribunal, rejecting all submissions to the contrary. hereby declares. orders and awards that:*

(a) Claimants' application is upheld as against the First Respondent:

(b) The First Respondent shall forthwith pay to the Claimants (or any one or more of them) the sum of £170,000;

(c) The First Respondent shall also pay to the Claimants (or any one or more of them) interest on the sum awarded under (b) above at a rate of 8% per annum compounded quarterly from 12 February 2007 until payment is made.

77. The question of whether the Second and Third Respondents should contribute to the payment the First Respondent has been ordered to make under this Award is reserved for later consideration and determination by the Tribunal, if it becomes necessary to do so.

With respect to the application in relation to First Respondent's Application to use Court Procedures to Compel Document Production

78. The Tribunal, rejecting all submissions to the contrary, hereby declares, orders and awards as follows:

(a) Claimants' application is upheld.

(b) The First Respondent shall forthwith pay to the Claimants (or any one or more of them) the sum of £2,373.47.

79. All other decisions, including any decisions as to costs not otherwise disposed of in this Partial Final Award; are reserved to a further award."

III. AWARD NO.3 - Arbitral award dated 5th January, 2010

62. A partial final award as to liability was passed by the Arbitral Tribunal on 5th January, 2010. In this award, the Tribunal has dealt with almost all the aspects and disputes which were raised *qua* the SHA.

63. In this Award, the Arbitral Tribunal in this award, considered and discussed the overall facts of the case. The Tribunal discussed the procedural history of the case, and reiterated the findings of Award No.1 with respect to the shareholding structure of ITEL. The Tribunal observed that the nominees of Roger Shashoua/Petitioner No. 1 *i.e.,* Rodemadan and Stancroft, hold 50% of the ITEL/Respondent No. 3's issued share capital. The remaining 50% of ITEL's issued share capital was held by Mukesh Sharma and ITE.

64. The Arbitral Award No. 3 recorded the evidence led on facts by five witnesses on behalf of the Petitioners as also two witnesses on behalf of the Respondent No. 1. Various expert reports, supplemental reports, etc. were also submitted. Further, in this award, the claims of the Petitioners/Claimants were considered along with reliefs sought.

65. Broadly, the reliefs which were sought in the arbitral proceedings by the Claimants/Petitioners herein, which were summarised in the initial terms of reference were:

(a) According to the Petitioners, the basic relief that would settle the entire dispute would be for one party to exit ITEL. For this purpose,

the Petitioners agreed to purchase out the Respondent No. 1 by buying out his share in the ITEL. The Petitioners were also open to let the Respondent No.1 buy out its shares in the ITEL. However, if the Respondent No.1 is not agreeable to this proposal, the Petitioners would press for the reliefs.

(b) For an award declaring that the resolution passed on 29th October, 2003 by the board of directors of ITEL, for issuance of 2.5 million equity shares at par, in favour of ITE/Respondent No. 2 is void.

(c) For refund of all amounts paid by the Petitioners towards subscription of shares, loans, damages and losses caused in arbitration, *etc.,* with respect to the Respondent No. 3 company.

(d) Thereafter, an amended request was also filed seeking relief to the effect that the Respondent No. 1 ought to vacate the office of the Managing Director of ITEL. Further, other reliefs relating to leaves of damages, losses, reimbursements, information relating to contracts, etc.

66. Mukesh Sharma/Respondent No. 1 also sought relief from the Arbitral Tribunal. According to the Respondent No. 1, the SHA was merely for discussion purposes and was not a binding contract. Further, the joint-venture agreement was an oral agreement and the SHA does not capture the entire contract. Thus, the Arbitration Tribunal does not have the jurisdiction to adjudicate the matter with respect to the Respondent No. 3/ ITEL.

67. The Respondent No. 2/ ITE had also filed a reply stating that there was an injunction against the Arbitral Tribunal proceedings, *qua* Respondent No.2, vide order dated 12th July, 2005 in ***CS(OS) 926/2005.***

The Arbitral Tribunal's jurisdiction to grant relief:

68. The Arbitral Tribunal, after considering the material on record, gave findings *qua* the Tribunal's jurisdiction to grant relief in this case. The observations of the Arbitral Tribunal with respect to its jurisdiction are captured below:

(i) The fundamental challenge made by the Respondents is that the present case is within the exclusive jurisdiction of the Courts and Tribunals, as contemplated under the Companies Act, 1956.

(ii) The Arbitral Tribunal observed that, in the present case, the Claimants were seeking enforcement of contractual rights, arising out of the SHA. Any lack of probity in the conduct of the Board of directors can give rise to a contractual course of action. A Civil Court can delve into such breach of contractual obligations and thus, even the Arbitral Tribunal can preside over such matters.

(iii) The Arbitral Tribunal can grant only such relief as is made available in the arbitration agreement, including disputes in connection with the validity, interpretation, implementation or breach of the agreement.

(iv) It is observed by the Arbitral Tribunal that the broad powers granted to the Company Law Board, under Sections 397/398 of the Companies Act, 1956, where allegations of oppression and mismanagement are raised would not be available to the Arbitral Tribunal. However, the difference that needs to be maintained is whether the nature of dispute falls within the ambit of Company Law or the issue is raised with respect to the contract. While recognising this difference, the Tribunal held that Sections 397 and 398 of the Companies Act, 1956, does not in any manner inhibit its jurisdiction to deal with the disputes and

differences that have arisen between the parties. The relevant portion of the Arbitral Award No. 3 is extracted hereunder:

> *"8.28 For the foregoing reasons the Tribunal holds that Sections 397 and 398 of the Companies Act do not in any manner inhibit its jurisdiction to deal with the disputes and differences that have arisen between the parties."*

Scope of the Arbitration Clause

69. The Arbitral Tribunal, while making observations with respect to its jurisdiction in the present matter, analysed the scope of the arbitration clause, as provided in the SHA.

70. The Tribunal held that language of the arbitration clause, *i.e.,* Clause 14 of the SHA, provides for adjudication of disputes which have arisen in connection with the validity, interpretation, implementation or breach of any provisions of the SHA, to be adjudicated by the Arbitral Tribunal.

71. Clause 4.7 and 5 of the SHA contemplate deadlock and shareholders' meetings respectively. In these covenants, it is provided that in respect of deadlocks in the working of the ITEL, if a consensus is not reached the same would be referred to arbitration.

72. Insofar as allegations of fraud and misrepresentation are concerned, irrespective of whether they constitute a tort, the Arbitral Tribunal would be entitled to examine the conduct of the parties. The Tribunal observed that this would include fraudulent or misrepresentative conduct of the parties, to the extent that it affects their contractual relationship. The Arbitral Tribunal further held that in terms of Clause 5 of the SHA, it is empowered to amend the Articles of Association as also to resolve a deadlock between the shareholders of the ITEL.

73. On a further analysis of the SHA, to determine its jurisdiction, the Arbitral Tribunal observed that to resolve a deadlock which has arisen, the SHA contemplates transfer of shares from one party to another, by the Tribunal. Further, the Tribunal also has the power to disgorge the benefit acquired by any party by transferring shares of the ITEL or even to restitute the injured party by giving damages. Any shares of the company, issued in violation of the agreement, can also be restituted.

74. Thus, the Arbitral Tribunal, while deciding on its jurisdiction, held that it has the jurisdiction to adjudicate the issues raised herein with respect to the SHA.

Reliefs granted by the Arbitral Tribunal:

75. The Arbitral Tribunal observed that since there is a breakdown between the parties, the consequences of breakdown *(hereinafter, 'termination')* is also permissible. If the SHA has become unworkable, effective relief ought to be granted.

76. Applying the principles of fairness and equity, the Arbitral Tribunal, *inter alia* held that the Respondent No. 1 deserves to be directed to transfer its shares in ITEL to the Petitioners. The Arbitral Tribunal reasoned this by considering the investment made by the Petitioners in ITEL as also siphoning of funds by Mr. Mukesh Sharma/Respondent No. 1. The Tribunal observed that allotment of shares to Respondent No. 2 was manipulated by the Respondent No. 1 in a manner by circulating the funds of Respondent no.3 itself and showing the same as funds infused by the Respondent no.2 for acquisition of shares.

77. The Arbitral Tribunal, in addition, granted an injunction against alienation of shares. The Respondent No. 1 was to also indemnify against loss to the Petitioners/Claimants on the shares that were allotted to M/s HS Oberoi and Co. Pvt. Ltd.

78. The final relief granted by the Arbitral Tribunal in Award No. 3 is as under:

> *"12. SUMMARY OF FINDINGS - AWARD*
> *12.1 For all of the foregoing reasons, and rejecting all submissions to the contrary, the Tribunal HEREBY FINDS DECLARES AND AWARDS as follows:*
> *(a) In accordance with paragraphs 9.5-9.13 of this Award, the First Respondent shall transfer or cause to be transferred to the Claimants all shares held by him in the Third Respondent.*
> *(b) Also in accordance with paragraphs 9.5-.13 of this Award, the First Respondent shall ensure the transfer to the Claimants of all shares held by the First Respondent's nominee's in the Third Respondent.*
> *(c) In accordance with paragraph 9.36 (a) of this Award the transfer of the shares directed in 12.1 (a) and (b) above shall take place by way of the delivery of the original share certificates for 4 million shares in the Third Respondent, together with duly signed transfer deeds executed on behalf of the First and Second Respondents in favour of the Second and Third Claimants (2 million shares each). The First Respondent shall deposit these shares and transfer deeds with his Indian solicitor, Mr Satinder Kapur, within four weeks of publication of this Award., Written notice of such deposit must be given by the First Respondent to the Claimants' Indian solicitors.*

Amarchand & Mangaldas & Suresh Shroff & Co.

(d) In accordance with paragraphs 9.15-9.24 of this Award, the First Respondent shall in respect of 1.5 million of the shares be entitled to receive the sum of Rs 144,283,500 from the Claimants.

(e) Also in accordance with paragraphs 9.15-9.24 of this Award, the First Respondent or his nominee's shall in respect of the balance of the shares be entitled to recover from the Claimants a sum equal to the par value of the shares, being their paid-up value as recorded in the books of the Third Respondent, less Rs 16.29 million.

(f) In accordance with paragraph 9.36 (b) of this Award the Claimants shall, within two weeks of receipt of notice from the First Respondent as to the transfer of shares as directed at paragraph 12.1 (c) above, deposit in a no lien escrow account with their solicitors Amarchand & Mangaldas & Suresh Shroff & Co, or any other solicitors nominated by the Claimants, the entire sum payable towards these shares as directed by the Tribunal at paragraphs 12.1 (d) and (e) above. The party with whom the deposit was made shall within 7 days of receipt of the funds advise Mr Sharma's solicitor, Satinder Kapur, and the First Respondent in writing that the funds have been received.

(g) Upon receipt of notice in accordance with paragraph 12.1 (f) above that the funds have been received. Mr Kapur is to forthwith deliver unconditionally all the share certificates to Amarchand & Mangaldas & Suresh Shroff & Co, or any other solicitors nominated by the Claimants Mr Kapur shall be reimbursed for his reasonable out-of-pocket expenses.

h) The amounts deposited in escrow in accordance with paragraphs 12.1 (d) and (c) above, together with any interest earned thereon, shall be paid to either the First or Second Respondent upon delivery of the share certificates and transfer deeds, in such manner as may be agreed to between Amarchand & Mangaldas & Suresh Shroff & Co and Mr Kapur.

(i) Until such time as the transfer of the shares referred to in 12.1 (a) and (b) above has occurred, the First Respondent is prohibited and injuncted from dealing with, alienating, encumbering or otherwise disposing of any interest in said shares that are registered in his name, or in which he has any interest, in accordance with paragraph 9.36 (d) of this Award.

(j) Also in accordance with paragraph 9.36 (d) of this Award, the First Respondent shall ensure that the Second Respondent similarly desists from dealing with, alienating, encumbering or otherwise disposing of any interest in shares in the Third Respondent registered in its name.

(k) In accordance with paragraphs 9.28-9.29 of this Award Mr Nicholas Berry shall continue as a Director of the Third Respondent.

(1) In accordance with paragraph 9.32 (e) of this Award the meeting of the board and shareholders of the Third Respondent of 2 April 2003 is declared to have been illegal.

(m) In accordance with paragraphs 9.32 (g)-(i) of this Award the meetings of the board and shareholders of the Third Respondent of 16 February 2005, 4 April 2005, and 23 May 2005 are declared to be void and of no effect.

(n) In accordance with paragraph 9.32 (j) of this Award it is declared that nothing arising out of

the meeting of the board and shareholders of the Third Respondent of 5 August 2005 is binding upon the Claimants.

(o) In accordance with paragraph 9.35 of this Award, the First Respondent shall be liable for any loss or injury suffered by the Third Respondent as a result of the First Respondent having obtained a loan with the Indian Overseas Bank and creating a mortgage on the properties of the Third Respondent.

(p) In accordance with paragraph 9.38 (a) of this Award. the First Respondent shall indemnify the Claimants against any loss the Claimants may incur on the shares that were allotted to Oberoi.

(q) In accordance with paragraph 9.38 (b) of this Award the First Respondent shall co-operate with the Claimants in effecting the passing of any resolution of the Third Respondent or in doing whatever is. necessary, be it before or after the First Respondent has transferred his and his nominees' shares in the Third Respondent, for the initiation of appropriate legal proceedings against Oberoi to seek either a cancellation of the allotment of shares, or a transfer of shares, or any other relief as the Claimants consider necessary, and for which purpose they are required to initiate proceedings in the name of the Third Respondent.

(r) In accordance with Article 4.7 of the SHA the decision of the Tribunal shall be recorded by way of a board resolution of the Third Respondent.

(s) In accordance with paragraph 9.42 (c) of this Award. the First and Third Respondents shall do all acts, execute all necessary documents, and cooperate fully in giving effect to the form

and substance of all relief granted by the Tribunal, whether by the passing, reversal or revocation of any resolution of the shareholders or the directors, by the filling of documents, by the procuring of others to act or otherwise howsoever.

(t) In accordance with paragraphs 11.31 and 11.37-11.39 of this Award the Claimants are entitled to recover from the First Respondent the sum of £1,242,395 in respect of their legal costs, expert witness expenses and other expenses incurred in connection with these arbitral proceedings.

(u) The First Respondent shall pay the sum of £1.242,395 to any one of the Claimants within 21 days of the date of this Award. Such payment will constitute a discharge of the First Respondent as against all Claimants.

(v) In accordance with paragraphs 11.40-11.52 and 11.54 -11.58 of this Award the Claimants are also entitled to recover from the First Respondent the sum of US$140,000 in respect of the initial advance on costs, together with interest at the rate of 8% per annum from 2 May 2007 until the date of payment, such interest to be compounded on a quarterly basis.

(w) In accordance with paragraphs 11.40-11.52 and 11.59-11.60 of this Award the Claimants are also entitled to recover from the First Respondent the sum of US$60,000 in respect of the second advance on costs.

(x) In accordance with paragraphs 9.26, 9.33, 9.34, 9.35, 9.39 and 9.40 of this Award, no other relief sought by the Claimants against the First and/or Third Respondents is granted."

IV. AWARD NO.4 - Arbitral award dated 1st August, 2011

79. The final award dated 1st August, 2011 reiterated the findings of the Tribunal in Award No. 3. However, in the final award, the stand of ITE/Respondent No. 2, which had also participated in the arbitration proceedings by that stage, was fully considered.

80. According to the Arbitral Tribunal, the Respondent No. 2 was all along controlled by Respondent No. 1 and his immediate family members. Nevertheless, Respondent No. 2 took the position that there was no valid arbitration agreement binding it. Further, it had also filed a suit being, ***CS (OS) 926/2005***, in this Court and had initially obtained an interim injunction. The same, however, was vacated vide order dated 20th December, 2005, as recorded in the facts of this judgment.

81. Further, the Tribunal observed that the Respondent No. 2 did not file a reply or answer to the claims raised by the Claimants/Petitioners. However, the Arbitral Tribunal held that it had jurisdiction to rule against Respondent No. 2, and reiterated the findings of facts and jurisdiction from Award No. 3.

82. The final relief granted by the Arbitral Tribunal included the rejection of Respondent No. 2's objection to jurisdiction. All shares held by Respondent No. 2 in ITEL were directed to be transferred to the Petitioners through the delivery of original share certificates and duly executed transfer deeds. Respondent No. 2 was held entitled to receive a sum of Rs. 96.189/- per share from the Petitioners. The modalities to give effect to the award were set out, and costs were also awarded. The following were the summary of findings in Award No. 4:

"SUMMARY OF FINDINGS - AWARD

9.1 For all of the foregoing reasons, and rejecting all submissions to the contrary, the Tribunal HEREBY FINDS DECLARES AND AWARDS as follows:

(a) In accordance with paragraphs 6.1 and 6.11 of this Award, the objections of the Second Respondent as to jurisdiction are dismissed.

(b) To the extent that such has not already occurred, the Second Respondent shall transfer or cause to be transferred to the Claimants all shares held by it in the Third Respondent.

(c) In accordance with paragraph 7.8 of this Award the transfer of the shares directed in 9.1 (b) above shall take place by way of the delivery of the original share certificates for all shares held by the Second Respondent in the Third Respondent, together with duly signed transfer deeds executed on behalf of the Second Respondent in favour of the Second and Third Claimants in equal share. The Second Respondent shall deposit these shares and transfer deeds with the Claimants' Indian solicitors, Amarchand & Mangaldas & Suresh Shroff & Co., within four weeks of publication of this Award.

(d) in accordance with paragraph 7.7 of this Award, the Second Respondent shall, in respect of those of the initial batch of 1.5 million shares that it holds, be entitled to receive the sum of Rs 96.189 per share from the Claimants.

(e) Also in accordance with paragraph 7.7 of this Award, the Second Respondent shall in respect of the balance of the shares in the Third Respondent (2.5 million shares) be entitled to recover from the Claimants a sum equal to the par value of the shares, being their paid-up value as recorded in the books of the Third Respondent, less Rs 16.29 million.

(f) In accordance with paragraph 7.8 of this Award the Claimants shall, within two weeks of receipt of confirmation of the transfer of shares as directed at paragraph 9.1(b) above, deposit with their solicitors Amarchand & Mangaldas & Suresh Shroff & Co, or any other solicitors nominated by the Claimants, the entire sum payable towards these shares as directed by the Tribunal at paragraphs 9.1 (d) and (e) above. The party with whom the deposit was made shall within 7 days of receipt of the funds. advise the Second Respondent in writing that the funds have been received.

(g) Upon the giving of notice to the Second Respondent that the funds have been received in accordance with paragraph 9.1 (f) above, the Claimants' nominated solicitors will be entitled to forthwith deliver unconditionally all the share certificates and deeds of transfer to the Claimants.

(h) Until such time as the transfer of the shares referred to in 9.1 (b) above has occurred, the Second Respondent is prohibited and injuncted from dealing with, alienating, encumbering or otherwise disposing of any interest in said shares that are registered in its name, or in which it has any interest, in accordance with paragraphs 7.8 (iv) and 7.17 of this Award

(i) In accordance with paragraph 7.18 of this Award. the Second Respondent shall do all acts, execute all necessary documents, and cooperate fully in giving effect to the form and substance of all relief granted by the Tribunal, whether by the passing, reversal or revocation of any resolution of the shareholders or the directors, or by the filing of documents, or by the procuring of others to act or otherwise howsoever.

(j) In accordance with paragraphs 8.16 and 8.48 of this Award the Second Respondent shall pay the sum of £41,077.47, in respect of the Claimants' legal costs, expert witness expenses and other expenses incurred in connection with these arbitral proceedings as they related exclusively to the Second Respondent, to any one of the Claimants within 21 days of the date of this Award. Such payment will constitute a discharge of the Second Respondent as against all Claimants for this sum.

(k) In accordance with paragraphs 8.33 and 8.47 of this Award the Second Respondent shall pay the sum of £414,131.67, in respect of the Claimants' legal costs, expert witness expenses and other. expenses incurred in connection with these arbitral proceedings, to any one of the Claimants within 21 days of the date of this Award. Such payment will constitute a discharge of the Second Respondent as against all Claimants for this sum.

(1) In accordance with paragraphs 8.41, 8.42 and 8.46 of this Award the Second Respondent, jointly and severally with the First Respondent, shall pay the Claimants the sum of US$140,000 in respect of the initial advance on costs, together with interest on that sum at the rate of 8% per annum from 2 May 2007 until the date of payment, such interest to be compounded at 2 May 2007 and thereafter on a quarterly basis. Payment to any one of the Claimants will constitute a discharge of the Second Respondent as against all Claimants for this sum.

(m) In accordance with paragraphs 8.41, 8.43 and 8.46 of this Award the Second Respondent, jointly, and severally with the First Respondent, is to pay to the Claimants the sum of US$410,000, being the costs of the arbitration

as set by the ICC Court less the amount awarded at 9.1 (1) above. Payment to any one of the Claimants will constitute a discharge of the Second Respondent as against all Claimants for this sum.

(n) In accordance with Article 4.7 of the SHA the decision of the Tribunal shall be recorded by way of a board resolution of the Third Respondent.

9.2 No other relief sought by the Claimants against the First and/or Third Respondents is granted."

83. The Court, thereafter, has considered the submissions made on behalf of the parties.

Submissions:

84. On behalf of the Petitioners, Mr. Anil Kumar Airi, ld. Senior Counsel has appeared, along with ld. Counsels-Mr. Gaurav M. Liberhan, Mr. Neeraj Gupta, Mr. Rahul Dwivedi, Ms. Aakriti Gupta, Mr. Arun Singh Rawat and Mr. Vishal Shayak Kumar.

Submission of behalf of the Petitioners

85. The said Counsels have made the following submissions on behalf of the Petitioners:

85.1. The core of this dispute is the SHA. The SHA is a final agreement between the Petitioner, Respondent No.1, and the Respondent No.3. It was through this agreement that Respondent No.3 came into existence. The SHA sets out the structure, rights, and responsibilities of each party. It includes within it, the definition of shareholding, board representation, quorum, financial controls, and transfer restrictions.

This demonstrates the intention of the parties to be bound by its terms and treat it as an operative legal document.

85.2 Clause 14 of the SHA contains the arbitration clause, which is described as wide and comprehensive. It covers disputes concerning the validity, interpretation, implementation, or breach of the agreement. There is no ambiguity regarding its scope. Further, the arbitration clause contains the language *'in connection with'*, which clearly shows that the arbitration clause in itself is very broad.

85.3 The SHA, in Clause 4.7 provides the dispute resolution process in case of a deadlock between the parties. It clearly states that in the event the parties fail to reach a consensus on an issue, the said issue will be referred to arbitration.

85.4 The arbitration clause does not contain any covenants regarding its exclusion, nor does it provide for any exceptions. The arbitration clause fully empowers the Arbitral Tribunal to adjudicate on the issues that arise between the parties *qua* Respondent No. 3. There is no exception carved out in the said clause, with respect to the matters that are not arbitrable. Therefore, all disputes under the SHA are subject to arbitration.

85.5 The jurisdiction of the Arbitral Tribunal was to decide on the disputes referred by the parties to the SHA. The referred disputes are clearly captured in the TOR dated 27th February, 2006, which was signed by both the parties. Though the TOR was not signed by the Respondent No.2, it was approved by ICC Court on 13th July, 2006.

85.6 In the Award No. 1, the Arbitral Tribunal held that it had substantive jurisdiction to decide upon all the disputes referred to it. After the

Award No. 1 on jurisdiction was rendered, the Respondents filed an application on 2nd February, 2008 before the Arbitral Tribunal fully accepting the jurisdiction award. In the said application, the Respondents sought relief, stating that they were ready to purchase the Petitioners' shares in Respondent No.3. This application was filed on 2nd February, 2008, and was rejected on 7th March, 2008. Once the Respondents themselves filed an application seeking relief from the Tribunal for the purchase of shares, it cannot now be argued by the Respondents that the Tribunal did not have the power to direct the sale or purchase of shares.

85.7 There is no dispute on contribution made by the parties in ITEL. The contribution of the Petitioners in ITEL is Rs. 24,79,71,000/- i.e., more than Rs. 24 crores. While the Respondent No.1 did not contribute anything. Even the amount of Rs. 3,50,00,000/- which the Respondent No. 1 claims to be his contribution to ITEL, was Petitioners' contribution to ITEL, being used in a circuitous manner.

85.8 The Award No. 1 holds categorically that substantive jurisdiction exists for the Arbitral Tribunal to adjudicate the disputes. After the rendering of this arbitral award, no challenge was raised by the Respondents. The Respondents, in fact, filed an amended answer to the request for arbitration and admitted that the parties were in a commercial relationship.

85.9 The Award Nos.1, 2 and 4 have not been challenged by the Respondents in any Court including the UK Courts. The Respondents were aware of what was the governing law, the procedural law, and the curial law of

the contract as they had challenged the second award in the UK Courts. However, still no challenge to the said awards was made.

85.10 The identity of Respondent No.2 and Respondent No.3 is completely blurred as held in paragraph 12 of the Award No. 1.

85.11 The Respondent No.1 had signed on behalf of the Respondent No.3 on all the pleadings in the arbitral proceedings. The Arbitral Tribunal framed issues as set out in paragraph 27 of the Award No.1. The Delhi High Court has held that the Respondent No.2 is nothing but the alter ego of Respondent No.1.

85.12 The SHA, in its recitals itself, contains the term 'Assigns'. The term Assigns includes nominees of the initial parties to the SHA and is a broad expression. Award No.3 deals with Respondent No.1 and Respondent No.3's contentions and final award deals with Respondent No.2's contentions.

85.13 The Arbitral Tribunal comes to the clear conclusion that the breach was committed by the Respondents and this is a factual finding that cannot be assailed in these writ petitions.

85.14 It is the settled position that the parties can invoke jurisdiction of a civil court for any dispute so long the same is not barred. Thus, invoking arbitration, which is the substitute of a civil court, is fully permissible.

85.15 Once the Arbitral Tribunal has held that the Respondent No.1 is in breach, the consequential relief is the only question. Paragraph 9.7 of the Award No. 3 captures that there is a serious breach of the SHA by the Respondent No. 1. Once this is the position, the consequential relief ought to follow. The question, whether there is a breach of the SHA or not, cannot be revisited by the Court at this stage.

85.16 The argument that fairness and equity has been applied by the Arbitral Tribunal is a misdescription of the findings of the Arbitral Tribunal. From paragraph 9.7 of Award No.3 till paragraph 9.13, there are various factual findings and in paragraph 9.9, the Arbitral Tribunal holds that there is no equity in favour of Mr. Sharma. It is only in this context that the fairness and equity is mentioned.

85.17 The Arbitral Tribunal has held that the Respondents were guilty of siphoning of funds and that there was a great degree of dishonesty by the Respondent No.1 and its partners. Induction of various persons into the company violated the duty of disclosure.

85.18 The entire project was based on the funds of the Petitioners and the Respondent was merely using the Petitioners' funds.

85.19 The Arbitral Tribunal is entitled to conduct valuation of the shares. Paragraph 9.6 of the Award No. 3 clearly sets out the reasons for which transfer of shares is to be allowed.

85.20 In case of a foreign award, considering Section 48 of the A&C Act, 1996, the Court is not obligated to refuse enforcement, even if one of the grounds is made out.

85.21 The SHA is fully binding on the parties. On sale and purchase of the shares, the Respondents themselves made an offer for purchase. Therefore, the Arbitral Tribunal was vested with the power by the Respondents and the Respondents are stopped from challenging the said power.

85.22 The breakdown of commercial relationship had to be resolved in some manner by the Arbitral Tribunal.

85.23 The jurisdiction being vested with the National Company Law Tribunal ('NCLT')/Company Law Board *('CLB')* is disputed and the said Tribunal is the only one which can adjudicate upon this dispute is rejected. The Arbitral Tribunal was operating within the framework of SHA. Since the civil Courts are well within the jurisdiction to grant relief under SHA, the Arbitral Tribunal also has same powers.

85.24 The Petitioners have sought enforcement of all the awards and not only the final award.

85.25 ***O.M.P. (EFA) (COMM.) 3/2018*** is not barred by limitation. When Section 34 of the A&C Act, 1996 petitions were filed in 2011, there was an automatic stay of all the awards and the Petitioners could not have filed the enforcement petitions. In any event, there is sufficient cause for condonation of delay.

85.26 The Respondent No.1 is a person, who was controlling all the three entities *i.e.,* Respondent No.2, Respondent No.3 and HUFs. The transfer of shareholding of ITEL were contrary to law and were violative to the status *quo* order dated 12th May, 2010 as the said transfer of shares of ITEL was done in the financial years 2006-07, 2007-08 and 2011-12.

85.27 The present petitions are for enforcement of the awards and no substantive challenge on merits is entertainable except on the grounds mentioned in Section 48 of the A&C Act, 1996.

86. The judgments relied upon by Mr. Anil Airi, ld. Senior Counsel are:

- ***RenuSagar Power Co. Ltd. v. General Electric Company [(1994) SUPP (1) SCC 644]***
- ***Sohan Lal Gupta v. Asha Devi Gupta [(2003) 7 SCC 492]***

- ***ITE India Private Limited v. Shri Mukesh Sharma & Ors. [(2005) SCC OnLine Del 1398]***
- ***GEO Group Communications v. IOL Broadband, [(2010) 1 SCC 562]***
- ***Vodafone International Holdings BV v. Union of India and Another [(2012) 6 SCC 613]***
- ***Shri Lal Mahal Ltd. v. Progetto Grano SPA [(2014) 2 SCC 433]***
- ***LMJ International Ltd. v. Sleepwell Industries Company Ltd. [(2019) 5 SCC 302]***
- ***Vijay Karia v. Prysmian Cavi E Sistemi SRL and Ors., [(2020) 11 SCC 1]***
- ***Gemini Bay Transcription Private Limited v. Integrated Sales Service Limited & Another [(2022) 1 SCC 753]***

Submissions on behalf of the Respondents on facts:

87. On behalf of the Respondent No.1, Mr, Akhil Sibal, ld. Senior Counsel, Mr. Abhinav Hansaria, ld. Counsel, Mr. Sarthak Sharma, ld. Counsel and Mr. Sugandh Shahi, ld. Counsel have appeared.

88. The Respondent No. 2 is represented by Mr. Sandeep Sethi, ld. Senior Counsel and Ms. Neeru Sharma, ld. Counsel. Mr. Deepak Kumar Vijay, ld. Counsel appeared on behalf of the Respondent No. 3.

89. The submissions on behalf of the Respondents are as under:

90. According to the Respondents, Respondent No.3/ITEL was incorporated on 13th July, 1997. Initially, there were seven shareholders including one of the witnesses who deposed in arbitration proceedings *i.e.,* Dr. Vishwanath (father of the Respondent No. 1). The land located at A-11, Sector-62, Noida was allotted by the Noida authority, vide an allotment letter

dated 20th October, 1997. For the same, ITEL paid the required amount of Rs. 1,50,00,000/- for securing land, through funds infused by Mukesh Sharma in Respondent No.3. The lease deed for the said land was executed by the Noida Authority in favour of the Respondent No.3 on 31st March, 1999. Prior to this, on 1st July, 1998 the Petitioner No.1 had approached the Respondent No.1 for investing in the Respondent No.3, which is the alleged SHA dated 1st July, 1998. The Petitioner No.1 invested a sum of Rs. 1,50,00,000/- and 15,00,000 shares were allotted to the Petitioner No.1 at par. The Petitioner No.1 had also agreed to promote the project internationally and obtain funding. The Petitioner No.1 and Respondent No.1, therefore, had almost equal share in the Respondent No.3/ITEL.

91. The Petitioner No.1 then wanted to transfer his shareholding to Petitioner No.2 *i.e.,* Rodemadan, which, therefore, resulted in SHA itself being discharged as the purpose of the agreement became non-existent.

92. The purpose of the SHA was formation of a joint venture to carry out the construction and running of an exhibition Centre in Noida, Uttar Pradesh, India. Subsequently, building plans were submitted as per the agreement between the Petitioner and the Respondent No.1. Construction of the exhibition center building was being negotiated between 2001-02 and M/s. HS Oberoi and companies were finalized as contractors to whom a price turnkey contract of worth of Rs.24,00,00,000/- was to be awarded. The said decision was taken with the consent of the Petitioner No.1. The contract was also drafted by a consultant, who was engaged by the Petitioner No.1. The contract was then signed for construction of the exhibition center and the mobilization advance of Rs. 4,48,00,000/- was extended. The amounts were borrowed from the Petitioner No.1 and the Respondent No.2 also extended

loan of Rs. 2,50,00,000/- to the Respondent No.3. Petitioner No.3 also extended a loan of one million pounds with Respondent No.3, which was signed by the consultant engaged by the Petitioner No.1 on behalf of the Respondent No.3.

93. Certain loans were to be arranged for the Respondent No.3 from the financial institutions, but at that stage, disputes had arisen as the Petitioner No.1 refused to sign the loan documents and the guarantee. Thereafter, meetings were held on 9th October, 2003 and 29th October, 2003 wherein it was initially agreed that 25% of the shareholdings of ITEL shall be transferred to Dr. Vishwanath for infusion of a fund of 2 million dollars. In the meeting on 29th October, 2003, it was alleged that issuance of share capital to Respondent No.2 at par against the loan was proposed by the Petitioner No. 1 himself. Even at that stage, the SHA was not referred to.

94. The disputes got precipitated when the Petitioner No.1, on 29th January, 2004 incorporated a company by the name of Indian Exhibition Management Private Limited, which had similar objects as that of the Respondent No.3. At that stage, the Petitioner No.1 sought No Objection Certificate *('NOC')* from the Respondent No.1 to undertake business in India competing with that of the Respondent No.3. It was then, that the disputes arose on a large scale between the Petitioner No.1 and the Respondent No.1.

95. In 2004, the Petitioner No.1 also set up another company called India International Expo XXI Private Limited in direct competition with Respondent No.3 in Greater Noida, U.P., India. The stand of the Petitioner No.1 was that Expo Media and Rodemadan were separate entities and that they could compete with Respondent No.3. However, the Respondent No. 1 contended that the said business is directly competing with the business of

Respondent No.3 and the Petitioners ought to discontinue such competing business. The Respondent No. 3 thereafter, filed a suit being, ***Suit No. 257/2005*** in the District Court of Gautam Budh Nagar, U.P, India seeking an injunction *qua* the businesses of the Petitioner No.1 that are competing with the Respondent No. 3. However, the Civil Judge in ***Suit No. 257/2005*** considered the arbitration clause in the SHA and referred the parties to arbitration.

96. Apart from the legal proceedings, which are already summarized in the facts above, it is also alleged by the Respondent that the Petitioner No.1 applied to the Foreign Investment Promotion Board *('FIPB')* on 1st September, 2005 for incorporating a company in India for organizing exhibitions, trade fairs etc. In the application, the Petitioner No.1 alleged that the Respondent No.3 is a defunct company. The FIPB refused the permission as several letters were written by the Respondent No.1 and the Respondent No.3 to the Ministry of Finance to the effect that the Petitioner No.1 was illegally competing with Respondent No.3.

97. The DIPP on 5th May, 2006, in view of the representations made by ITEL, issued a Show Cause Notice to Expomedia Exhibition and Conferences Ltd. and Expomedia Group PLC, for violation of the Foreign Direct Investment *('FDI')* policy as also FEMA, 1999 and called upon the said companies to discontinue their activities in India. However, vide letter dated 11th June, 2007 the DIPP withdrew its notice dated 5th May, 2006.

98. The Respondent No.3 then, in February, 2008, filed a writ petition being ***W.P.(C) 757/2008*** challenging the permission granted by the DIPP to the Expomedia group, allowing it to do competing business in India.

99. Thereafter, various Awards were rendered by the Arbitral Tribunal and legal proceedings ensued between the parties, before this Court, Allahabad High Court, Supreme Court, etc. Finally, the judgments of the Supreme Court dated 4th July, 2017 and 19th March, 2018 were rendered, which then led to filing of the enforcement petitions.

Submissions on behalf of the Respondents qua enforcement of the awards:

100. Broadly, the submissions of the Respondents who are objecting enforcement of the awards, are as under:

100.1 The Arbitral Tribunal directed relief in excess of its jurisdiction. The Tribunal directed Respondent No. 1 and 2 to transfer its shares in ITEL to the Petitioners. The power that the Arbitral Tribunal exercises, finds its source in Clause 4.7 of the SHA, *i.e.,* the clause relating to deadlock between the parties. Vide this clause, the initial power to decide on matters relating to deadlock between the parties lies with the shareholders and board directors. This power could not have been usurped by the Arbitral Tribunal since there was no deadlock situation that was submitted to the Arbitral Tribunal for arbitration.

100.2 The transfer of shares in Respondent No.3 cannot be granted by the Arbitral Tribunal. The nature of allegations against the Respondent No.3 was one of oppression and mis-management, in respect of which, the relief could only be granted under Sections 397 and 398 of the Companies Act. For this issue, therefore, the appropriate forum would be CLB/NCLT and not the Arbitral Tribunal.

100.3 The Arbitral Tribunal rightly holds that it can only grant reliefs when there is a breach of contract and not under any statute, but by holding

that there is breach of contract, the relief given is one which can be granted only under the statue.

100.4 The Arbitral Tribunal recognizes that it can only grant damages or specific relief but cannot order restructuring of the company - However, it exactly does the same by directing transfer of shares.

100.5 The Respondent No.3 was a pre-existing company even when the Petitioner No.1 invested in it and, therefore, the shareholding belong to one party in Respondent No.3 could not have been directed to be transferred to Petitioner No.1.

100.6 The Arbitral Tribunal's approach of dealing with non-arbitrable issues is contrary to public policy. The Arbitral Tribunal could not direct the termination of the SHA. Even if there was a breach, only damages could have been directed.

100.7 The approach that there is deadlock and loss of faith and, therefore, the Arbitral Tribunal has to mould relief by exercising equitable power is contrary to law as the Arbitral Tribunal does not enjoy the power to pass orders in equity.

100.8 The present is not a case of specific performance where the parties agree that if there was a deadlock, the shares would be transferred. The principle of fair and just cannot be applied by the Arbitral Tribunal as the only source of power for the Arbitral Tribunal, in the present case, is the SHA.

100.9 Clauses 4.7 and 5 of the SHA, do not confer the powers to the Arbitral Tribunal for directing shares transfer. In fact, even if there was a deadlock, the shareholder can only voluntarily agree for share transfer and this cannot be an order passed by the Arbitral Tribunal.

100.10 A finding of lack of probity, which can be dealt with mutual assistance and cooperation, cannot become the basis for grant of reliefs.

100.11 The Arbitral Tribunal could not have directed transfer of shares, which led to the termination of SHA, by invoking Clause 4.7 of the SHA, which relates to resolving deadlock between the parties.

100.12 The Respondent No.3 company, is valued at Rs. 77 crores but has been transferred to Petitioner No.1 on the basis of investment of Rs.24.75 crores. The Petitioner was only an investor in the company. The market value is being given only in respect of 15 lakhs shares. Remaining 25 lakhs shares have been valued at par value. The sum of Rs.15 crores has not been paid. In fact, benefit of Rs.37 crores had been extended to the Petitioners. This constitutes expropriation of shares and transfer in favour of the Petitioners.

100.13 The Arbitral Tribunal recognizes that CLB (now NCLT) has wider powers and it can only exercise jurisdiction which is contractual in nature but still proceeds to grant transfer of shares.

100.14 The arbitral Awards violate Sections 48(1)(c), 48(2)(a) and 48(2)(b) of the A&C Act, 1996.

100.15 In the claim petition, there were no claims raised *qua* clauses in respect of deadlock, i.e., Clauses 4.7 and 5 of the SHA.

100.16 The character of the company could not have been changed by the Arbitral Tribunal. Resolving of the deadlock was beyond the power of the Arbitral Tribunal. The Respondent No.1 also made an investment of Rs.4 crores in the Respondent No.3 company and the Respondent No.3 was also the allottee of the land, hence, there was a

substantial contribution by the Respondents. These facts have been ignored by the Arbitral Tribunal.

Submissions on behalf of Respondent No.2

101. Mr. Sandeep Sethi, ld. Senior Counsel for the Respondent No.2/ITE submitted as follows:

101.1 Initially, at the time of reference to arbitration, the Respondent No.2 held a total of 35 lakhs shares in the Respondent No.3 company. It is not disputed that the Respondent No.2 was, in fact, controlled by the Respondent No.1. However, thereafter, the Respondent No. 3 company underwent a substantial change in its shareholding.

101.2 The current position of the Respondent No. 3 company now, is that there are various changes that have been made to its shareholding and various third parties have also been inducted. Respondent No. 1 and 2 holds 35 lakh shares each in the Respondent No. 3 company while M/s Stanford Infraproject Pvt. Ltd (run by M/s H.S. Oberoi) holds 37.50 lakh shares. The Petitioners own, 45 lakh shares. In view of increase in shareholdings, as of now, the Petitioner No.1 only owns 24.75 % in the Respondent No.3.

101.3 In terms of the initial agreement between Mr. Roger Shashoua, Mr. Mukesh Sharma and the joint venture company, Respondent No. 2 was not a party to the arbitration agreement. However, request for arbitration was made on 20th May, 2005 and Respondent No. 2 was sought to be impleaded in the said arbitral proceedings.

101.4 Since, the Respondent No. 2 was not a party to the arbitration agreement a suit for declaration being ***Suit no. 926/2005*** was filed and the interim

order was granted on 12th July, 2005 directing the Arbitral Tribunal not to commence the arbitral proceeding against Respondent No. 2. This order was subsequently appealed on 20th October, 2005 and it was held that the Arbitral Tribunal will decide earlier questions. Thereafter, various proceedings *qua* this order took place, the conclusion of which, was ordered by the Supreme Court, wherein vide order dated 18th March, 2018, the Supreme Court clarified that the Respondent No. 2 could raise all its objections under Section 48 of the A&C Act, 1996. In effect, therefore, Respondent No.2 is currently raising its objections to the arbitral awards and is seeking appropriate relief from the Court.

101.5 Respondent No. 2 has challenged Award No. 3, specifically with respect to the findings of the Arbitral Tribunal contained in paragraphs 12.1(a), 12.1(b), 12.1(d), 12.1(e), 12.1(i), and 12.1(j) of the said award.

101.6 The Respondent No.2 is a separate entity and issuance of further shareholdings in favour of the Respondent No.2 is not subject matter of the agreement.

101.7 The work 'assign' in the recitals of the SHA cannot be stated to include the Respondent No.2.

101.8 The Arbitral Tribunal's approach that every shareholder of Respondent No.3 would become a party to the SHA is incorrect. The Arbitral Tribunal holds that the Petitioner No.2 and Petitioner No.3, who are the assigns of Petitioner No.1 and the Respondent No.2 which is a assign of Respondent No.1 are bound by the SHA. This is an incorrect interpretation.

101.9 There is no agreement in writing, which is a pre-condition under Section 7 of the A&C Act, 1996.

101.10. ***OMP 3/2018*** is barred by limitation as it was filed only on 16th March, 2018 and the arbitral award is dated 1st August, 2011. The Arbitral Tribunal does not have powers under the equity. The award of costs is also challenged.

102. Mr. Akhil Sibal, ld. Senior Counsel made the following further submissions:

102.1 Under Section 48 of the A&C Act, 1996 when the objections are in respect of jurisdiction, the power vested in the Courts is unlimited as it would go to the root of the matter.

102.2 If the arbitral award deals with subject matter which is beyond the scope of submission to arbitration, then the scrutiny is robust and need not be limited.

102.3 The Arbitral Tribunal could not have usurped the power of the parties and its shareholders under Clause 4.7 of the SHA, as there was no situation of deadlock between the parties.

102.4 The Arbitral Tribunal cannot exercise powers of CLB. The Arbitral Tribunal's reasoning cannot be sub-planted by the Court.

102.5 The application moved by the Respondent No.1 in the context of the original terms of reference, does not vest any mandate with the Arbitral Tribunal. The said application was moved by the Respondent for enabling purchase of shares, the Petitioner No. 1 held in ITEL and the same was rejected by the Arbitral Tribunal vide its order dated 7th March, 2008. The Arbitral Tribunal was conscious that it was only a fair proposal for resolving the disputes and was not to be treated as admission. Under such circumstances, this application cannot form the

basis of an argument that sale and purchase of shares was accepted by the Respondents.

102.6 Article 12 of the SHA is also misinterpreted as the same is a right of first refusal, which can be exercised only by parties and not by the Arbitral Tribunal.

102.7 The Respondent No.2 is severely prejudiced by the arbitral proceedings as it had not given consent for constitution of the Arbitral Tribunal. The Arbitral Tribunal had already pre-determined the Award no.3 and the Award no.4 was merely a farcical award *qua* the Respondent No.2.

103. Ld. Counsels for the Respondents have relied on the following list of judgments:

- ***Khardah Company Ltd. v. Raymon and Co. (India) Pvt. Ltd. (AIR 1962 SC 1810)***
- ***H.L. Trehan & Ors. v. Union of India & Ors. [(1989) 1 SCC 764]***
- ***State of West Bengal v. Shivananda Pathak & Ors. [(1998) 5 SCC 513]***
- ***Olympus Superstructure v. Meena Vijay Khaitan Termination*** **[(1999) 5 SCC 651]**
- ***Dayagen Pvt. Ltd. v. Rajendra Dorian Punj and Ors. [151 (2008) DLT 375]***
- ***Venture India Properties P. Ltd. and Ors. v. Manmohan Singh Kohli and Ors. [2011 (123) DRJ 520]***
- ***Prakash Atlanta (JV) v. National Highways Authority of India [(2016) 156 DRJ 479]***

- ***SSangyong Engineering & Construction Co. Ltd. v. National Highway Authority of India [(2019) SCC OnLine SC 677]***
- ***Vinod Bhaiyalal Jain & Ors. v. Wadhwani Parmeshwari Cold Storage Pvt. Ltd. through its Director & Anr. [(2020) 15 SCC 726]***
- ***Government of India v. Vedanta Limited and Ors. [(2020) 10 SCC 1]***
- ***PSA Sical Terminals Pvt. Ltd. v. The Board of Trustees of V.O. Chidambranar Port Trust, Tuticorin [AIR (2021) SC 4661]***

<u>On jurisdiction of Arbitral Tribunal- Respondents.</u>

- ***Needle Industries (India) Ltd. and Ors. v. Needle Industries Newey (India) Holding Ltd. and Ors. [(1981) 3 SCC 333]***
- ***Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688]***
- ***V.S. Krishnan and Ors. v. Westfort Hi-Tech Hospital Ltd. and Ors. [(2008) 3 SCC 363]***
- ***Reivera Builders Pvt. Ltd. v. Vijay Kumar Sekhri & Ors. [(2012) 173 Comp Cas 149]***
- ***Rakesh Malhotra v. Rajinder Kumar Malhotra [(2015) 192 Comp Cas 516]***
- ***Apex FRP Chemicals Pvt. Ltd. and Ors. v. Om Prakash Gupta and Ors. [(2016) SCC OnLine Del 2312]***
- ***Government Of N.C.T. of Delhi v. Yasikan Enterprises Pvt. Ltd. [(2018) SCC OnLine Del 11918]***
- ***Vidya Drolia and Others v. Durga Trading Corporation [(2021) 2 SCC 1]***

ANALYSIS AND FINDINGS

Consideration of the Application for Condonation of Delay in Filing O.M.P.(EFA)(COMM.) No. 3/2018:

I.A.8544/2018 (for condonation of delay)

104. This application has been filed on behalf of the Petitioners seeking condonation of delay in filing the petition, ***O.M.P.(EFA)(COMM.) No. 3/2018***, which was filed under Sections 47 and 49 of the A&C Act, 1996, for enforcement of the arbitral award dated 1st August, 2011.

105. It is the stand of the Petitioners that in the present factual circumstances, wherein the case relates to enforcement of an international arbitral award, Article 136 of the Limitation Act, 1963 shall apply. Thus, the period of limitation for filing the present enforcement petition is 12 years from the date the arbitral award was passed, *i.e.,* 1st August, 2011.

106. It is further contended by the Petitioners that after passing of the said arbitral award, the Respondents filed various petitions challenging the Award No. 4 so as to delay the matter, and filing of petitions under Section 34 of the A&C Act, 1996 led to stay of the execution.

107. According to the Petitioners, until the decision was made in the petitions filed by the Respondents challenging the Award No. 4, the Petitioners were constrained to not file for enforcement of the award. This time period ought not to be calculated towards the period of limitation for filing the enforcement petition.

108. The Court has considered the application. As per Section 46 of the A&C Act, 1996, whenever a foreign arbitral award is passed, the same would be binding on the persons between whom it was made. It is further provided

under Section 49 of the A&C Act, 1996, that once a Court declares a foreign award to be enforceable, the award is deemed to be a decree of the Court. Sections 46 and 49 of the A&C Act, 1996, are extracted below:

> ***"46. When foreign award binding.***—*Any foreign award which would be enforceable under this Chapter shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in India and any references in this Chapter to enforcing a foreign award shall be construed as including references to relying on an award.*
>
> ***xxx xxx xxx***
>
> ***49. Enforcement of foreign awards.***—*Where the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court"*

109. Thus, once a Court is satisfied that a foreign arbitral award is enforceable, it shall be deemed to be a decree of that Court and becomes executable as such under Indian law.

110. Usually, when decrees of foreign Courts which are reciprocating territories are to be enforced, the same is to be filed in India in terms of the provisions of Section 44A of the Code of Civil Procedure, 1908 *('CPC')*. However, Explanation 2 of Section 44A CPC clarifies that a decree would not include an arbitration award, even if the same is enforceable as a decree or a judgment. Explanation 2 of Section 44A of the CPC reads as under:

> *"Explanation 2.-- "Decree" with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty,* ***but shall***

in no case include an arbitration award, even if such an award is enforceable as a decree or judgment."

111. Thus, automatic execution of foreign awards is impermissible. A specific petition has to therefore be filed for enforcement of the foreign award, in terms of a conjoint reading of Sections 47 and 49 of the A&C Act, 1996. This is further clarified by a ld. Single Judge of this Court, in the decision ***Furest Day Lawson Ltd. v Jindal Exports Ltd. (MANU/DE/0141/1999).*** In this judgment, it is *inter alia* observed that after a foreign award is made, the same could be enforced in India only when the Court is satisfied that the foreign award is enforceable. The relevant portion of the judgment reads as under:

> *"8. A particular and specified mode and manner is provided for and prescribed for enforcement of a foreign award in India both under the Foreign Awards (Recognition and Enforcement) Act, 1961 as also the Arbitration and Conciliation Act, 1996. With the coming into force of the Arbitration and Conciliation Act, 1996 the provisions of the FARE Act, 1961 stood repealed subject to the saving clause. The new provisions which have been enacted for enforcing an award in India would indicate that before the said foreign award could be enforced there is a necessity for a party to obtain a foreign award which is defined under the provisions of section 44 of the Arbitration and Conciliation Act, 1996.* ***After a foreign award is made the same could be enforced in India when the court is satisfied that the foreign award is enforceable. The said satisfaction is arrived at when the party in whose favor the award is made apply for its enforcement. Thus a party has to apply for under Section 46 & 47 of the Arbitration Act seeking for enforcement of the foreign award. A foreign award becomes binding between the persons as against whom the same is made for all practical***

> ***purposes when the same is enforceable under the provisions of sections 46 to 49 of the Arbitration and Conciliation Act. Section 47 provides that a person seeking for enforcement of a foreign award has to apply for the said relief before the court enclosing therewith the documents as mentioned specifically in section 47 of the Act****. A right is given to the party as against whom the foreign award is sought to be enforced, to raise objections as against the aforesaid enforcement of a foreign award on any of the grounds as mentioned in the provisions of section 48. Section 49 on the other hand provides that it is only when the court is satisfied that the foreign award is enforceable under Chapter I of Part II the award could be deemed to be a decree of the particular court."*

112. As per the Petitioners, the enforcement of a foreign award can be undertaken like execution of a decree, within 12 years, in terms of Article 136 of the Limitation Act, 1963. However, as per the Respondents, the limitation period for seeking enforcement of a foreign award would be three years, in terms of Article 137 of the Limitation Act, 1963. The said two provisions are set out below:

	Description of suit	*Period of limitation*	*Time from which period begins to run*
136	*For the execution of any decree (other than a decree granting a mandatory injunction) or order of any civil court.*	*Twelve years*	*[When] the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place: Provided that an*

			application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation
137	*Any other application for which no period of limitation is provided elsewhere in this Division.*	*Three years.*	*When the right to apply accrues.*

113. A conjoint reading of Section 44A, Code of Civil Procedure, 1908 along with Sections 46 and 49 of the A&C Act, 1996 would show clearly that it is only upon a foreign award being held to be enforceable that the award becomes a decree of the Court. Thus, an enforcement petition would be required to be filed by any party seeking to enforce a foreign order.

114. The limitation period for filing of an enforcement petition with respect to a foreign arbitral award, would be governed by Article 137 of the Limitation Act, 1963. This issue has been decided by the Supreme Court in ***Government of India v. Vedanta Limited (Formerly Cairn India Limited) and Ors., [(2020) 10 SCC 1]*** where the Court considered divergent views from different High Courts. The Supreme Court, in this judgment, after considering the legal position, *inter alia* observed that Article 136 of the Limitation Act would not be applicable for the enforcement/execution of a foreign award, since it is not a decree of a Civil Court in India. The Supreme Court held that the period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49 of the A&C Act, 1996 would be

governed by Article 137 of the Limitation Act, 1963. Thus, the period of limitation for filing a petition for enforcement of a foreign award would be three years from when the right to apply accrues. The relevant portion of the judgment reads as under:

> *"65. The limitation period for filing the enforcement/execution petition for enforcement of a foreign award in India, would be governed by Indian law. The Indian Arbitration Act, 1996 does not specify any period of limitation for filing an application for enforcement/execution of a foreign award. Section 43 however provides that the Limitation Act, 1963 shall apply to arbitrations, as it applies to proceedings in court.*
>
> *xxx xxx xxx*
>
> *72. Foreign awards are not decrees of an Indian civil court. By a legal fiction, Section 49 provides that a foreign award, after it is granted recognition and enforcement under Section 48, would be deemed to be a decree of "that court" for the limited purpose of enforcement. The phrase "that court" refers to the court which has adjudicated upon the petition filed under Sections 47 and 49 for enforcement of the foreign award.* ***In our view, Article 136 of the Limitation Act would not be applicable for the enforcement/execution of a foreign award, since it is not a decree of a civil court in India.***
>
> *73.* ***The enforcement of a foreign award as a deemed decree of the High Court concerned [as per the amended Explanation to Section 47 by Act 3 of 2016 confers exclusive jurisdiction on the High Court for execution of foreign awards] would be covered by the residuary provision i.e. Article 137 of the Limitation Act.*** *A three-Judge Bench of this Court in Kerala SEB v. T.P. Kunhaliumma held that the phrase "any other application" in Article 137 cannot be interpreted on the principle of ejusdem generis to be applications under*

the Civil Procedure Code. The phrase "any other application" used in Article 137 would include petitions within the word "applications", filed under any special enactment. This would be evident from the definition of "application" under Section 2(b) of the Limitation Act, which includes a petition. Article 137 stands in isolation from all other Articles in Part I of the Third Division of the Limitation Act, 1963.

xxx xxx xxx

76. ***In view of the aforesaid discussion, we hold that the period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49, would be governed by Article 137 of the Limitation Act, 1963 which prescribes a period of three years from when the right to apply accrues****.*

77. The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code 27 The application under Section 47 is not an application filed under any of the provisions of Order 21 CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order 21 CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order 21 CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case."

115. From the above discussion, it is clear that the limitation period for filing a petition for enforcement of a foreign award is three years. The Award no.4 sought to be enforced in the present case is dated 1st August, 2011. The petition has been filed on 16th March, 2018 *i.e.,* much beyond the three-year period as

provided under Article 137 of the Limitation Act, 1963. Thus, a case of delay in filing of the present petition for enforcement of Award No. 4 has been set up by the Respondents.

116. The only question that is to be examined is whether the delay is condonable under Section 5 of the Limitation Act, 1963.

117. The present application filed by the Petitioner, is praying for exclusion of the period when the petitions under Section 34 of the A&C Act, 1996, filed by the Respondents, challenging the Award No. 4, remained pending.

118. In order to appreciate this plea of the Petitioners, the following chronology of events are relevant to be noted.

119. There were a total of four arbitral awards, which were passed by the Arbitral Tribunal.

i. Award No.1 dated 12th February, 2007— Partial award on jurisdiction.
ii. Award No.2 dated 15th November, 2007—Costs award.
iii. Award No.3 dated 5th January, 2010— Partial final award as to liability.
iv. Award No.4 dated 1st August, 2011— Final award.

120. After passing of the arbitral awards, the Respondent No. 2 filed a petition being ***O.M.P No. 914/2011*** on 29th October, 2011 under Section 34 of the A&C Act, 1996. Vide this petition, the said Respondent challenged the arbitral award dated 1st August, 2011 along with other arbitral awards dated, 27th February, 2007, 17th November, 2007 and 5th January, 2010. Further, a petition being ***O.M.P. No. 4/2008*** was also filed by the Respondent No. 1 under Section 34 of the A&C Act, 1996, challenging the award dated 17th November, 2007. Thus all four Awards were under challenge.

121. In the said petition, a primary objection *qua* maintainability was raised by the Petitioners. Vide judgment dated 7th June, 2016, the ld. Single Judge of this Court held that the petitions filed under Section 34 of the A&C, 1996 are maintainable. The relevant portion of the judgment is extracted hereunder:

> *"Insofar as the submission of Mr. Dayan Krishnan on the non-maintainability of petitions under Section 34 of the Act of 1996 is concerned, the said plea is rejected in view of my discussion made above."*

122. The issue with respect to maintainability of petitions filed under Section 34 of the A&C Act, 1996 vide which the said arbitral awards were challenged, was brought to finality by the Supreme Court on 4th July, 2017 in the judgment ***Roger Shashoua and others v. Mukesh Sharma and others [(2017) 14 SCC 722]***. In the said judgment, the Supreme Court *inter alia* observed that the arbitral awards being foreign awards**,** Part I of the A&C Act, 1996, would not be applicable. It was further held that petitions filed by the Respondents challenging the arbitral awards herein under Section 34 of the A&C Act, 1996, would not be maintainable. The relevant paragraph of the said judgment is extracted herein below:

> *"76. In view of the aforesaid analysis, we allow the appeals and set aside the judgment of the High Court of Delhi that has held that courts in India have jurisdiction, and has also determined that Gautam Budh Nagar has no jurisdiction and the petition under Section 34 has to be filed before the Delhi High Court. Once the courts in India have no jurisdiction, the aforesaid conclusions are to be nullified and we so do. In the facts and circumstances of the case. there shall be no order as to costs."*

123. This decision was rendered on 4th July, 2017. Thereafter, the present petition was filed on 16th March, 2018.

124. The submission on behalf of the Petitioners is that the period from the filing of petitions under Section 34 of the A&C Act, 1996 till the decision of the Supreme Court, deserves to be excluded.

125. The legal position in India in respect of enforcement of foreign awards and the question as to whether challenges could be raised to foreign awards, remained unsettled for a substantial period.

126. In the judgment, ***Bhatia International v. Bulk Trading S.A. and Anr. [(2002) 4 SCC 105]*** the Supreme Court *inter alia* held that provisions of Part I of the A&C Act, 1996 are equally applicable to international commercial arbitrations held outside India, unless any or all such provisions have been excluded by an agreement between the parties. The relevant portion of the judgment is as under:

> *"32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rules will not apply."*

127. However, in ***Balco v. Kaiser Aluminium Technical Services Inc. [(2012) 9 SCC 552]*** the Supreme Court overruled ***Bhatia International***

(supra) and *inter alia* observed that Part I of the A&C Act, 1996 shall apply to all arbitrations which take place within India. However, the same would have no application to international commercial arbitrations held outside of India. The relevant portion of the judgment reads as under:

> *"194. In view of the above discussion, we are of the considered opinion that the Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the Uncitral Model Law. Section 2(2) makes a declaration that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which take place within India. We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to international commercial arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996. In our opinion, the provisions contained in the Arbitration Act, 1996 make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Arbitration Act, 1996.*
>
> *195. With utmost respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International [(2002) 4 SCC 105] and Venture Global Engg. [(2008) 4 SCC 190]* ***In our opinion, the provision contained in Section 2(2) of the Arbitration Act, 1996 is not in conflict with any of the provisions either in Part I or in Part II of the Arbitration Act, 1996. In a foreign-seated international commercial arbitration, no application for interim relief would be maintainable under Section 9 or any other provision, as applicability of Part I of the Arbitration Act, 1996 is limited to all arbitrations which take place in India****. Similarly, no suit for interim injunction simpliciter would be maintainable in India, on the basis of an*

> *international commercial arbitration with a seat outside India.*
> *196.* ***We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which take place within the territory of India****."*

128. Vide this judgment, the Supreme Court settled the question of applicability of Part I of the A&C Act, 1996 to foreign awards. However, there was also considerable uncertainty as to how the seat of arbitration is to be determined and whether Courts in India would have jurisdiction if the governing law, is Indian law. This issue got finally decided in the decision which was rendered by the Supreme Court on 4th July, 2017 in ***Roger Shashoua and others v. Mukesh Sharma and others (supra)*** wherein the principle laid down in ***Union of India v. Reliance Industries Ltd., [(2015)10 SCC 213]*** was upheld and it was unequivocally held that Indian Courts have no jurisdiction even if the governing law of the contract is the Indian law. The relevant portion of the said judgment is set out below:

> *"74. It is apposite to note that the said decision has been discussed at length in Union of India v. Reliance Industries Ltd. The Court, in fact, reproduced the arbitration clause in Singer Co. and referred to the analys is made in the judgment and noted that notwithstanding the award, it was a foreign award since the substantive law of the contract was Indian law and the arbitration law was part of the contract, the arbitration clause would be governed by Indian law and not by the Rules of International Chamber of Commerce. On that basis the Court held in Singer Co. that the mere fact that the venue chosen by the ICC Court or conduct of the arbitration proceeding was London, does not exclude the operation of the Act which dealt with the domestic awards under the 1940 Act. The two-Judge Bench in Reliance Industries Ltd. quoted para 53 of*

Singer Co. and thereafter opined: (Reliance Industries case, SCC pp. 225-26 paras 13-14)

> *"13. It can be seen that this Court in Singer Case did not give effect l the difference between the substantive law of the contract and the law that governed the arbitration. Therefore, since a construction of Section 9(b) of the Foreign Awards Act led to the aforesaid situation and led to the doctrine of concurrent juris diction, the 1996 Act, while enacting Section 9(a) of the repealed Foreign Awards Act, 1961, in Section 51 thereof, was careful enough to omit Section 9(b) of the 1901 Act which, as stated hereinabove, excluded the Foreign Awards Act from applying to any award made on arbitration agreements governed by the law of India.*
>
> *14. This being the case, the theory of concurrent jurisdiction was expressly given a go-by with the dropping of Section 9(b) of the Foreign Awards Act, while enacting Part II of the Arbitration Act. 1996, which repealed all the three earlier laws and put the law of arbitration into one statute, albeit in four different parts."*

75. We respectfully concur with the said view for there is no reason to differ. Apart from that, we have already held that the agreement in question having been interpreted in a particular manner by the English courts and the said interpretation having gained acceptation by this Court, the inescapable conclusion is that the courts in India have no jurisdiction."

129. Another aspect that needs to be noted is that, earlier, the law in terms of ***National Aluminum Co. Ltd. v. Pressteel & Fabrications (P) Ltd. & Anr. [(2004) 1 SCC 540]*** was that whenever a petition under Section 34 of the A&C Act, 1996 was filed, the arbitral award would be unexecutable. The relevant portion of the judgment is extracted below:

"10. Learned counsel for the applicant then contended that nearly 16 years have gone by since the dispute between the parties arose and since the said dispute was first referred to an arbitrator. After the passage of such a long time, the applicant has been able to get only a partial award in his favour, but he is still unable to enjoy the fruits of that award also because of the proceedings initiated under Section 34 of the 1996 Act. In this factual background, he prays that to do complete justice, we should consider the objections of both the parties to the said award and decide the same in these proceedings. Since we have come to the conclusion that the parties having agreed to the procedure under the 1996 Act to be followed by the arbitrator for the post-award proceedings also, the provisions of the said Act would prevail and the said statute having specifically provided for a remedy under Section 34 of the 1996 Act, it may not be proper for us to exercise our jurisdiction under Article 142 of the Constitution to adjudicate upon the objections filed by both the parties to the award. Learned counsel then prayed that at least the amount representing that part of the award which is in its favour should be directed to be deposited in the competent civil court by the respondents herein so that the applicant could enjoy the fruits of the said award during further proceedings. At one point of time, considering the award as a money decree, we were inclined to direct the party to deposit the awarded amount in the court below so that the applicant can withdraw it, on such terms and conditions as the said court might permit it to do as an interim measure. ***But then we noticed from the mandatory language of Section 34 (sic Section 36) of the 1996 Act, that an award, when challenged under Section 34 within the time stipulated therein, becomes unexecutable. There is no discretion left with the court to pass any interlocutory order in regard to the said award except to adjudicate on the correctness of the claim made by the applicant therein****. Therefore, that*

> *being the legislative intent, any direction from us contrary to that, also becomes impermissible. On facts of this case, there being no exceptional situation which would compel us to ignore such statutory provision, and to use our jurisdiction under Article 142, we restrain ourselves from passing any such order, as prayed for by the applicant."*

130. This position of law continued and, in the judgment, ***AFCONS Infrastructure Ltd. v. The Board of Trustees of the Port of Mumbai (MANU/MH/1398/2013)*** the High Court of Mumbai observed that an arbitral award cannot proceed for enforcement or execution if it is challenged within the limitation period. The relevant portion of the judgment is extracted hereunder:

> *"8. Therefore, whereas a decree of a Court can proceed to be executed, the arbitral award cannot proceed for enforcement or execution if it is challenged within the limitation period. The sufficient cause which the Court is required to see to stay execution of the decree enables the Court to pass orders for deposit of the decretal amount in cases of first appeals. The requirement of postponement of the enforcement of the arbitral award would, therefore, have a contrary effect pending the challenge to the arbitration made."*

131. However, pursuant to the Arbitration and Conciliation (Amendment) Act, 2015, Section 36(2) of the A&C Act, 1996 was amended to state that filing of an application to set aside an arbitral award shall not by itself render the award unenforceable and a specific order of stay of operation of the award shall have to be granted on a separate application being made for that purpose.

132. This position continued until clarity in law came about insofar as foreign arbitral awards are concerned, that Part I of the A&C Act, 1996 would

not be applicable, in view of the discussion above. Thus, the objections under Section 34 of the A&C Act, 1996 for setting aside an arbitral award would not be maintainable in respect of foreign awards.

133. These uncertainties in the legal position, at that time, would establish that there is sufficient cause to condone the delay in the present case.

134. In view thereof, it cannot be said that the petition seeking enforcement is barred in terms of ***Vedanta Limited (supra)***. Delay in filing the enforcement petition is condonable under Section 5 of the Limitation Act, 1963 if sufficient cause is established. In the present case, this Court holds that sufficient cause has been established for condoning the delay owing to the long period of uncertainty as to the applicability of Part I of the A&C Act to arbitral awards. In addition, upon filing of a Section 34 petition, the prevailing position at the relevant point was that the Award is unexecutable.

135. In the present case, the Respondent No. 2 filed the petition ***O.M.P. No. 914/2011*** under Section 34 of the A&C Act, 1996 on 29th October, 2011, wherein it had *inter alia* challenged the arbitral award dated 1st August, 2011. The said petition remained pending, until the Supreme Court in ***Roger Shashoua v. Mukesh Sharma (supra)*** decided on 4th July, 2017, held that such challenges to foreign awards were not maintainable. However, the uncertainty in this case, continued and it was only on 19th March, 2018 that the Supreme Court disposed of ***SLP (C) Nos. 22318-22321 of 2010*** filed by the Respondent No. 2 against the orders passed by the ld. Single Judge in ***O.M.P No. 914/2011.*** Thus, the period between 29th October, 2011 to 19th March, 2018 deserves to be excluded. If the said period is excluded, the present petition for execution being, ***O.M.P.(EFA)(COMM.) No. 3/2018***, has

been filed within the prescribed limitation period. The delay is accordingly condoned.

136. ***I.A.8544/2018*** is allowed in the above terms. The application is disposed of.

Enforcement of the Awards:

137. The Petitioners, vide the present two petitions filed under Sections 47 and 49 of the A&C Act, 1996, seek enforcement of the foreign awards dated 5th January, 2010/Award No. 3 and 1st August, 2011/Award No. 4. The said arbitral awards were passed by a three member Arbitral Tribunal, constituted in terms of the Rules of the ICC.

138. In these petitions, the Respondents have filed the following applications, objecting to the enforcement of the arbitral awards:

O.M.P. (EFA) (COMM.) 3/2018			
S.No.	Application Number	Applicant	Description
1.	***E.X. APPL. (OS) 3127/2022***	Respondent No. 1	Seeking a refusal to the enforcement of the arbitral award dated 1st August, 2011.
2.	***E.X. APPL. (OS) 3501/2022***	Respondent No. 2	Seeking a refusal to the enforcement of the arbitral award dated 1st August, 2011.
O.M.P. (COMM) 88/2020			
1.	***I.A. 13271/2017***	Respondent No. 3	Objecting to the enforcement of the arbitral awards dated, 19th January, 2010, 12th February, 2007, 17th November, 2007, 19th January, 2010, 12th

			February, 2007 and 17th November, 2007
2.	***I.A. 16586/2010***	Respondent No. 2	Seeking a refusal to the enforcement of the arbitral award dated 19th January, 2010.
3.	***I.A. 13273/2017***	Respondent No. 1	Seeking a refusal to the enforcement of the arbitral award dated 19th January, 2010 as also the awards dated 12th February, 2007 and 17th November, 2007.

139. As per the scheme of the Act, the enforceability of the impugned arbitral awards is to be determined first, prior to any execution of the awards being undertaken. In view thereof, the enforceability of the said two awards is being considered.

Objections raised by the Respondents to the enforcement of the Arbitral Awards.

140. The objections broadly raised by the Respondents *qua* enforcement of the arbitral awards are categorized as under:

i) The Arbitral Tribunal directed relief in excess of its jurisdiction. The Tribunal did not have the mandate to direct transfer of shares of the Respondent No. 3 company.

ii) The appropriate forum which could have granted the relief of transfer of shares of the said company would be CLB/NCLT and not the Arbitral Tribunal. Relief of this nature can only be granted under the Companies Act and not under the A&C Act, 1996.

iii) The arbitral awards violate Sections 48(1)(c), 48(2)(a) and 48(2)(b) of the A&C Act, 1996;

iv) The price at which the shares have been directed to be transferred would be in violation of public policy as the same constitutes expropriation of the Respondents' shares in ITEL, in favour of the Petitioners.

v) The Arbitral Tribunal cannot act on equitable considerations. It is a creature of the contract and any relief granted by the Arbitral Tribunal must be rooted to the contract itself.

141. The objections raised by the Respondents ought to be assessed within the strict framework laid down under Section 48 of the A&C Act, 1996 which mirrors Article V of the New York Convention.

Recognition and Enforcement of Foreign Awards: Scope of interference under Section 48 of the A&C Act, 1996

142. In 1958, within the framework of the United Nations Commission on International Trade Law, a conference was concluded in New York, which led to the adoption of the New York Convention on 10th June, 1958. The New York Convention was intended to bring into existence a uniform international scheme for the recognition and enforcement of foreign arbitral awards.

143. The New York Convention made a significant change in the regime for enforcement of international arbitration agreements and foreign arbitral awards. Article III of the New York Convention casts a fundamental obligation on contracting States to recognise foreign arbitral awards and enforce them. Article III of the New York Convention is extracted hereunder:

> *"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."*

144. India is a signatory to the New York Convention. To give effect to this international treaty, Part II of the Arbitration & Conciliation Act, 1996 incorporates its provisions into Indian law.

145. Article V of the New York Convention lays down the limited grounds on which a Court may refuse to recognize or enforce a foreign arbitral award. The overall scheme of the New York Convention is to facilitate enforcement of foreign arbitral awards. The grounds for refusing enforcement enlisted in Article V are considered exhaustive, and judicial decisions of various jurisdictions support this proposition. [1]

146. The limited and exhaustive nature of the grounds for refusing enforcement under the New York Convention is emphasized by Albert Jan Van Den Berg in his treatise, the New York Arbitration Convention of 1958. The relevant portion of the same is provided as under:

> *"It is a generally accepted interpretation of the Convention that the Court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in*

[1] SPP Ltd. v Egypt (1985) 10 Y Comm Arb 487 and Geotech Lizenz AG u Evergreen Systems Inc. 697 F Supp 1248 (EDNY 1988) cited in Chukwumerije, 1994, 5 Australian Dispute Resolution journal 237. Also see, Lamm and Hellbeck, 2002, International Arbitration Law Review 137 at 139.

> *Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement Judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national Court should not interfere with the substance of the arbitration. (p. 269)"*

147. Section 48 of the A&C Act, 1996 is based on Article V of the New York Convention. For the enforcement of a New York Convention award, an application has to be made under Section 47 of the A&C Act, 1996 to the Court. Once the Petitioner has complied with the requirements contained in Section 47 of the said Act, the onus shifts on the party resisting enforcement to make out a ground enlisted in Section 48 of the A&C Act, 1996.

148. The settled legal position in respect of foreign awards is that except strictly in terms of grounds of challenge as set out in Section 48 of the A&C Act, 1996 foreign arbitral awards are to be enforced in accordance with law in India. The substantive facts and merits of a particular case are not to be gone into. This position of law has been upheld in a catena of judgments, including the judgment of this Court in ***Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., [(2008) SCC OnLine Del 1271].*** In this judgment, the Court *inter alia* observed that if the Court does not find any of the defects enumerated in Sections 48(1) and Section 48(2) of the A&C Act, 1997 in the award sought to be enforced, it will enforce the award by virtue of Section 49 of the said Act. Further, the arbitral award sought to be

challenged under Section 48 of the A&C Act, 1996 ought not to be resisted on merits. The relevant portion of the judgment is set out as under:

> *"38. Section 48 stipulates that the party against whom the award is invoked may resist the enforcement on one or more of the grounds enumerated in Sections 48(1)(a) to 48(1)(e). If the resisting party furnishes before the Court proof to the satisfaction of the Court that the award suffers from one or more of the defects set out in Section 48(1), the Court may refuse enforcement of the award.* ***The enforcement of a foreign award may also be refused in the two eventualities set out in Sub-clauses (a) and (b) of Sub-section (2) of Section 48. These grounds, viz. non-arbitrability of the subject matter of the award and conflict of the enforcement with the public policy of India, need not be pleaded or proved by the party resisting the enforcement. The Court may suo motu refuse the enforcement if it finds existence of any of the aforesaid defects in the award sought to be enforced. If, however, the Court does not find any of the defects enumerated in Sections 48(1) and Section 48(2) in the award sought to be enforced, it will enforce the award by virtue of Section 49 of the Act.***
>
> *39. In other words, the Court may exercise its discretion, to refuse enforcement of a foreign award, for the first five conditions set forth in this section only if the party against whom it is invoked, makes a request and furnishes proof to it of the existence of any of the conditions set out in Sub-section (1) of Section 48. The Court may also exercise its discretion, to refuse enforcement of a foreign award on account of the last two conditions, namely, non-arbitrability of the subject matter of the dispute and conflict of the enforcement with the public policy of India [Sub-section (2) of Section 48]. This the Court may refuse suo motu. It is then for the party seeking enforcement of the award to satisfy the Court that the subject matter of the dispute is*

capable of settlement by arbitration under the law of India or the enforcement would not be contrary to the public policy of India. The Explanation to Sub-section (2) further declares that the Court may also refuse enforcement of the award and declare the award to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

40. What emerges quite clearly from a conjoint reading of Sub-section (1) and Sub-section (2) of Section 48 of the Act is the following:

(i) Sections 48(1) and 48(2) both use the expression 'may' in the context of refusing enforcement instead of the mandatory 'shall' or 'must'. In other words, the legislature has left it to the discretion of the Court to refuse enforcement of a foreign award, depending upon the facts and circumstances of a particular case.

(ii) ***The scope of enquiry before the Court before whom the application for enforcement of the foreign award is pending is circumscribed by the conditions for refusal set out in Sections 48(1) and 48(2) of the Act. It is not open to a party seeking to resist a foreign award to assail the award on merits or because a mistake of fact or law has been committed by the Arbitral Tribunal.*** *Dicey and Morris have even gone as far as to say that the Court under this Section is not concerned even if the arbitral tribunal applied no law at all, assuming this is permissible under the law governing the arbitration proceedings (The Conflict of Laws, Volume I, 13th Edition, 2000, pp. 622-23, paragraph 16-071).* ***In other words, the scope of inquiry before the Court in which the award is sought to be enforced is limited to the grounds set out in Sections 48(1) and 48(2) and it is not open to the party resisting the award to impeach the award on merits in such proceedings*** *(Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644 : AIR 1994 SC 860, page 881).*

> *(iii)* ***The legislative intent regarding enforcement of a foreign award is writ large, in that, the conditions for refusing enforcement are to be narrowly construed, and, as far as possible the Court may exercise its discretion in favour of enforcement of the award as is clear from the use of the words***—
> *"Enforcement of a foreign award may be refused,……, only if that party furnishes to the Court proof that ……."*
> *41. Keeping in view the aforesaid, I have no hesitation in holding that the plaintiff has discharged the burden placed upon him of proving that the award sought to be enforced is a genuine foreign award based on a foreign agreement for arbitration and thereby has discharged the obligation placed upon him of complying with the provisions contained in Section 47(a) to (c) of the Act of 1996."*

149. The Supreme Court further reiterated this position of law in the judgment, ***Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Limited (2024 INSC 242).*** The Supreme Court *inter alia* observed that minimal judicial intervention to a foreign award is the norm and interference can only be based on the exhaustive grounds mentioned under Section 48. The relevant portion of the judgment is extracted hereunder:

> *"17. The above decision has been followed in various jurisdictions including the Supreme Court of India in Renusagar Power Co. Ltd. v. General Electric Co9. The articulation of the "forum State's most basic notions of morality and justice" has been legislatively adopted in the Indian Arbitration Act,1996. The legal framework concerning enforcement of certain foreign awards in International Commercial Arbitration is contained in Part II of the said Act.* ***In this jurisdiction, we must underscore that minimal judicial intervention to a foreign award is the norm and interference can only***

be based on the exhaustive grounds mentioned under Section 48. A review on the merits of the dispute is impermissible. *This Court in Vijay Karia v. Prysmian Cavi E. Sistemi SRL, had noted that Section 50 of the Indian Arbitration Act,1996 does not provide an appeal against a foreign award enforced by a judgment of a learned Single Judge of a High Court and therefore the Supreme Court should only entertain the appeal with a view to settle the law. It was noted that the party resisting enforcement can only have "one bite at the cherry" and when it loses in the High Court, the limited scope for interference could be merited only in exceptional cases of "blatant disregard of Section 48". This principle of pro-enforcement bias was further entrenched by the Supreme Court in Union of India v Vedanta.*

18. At this point, we may also note that Courts in some countries have recognized that when applying their own public policy to Convention Awards, they should give it an international and not a domestic dimension. The Arbitration legislation in France, for instance, makes an explicit distinction between national and international public policy, limiting refusal of enforcement only to the latter ground. Scholars have noted that the New York Convention's structure and objectives argue strongly against the notion that reliance should be placed on local public policies without international limitations. The objective behind such a distinction is to make it less difficult to allow enforcement on public policy grounds. Most Courts have interpreted the public policy exception extremely narrowly.

19. The Indian Supreme Court in Renusagar (supra) had noted that there is no workable definition of international public policy, and "public policy" should thus be construed to be the "public policy of India" of India" by giving it a narrower meaning. Later on, in Shri Lal Mahal Ltd. v Progetto Grano SpA, the Supreme Court held that the wider meaning given to 'public

> *policy of India' in the domestic sphere under Section 34(2)(b)(ii) would not apply where objection is raised to the enforcement of the Award under Section 48(2)(b) of the Indian Arbitration Act.* ***This would indicate that the grounds for resisting enforcement of a foreign award are much narrower than the grounds available for challenging a domestic award under Section 34 of the Indian Arbitration Act."***

150. In light of the above, it is clear that the objections raised by the Respondents with respect to the foreign arbitral awards, must be tested strictly within the confines of Section 48 of the A&C Act, 1996. Among the objections raised, a core issue relates to whether the Arbitral Tribunal had the jurisdiction to grant the reliefs it did, particularly concerning the transfer of shares of the Respondent No. 3 company. Thus, it is imperative to analyse the jurisdiction of the Arbitral Tribunal in this context.

I. Jurisdiction of the Arbitral Tribunal

151. Jurisdiction of an Arbitral Tribunal is fundamentally rooted in the existence and scope of a valid arbitration agreement between the parties. An Arbitral Tribunal derives its authority not inherently, but from a mutual consent of the parties, as expressed in their arbitration agreement. Section 7 of the A&C Act, 1996 defines an arbitration agreement. In essence, the provision states, that an agreement by the parties to submit to arbitration, disputes which may have arisen in respect of a defined legal relationship, is an arbitration agreement. What constitutes an arbitration agreement is a settled principle of law. In the judgment, ***Jagdish Chander v. Ramesh Chander [(2007) 5 SCC 719]*** the Supreme Court sets out the principles in regard to what constitutes an arbitration agreement. The Supreme Court, in

this judgment, *inter alia* lays down that an arbitration agreement is constituted by the intention of the parties to submit to arbitration, the existence of a binding obligation between the parties to submit to arbitration and the understanding that the decision of the such forum where arbitration is submitted to, is final and binding. The relevant portion of the judgment is as under:

> *"8. This Court had occasion to refer to the attributes or essential elements of an arbitration agreement in K.K. Modi v. K.N. Modi [(1998) 3 SCC 573] , Bharat Bhushan Bansal v. U.P. Small Industries Corpn. Ltd. [(1999) 2 SCC 166] and Bihar State Mineral Development Corpn. v. Encon Builders (I) (P) Ltd. [(2003) 7 SCC 418] In State of Orissa v. Damodar Das [(1996) 2 SCC 216] this Court held that a clause in a contract can be construed as an "arbitration agreement" only if an agreement to refer disputes or differences to arbitration is expressly or impliedly spelt out from the clause. We may at this juncture set out the well-settled principles in regard to what constitutes an arbitration agreement:*
>
> *(i) The intention of the parties to enter into an arbitration agreement shall have to be gathered from the terms of the agreement. If the terms of the agreement clearly indicate an intention on the part of the parties to the agreement to refer their disputes to a private tribunal for adjudication and a willingness to be bound by the decision of such tribunal on such disputes, it is arbitration agreement. While there is no specific form of an arbitration agreement, the words used should disclose a determination and obligation to go to arbitration and not merely contemplate the possibility of going for arbitration. Where there is merely a possibility of the parties agreeing to arbitration in future,*

as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.

(ii) Even if the words "arbitration" and "Arbitral Tribunal (or arbitrator)" are not used with reference to the process of settlement or with reference to the private tribunal which has to adjudicate upon the disputes, in a clause relating to settlement of disputes, it does not detract from the clause being an arbitration agreement if it has the attributes or elements of an arbitration agreement. They are: (a) The agreement should be in writing. (b) The parties should have agreed to refer any disputes (present or future) between them to the decision of a private tribunal. (c) The private tribunal should be empowered to adjudicate upon the disputes in an impartial manner, giving due opportunity to the parties to put forth their case before it. (d) The parties should have agreed that the decision of the private tribunal in respect of the disputes will be binding on them.

(iii) Where the clause provides that in the event of disputes arising between the parties, the disputes shall be referred to arbitration, it is an arbitration agreement. Where there is a specific and direct expression of intent to have the disputes settled by arbitration, it is not necessary to set out the attributes of an arbitration agreement to make it an arbitration agreement. But where the clause relating to settlement of disputes, contains words which specifically exclude any of the attributes of an arbitration agreement or contains anything that detracts from an arbitration agreement, it will not be an arbitration agreement. For example, where an agreement requires or permits an authority to decide a claim or dispute without hearing, or

requires the authority to act in the interests of only one of the parties, or provides that the decision of the authority will not be final and binding on the parties, or that if either party is not satisfied with the decision of the authority, he may file a civil suit seeking relief, it cannot be termed as an arbitration agreement.

(iv) But mere use of the word "arbitration" or "arbitrator" in a clause will not make it an arbitration agreement, if it requires or contemplates a further or fresh consent of the parties for reference to arbitration. For example, use of words such as "parties can, if they so desire, refer their disputes to arbitration" or "in the event of any dispute, the parties may also agree to refer the same to arbitration" or "if any disputes arise between the parties, they should consider settlement by arbitration" in a clause relating to settlement of disputes, indicate that the clause is not intended to be an arbitration agreement. Similarly, a clause which states that "if the parties so decide, the disputes shall be referred to arbitration" or "any disputes between parties, if they so agree, shall be referred to arbitration" is not an arbitration agreement. Such clauses merely indicate a desire or hope to have the disputes settled by arbitration, or a tentative arrangement to explore arbitration as a mode of settlement if and when a dispute arises. Such clauses require the parties to arrive at a further agreement to go to arbitration, as and when the disputes arise. Any agreement or clause in an agreement requiring or contemplating a further consent or consensus before a reference to arbitration, is not an arbitration agreement, but an agreement to enter into an arbitration agreement in future."

152. The principles stated above are reiterated in the legal commentary, ***Justice Indu Malhotra, Commentary on the Law of Arbitration, 4th edn., Vol. 1 (2020), pp. 260, 282, 283, 287***, wherein, the author has, *inter alia,* opined that a valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured. The jurisdiction of the Arbitral Tribunal emanates from an agreement between the parties, to refer the disputes arisen to arbitration. This, in effect, forms an arbitration agreement. The arbitration clause in the contract, must reflect the clear and unequivocal intention of the parties, to resolve their disputes through arbitration.

153. The author, further elucidates that the Court must infer the intention of the parties from the correspondence exchanged, conduct and surrounding circumstances, to ascertain the existence of a binding contract between the parties. What is relevant is that the agreement should unequivocally show that the parties have intended to enter into an arbitration agreement. If the intention of the parties to refer the disputes to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial as to the nomenclature used in the agreement. The law is well settled that the arbitration clause may be incorporated by reference to a document which is in existence, and the terms of which are easily ascertainable.

154. In the said legal commentary, it is further clarified that the jurisdiction of the arbitrator will depend upon the construction of the arbitration clause. If it is widely worded to include all disputes, controversies, or differences arising from the agreement, it would be construed to be an unconditional agreement to resolve all disputes between the parties through arbitration.

155. Thus, to ascertain whether the parties intended to enter into an arbitration agreement, the Court needs to take into consideration the conduct of the parties, the exchange of correspondence between the parties and the surrounding circumstances. This is also clarified by the Supreme Court in the judgment titled ***Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd., [(1962) SCC OnLine SC 28]*** wherein, it is *inter alia* observed as under:

> *"18. But it is argued for the respondents that unless there is in the contract itself a specific clause prohibiting transfer, the plea that it is not transferable is not open to the appellants and that evidence aliunde is not admissible to establish it and the decisions in Boddu Seetharamaswami v. Bhagwathi Oil Company [(1951) 1 MLJ 147], Illuru Hanumanthiah v. Umnabad Thimmaiah [AIR 1954 Mad 87] and Hussain Kasam Dada v. Vijayanagaram Comm. Asson. [AIR (1954) Mad 528, 531] are relied on in support of this position. We agree that when a contract has been reduced to writing we must look only to that writing for ascertaining the terms of the agreement between the parties but it does not follow from this that it is only what is set out expressly and in so many words in the document that can constitute a term of the contract between the parties. If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term**. **The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract. And again it is well established that in construing a contract it would be legitimate to take into account surrounding circumstances. Therefore on the question whether there was an agreement between the parties that the contract was to be non-transferable, the absence of a specific clause forbidding transfer is***

> ***not conclusive. What has to be seen is whether it could be held on a reasonable interpretation of the contract, aided by such considerations as can legitimately be taken into account that the agreement of the parties was that it was not to be transferred. When once a conclusion is reached that such was the understanding of the parties, there is nothing in law which prevents effect from being given to it. That was the view taken in Virjee Daya & Co. v. Ramakrishna Rice & Oil Mills [AIR 1956 Mad 110] , and that in our opinion is correct****."*

156. In the present case, the SHA is stated to contain the arbitration clause. Accordingly, a thorough examination of the terms of the SHA is necessary to determine whether a valid and binding arbitration agreement exists.

Binding nature of the SHA

157. The first submission on behalf of the Respondents is that the SHA is not binding and it was merely a rough draft. On this aspect, the Arbitral Tribunal has analysed the evidence in detail and vide Award No. 1, the Tribunal clearly held that the SHA is binding.

158. While passing Award No. 1, the Arbitral Tribunal took into consideration various terms of the SHA, including the definition of 'parties' in the agreement, which expressly included their successors and permitted assigns. The relevant portion of the SHA containing the same is set out below for ready reference:

THIS SHAREHOLDERS AGREEMENT ('Agreement') is made on this 1 day of July, 1998.

BY AND BETWEEN

Mr Roger S Shashoua, son of Mr Samuel Shashoua and residing at Byron House, 112A, Shirland Road, London, W9 2EQ, United Kingdom, (hereinafter referred to as 'Roger Shashoua'), which expression shall, unless it be repugnant to the meaning or context thereof, be deemed to mean and include his successors and permitted assigns);

AND

Mr Mukesh Sharma, son of Mr VISHWANATH and residing at I-83, Lajpat NagarII, New Delhi – 110 024, (hereinafter referred to as 'Mukesh Sharma'), which expression shall, unless it be repugnant to the meaning or context thereof, be deemed to mean and include his successors and permitted assigns).

AND

International Trade Expo Centre Limited through Mr MUKESH SHARMA its Director and duly authorised representative (hereinafter referred to as 'ICO'), which expression shall, unless it be repugnant to the meaning or context thereof, be deemed to mean and include its successors and permitted assigns.

(Roger Shashoua and Mukesh Sharma are hereinafter referred to as such, collectively as the Parties and singularly as the Party, as the case may be).

159. After perusing the same, the Arbitral Tribunal observed that the SHA was intended to survive changes in shareholding and remain binding upon successors, transferees, and nominees. It further held that the expression 'permitted assigns' should be interpreted broadly to include not only formal assignees but also nominees of either party and any incoming shareholder. The relevant portion of the observations of the Arbitral Tribunal in Award No. 1 is as under:

> *"35. The extended definitions of "Roger Shashoua" and "Mukesh Sharma" made it clear that the parties contemplated that persons other than the initial shareholders might become party to the SHA. Likewise the SHA contemplated the issue of further shares and the transfer of shares to third parties (subject to the pre-emption rights in Article 12) without the SHA coming to an end under Article 16. The intention was that, unless agreed to the contrary, new shareholders coming into ITEC (and a fortiori transferees of existing shareholdings) should be bound by the SHA. Agreement to the contrary would no doubt be implicit in the event of the introduction of new shareholders unassociated with Mr Shashoua or Mr Sharma or in circumstances showing that the balance in the affairs of ITEC was not intended to survive. Conversely, if new shareholders were to be introduced under a structure preserving the balance between Mr Shashoua's and Mr Sharma's interests, the initial parties evidently intended that the SHA would survive and would bind the incoming shareholders.*
>
> *36. The Tribunal accepts the Claimants' argument that, in the light of such considerations, the phrase "permitted assigns" should be given a wider meaning than a technical, legal, definition of "assign" might allow. It extends to nominees of either of the initial parties and to any shareholder coming into ITEC in circumstances designed to preserve the joint venture."*

160. The Arbitral Tribunal thus gave a wide meaning to the term 'assigns' in the recitals of the arbitration agreement, so as to include the nominees of either of the parties. The Tribunal further held that even after the transfer or issuance of shares to third parties, the SHA remained in force. Thus, third parties inducted as shareholders were held to be bound by terms of the SHA.

Law of Assignment in an arbitration agreement:

161. Assignment is when the original party to a contract, which contains an arbitration clause, transfers its substantive claims, rights, and/or obligations to another person. It is universally accepted that arbitration agreements are assignable to any other contract. The question that often arises is whether the transferee will be bound by the arbitration clause contained in the main contract.[2]

162. The answer to this question is well found in the legal commentary, ***Justice R.S. Bachawat, Law of Arbitration & Conciliation, 5th edn., Vol. 1 (2010), p. 340,*** wherein it is stated that if a contract is capable of being assigned and is actually assigned, then the arbitration clause in the initial agreement will also bind the assignee. The relevant portion of the said commentary is extracted hereunder:

> "*If the contract is capable of being assigned and is actually assigned, then the arbitration clause in the initial agreement will also bind the assignee. Where the initial agreement specifically envisaged assignment, and defined parties to include their "successors and assignees", it was held that upon the execution of a subsequent tripartite agreement to effectuate assignment, the assignment of rights and obligations under the arbitration clause could not be challenged. In case arbitral proceedings are pending, upon assignment, the assignee must be substituted by the assignor before the arbitrator. This may, however, not be necessary in all cases, since this depends upon the terms of the assignment.*"

[2] O.P. Malhotra on the Law and Practice of Arbitration and Conciliation, third edn. p. 209, para 2-53

163. In the present case, the recitals portion of the SHA provided that the parties to the agreement would be deemed to mean and include their respective successors and assigns. This in affect would mean that the transferees, *i.e.,* Petitioner Nos. 2 and 3 as also Respondent No. 2 shall assume substantive claims, rights and obligations of the transferor i.e., Petitioner No.1 and the Respondent No.1.

164. The position of law with respect to assigns in an arbitration agreement is further clarified in the commentary***, Mustill & Boyd on Commercial Arbitration (Second Edition, page 138)***, wherein it is stated as under:

> *"(i) The presence of an arbitration clause in a contract does not prevent the contract from being assigned.*
>
> *(ii) The assignee can and must enforce his claim by arbitration, unless the clause is so worded as to make it clear that it binds only the original parties. This would be unusual. Section 16 of the 1950 Act provides that 'unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made ... shall be final and binding on the parties and the persons claiming under them respectively'. Section 4 of the 1950 Act and section I of the 1975 Act both refer to persons claiming 'through or under' a party to the arbitration agreement. The ability of derivative parties covered by these expressions to invoke the arbitration agreement is not defeated by the fact that the arbitration agreement refers only to the immediate parties to the agreement.*
>
> *(iii) Where there has been a legal assignment under the Law of Property Act 1925, the assignee may maintain an arbitration in his own name alone. The assignor is allowed to arbitrate, but he will recover nothing. Where the assignment is equitable, both the*

assignor and the assignee should join in the arbitration.

(iv) The mere fact that the claim is connected with the contract does not require the assignee to arbitrate. It is only if he is claiming to enforce the contract that he is bound by the clause. "

165. Following the principles laid down above, it can be said that presence of the arbitration clause *i.e.,* Article 14 of the SHA does not prevent the contract from being assigned. The recitals of the SHA clearly state that the parties would also include their respective successors and assigns. Thus, unless and until an expression, indicates contrary to binding of the Petitioner Nos.2 and 3 as also Respondent No. 2 to the SHA, the said parties will be bound by the agreement.

166. In the present set of facts, vide Award No. 1, the Arbitral Tribunal held that third parties inducted as shareholders are bound by terms of the SHA. The entire purpose of such findings by the Arbitral Tribunal was to ensure that the balance between Plaintiff No.1 and the Respondent No.1 was duly maintained and even if third parties were introduced, the SHA would survive and continue to bind the incoming shareholders.

167. The primary contention of Respondent No. 1, however, was that the SHA is not a binding contract, as the footer of the document at the time of signing contained the expression*, "preliminary and Tentative For discussion purposes only".* This contention of the Respondent No. 1 was captured in the Award No. 1 in the following terms:

> *"46. At about the end of March 1998, Rohit Berry advised Mr Shashoua that he should enter into a shareholders agreement to regulate the proposed joint venture. On 11 May 1998, Arthur Andersen produced a*

> *first draft of such an agreement [ABD1/13/164]. Arthur Andersen then produced a further draft dated 13 May 1998 [ABD4/28/970]. This was discussed at a meeting in Delhi between Mr Shashoua's representative, Anil Gadhia, and Mr Sharma in mid-May. Following those discussions Arthur Andersen produced a further draft dated 18 May 1998 [ABD1/13/198]. All these drafts were headed "Draft" at the top of each page and marked "Preliminary and Tentative For discussion purposes only" at the foot."*

168. The Arbitral Tribunal while considering this position of the Respondent No. 1 observed that the same is a dispute on facts. Hence, a consideration of the overall circumstances surrounding the execution of the SHA need to be gone into. The Tribunal, while doing so, emphasised that such questions are best addressed by examining the course of events between the parties, for which, the contemporaneous documentary record and the inferences derived from it would be relevant.

169. The Arbitral Tribunal then analyzed the various course of events including the documentary records contemporaneously exchanged between parties, the various replies and correspondence entered into between the parties, etc.

170. The Tribunal *inter alia* observed that the Respondent No. 1 being an experienced businessman understood the process and significance of signing contracts. The fact that the documents were signed in two originals, indicates that the documents were intended to be final and formal, with the intention that one original was to be held by each party. The Arbitral Tribunal further observed that, had the Respondent No.1 harboured any continuing objections to the terms of the SHA, it was unlikely he would have signed without noting such reservations or amendments.

171. On a consideration of overall facts and events, the Arbitral Tribunal observed that if the Respondent No. 1 had signed the originals of the SHA before they reached the Petitioner No. 1, he must have done so when the wording "*Preliminary and Tentative for discussion purposes only"* remained on the said document and not struck out. This according to the Tribunal, must have followed from the evidence given by the Petitioners No. 1 that he himself struck out that wording. The Arbitral Tribunal however, while considering these facts observed that, even if the Respondent No. 1 signed the SHA before the Petitioner No. 1, that does not mean that the said expression was left there with the intention of conveying an unwillingness to be bound to the terms of the SHA. The Tribunal in fact, observed that if the Respondent No. 1 had objections to the terms of the SHA or was unwilling to be bound by it, he would have expressed his reservations and not simply signed the said contract without noting any reservations or amendments. His failure to express any objections coupled with subsequent conduct of the Respondent No. 1 - such as the transfer of the subscription amount through formal banking channels and the signing of Form-32 under Article 3.1 of the SHA, was consistent with his acceptance of the agreement's terms. The Arbitral Tribunal further observed that a copy of the notarised SHA was faxed to both, Mr. Shashoua and Anil Gadhia on 23rd July-24th July, 1998 by the consulting firm, Arthur Andersen. After considering the overall facts and circumstances, the Arbitral Tribunal concluded as under:

> *"69. It follows from all the above that the Tribunal is entirely satisfied that the SHA was concluded as a binding contract between Mr. Shashoua, Mr. Sharma and ITEC. If reinforcement for this conclusion is required, we find it in the parties' subsequent*

correspondence and dealings. Although conduct subsequent to the making of a contract is generally inadmissible as an aid to interpretation of the contract, there is no such restriction on the admission of such evidence when the question is whether a contract was made at all: see (for a statement of Indian law on this point) Mulla, Indian Contract and Specific Relief Acts p.260 and (on English law) Chitty on Contracts 29th Ed. 12-126. It has (correctly) not been submitted to the Tribunal that the parties' subsequent conduct is inadmissible for the latter purpose. As to the conduct which appears to the Tribunal to be of particular significance:

(1) On 28 May 2004 Mr Sharma sent Mr Shashoua an email (ABD1/13/326] stating:

> *"I would like to inform you that the NOC you want is not in terms of the Share Holders Agreement and an understanding we had with each other."*

(2) On 1 September 2004 Mr Sharma wrote to Mr Shashoua [ABD1/13/331]:

> *"I am constrained to issue this notice to you for Breach of Understanding, Trust and Share Holders Agreement reached between us for our Joint Venture Company. (International Trade Expocentre Ltd.)*
>
> *....This action on your part is most unfair, unjustified and a complete violation of convents of the understanding and shareholder agreement which is in force as on date."*

(2) On 27 January 2005 Mr Shashoua wrote to Mr Sharma with regard to a new shareholders agreement [ABD1/14/353]. This included the following passages:

"h Deadlock: we consider this an essential element of the agreement and that it is wholly different from arbitration. Taking into account the history of the project and that there is a precedent set by the original Shareholders Agreement of having a deadlock clause. ...

j. Original Shareholders' Agreement: after review of this agreement it is suggested that this agreement does not replace the original 1998 Shareholders Agreement in its entirety but supersedes the original agreement on the basis that where we have not reconsidered or rewritten a clause within the confines of this agreement the original clause will apply."

On 8 February 2005 Mr Sharma replied [ABD1/14/357):

"d. Deadlock: let's discuss this and try to come to a mutual understanding. I think it shall be best to discuss in person when Berry and you are here.

.....

f. Original Shareholder's Agreement: I have no issues with this, but do not understand the meaning of it. But if you prefer you are free to do so and apprise me the same."

It is noticeable that, even three months before the initiation of the present arbitration, Mr. Sharma did not take issue with Mr. Shashoua's reference to the original Shareholders Agreement as a document with binding effect.

70. These documents, which provide powerful support for the proposition that a binding agreement came into force, were put to Mr Sharma in cross-examination. The Tribunal did not find his explanations helpful. His acknowledgement of the existence and

> *binding effect of the SHA is not consistent with his present case that no such contract was made."*

172. From the above discussion, it is clear that the Arbitral Tribunal has analysed all the documents and oral evidence on record and has concluded that the SHA is a binding contract.

173. The said observation is also in consonance with a recent judgment of the Bombay High Court, ***Neilan International Co. Ltd. vs Powerica Ltd. [(2024) SCC OnLine Bom 3654].*** In this judgment, the Court, *inter alia* observed that the use of the term 'its assignees' in a contract clearly indicates that the original parties had mutually agreed to permit assignment of contractual rights and obligations. The Court noted that such terminology reflects the intention of the parties to bind even non-signatories who step into the shoes of the assignor, thereby defeating any argument that the assignment was unilateral or contrary to the agreed terms. The relevant portion of the judgment is extracted hereunder:

> *"(E) Fifth, thus, what has to be seen in present case is whether the parties intended to assign the Contracts to a third party i.e. a non-signatory. In this regard, Clause 1.1.16 of the said contracts which defines NEC as the 'employer' and specifically includes 'Its assignees' makes it clear that the parties had agreed that NEC would unreservedly have the right to assign the said contracts. Clause 1.16.1 i.e. the Dispute Resolution clause also clearly provides for arbitration in respect of 'any dispute arising out of or in connection with' the said contracts. Thus, in my view, the intention of the parties to join and bind non-signatories as parties to the said contract is manifestly clear. Hence, the contention of the respondent that the assignment was unilateral, etc. is plainly untenable. Thus in the facts of the present case, the assignment was clearly as per the agreed terms*

of the said contracts and cannot be said to in any manner be against the fundamental policy of Indian law and/or the most basic motions of morality or justice which much less shock the conscious of the court."

174. Further, it is trite law that an Arbitral Tribunal has exclusive jurisdiction to rule on its own jurisdiction, as provided under Section 16 of the A&C Act, 1996. The Arbitral Tribunal is the judge of its own competence and jurisdiction, and decides disputes in accordance with such rules of law or equity as the parties agree. In the present case, the Arbitral Tribunal, vide Award No. 1, has concluded that the SHA is a binding contract and Article 14 of the SHA provides for arbitration, *qua* which the Arbitral Tribunal was established in this case.

175. The Award No.1 is not under challenge before this Court and has in fact been accepted by the Respondents. Thus, it is observed that the SHA is binding to the parties herein and there exists a valid and binding arbitration agreement.

176. The Respondents have placed reliance on the judgment, ***Government of N.C.T. of Delhi v. Yasikan Enterprises Pvt. Ltd. (supra)*** to argue that the Arbitral Tribunal has to strictly go by the contract between the parties. In this judgment, the Court observed that there did not exist an arbitration agreement between the parties. The arbitration clause was held to be an independent clause which was not assignable. Thus, the Court set aside the arbitral award therein.

177. The facts of the present case, substantially differ from ***Yasikan Enterprises (supra***). In the present set of facts, the SHA, in the recitals portion, clearly stated that the parties to the agreement would deem to include

their successors and permitted assigns. Thus, in the present case, the arbitration clause would bind the respective successors and assigns of the original parties to the contract.

II. Direction to transfer of shares whether violative of any of the grounds raised by the Respondents

178. The task of an Arbitrator is to determine disputes referred to him, either as a sole member of an Arbitral Tribunal, or jointly with other members of a Tribunal, on the basis of the evidence and submissions made before it, in accordance with the law chosen by the parties to govern the contract, and the curial law which would determine the conduct of arbitral proceedings, within the general obligation of a fair resolution by an impartial Tribunal, without unnecessary delay or expense.[3]

179. In the present case, vide the final award dated 1st August, 2011, the Arbitral Tribunal *inter alia* directed Respondent No. 2 to transfer to the Petitioners/Claimants all shares held by it in the Respondent No. 3 company.

180. The primary contention on behalf of the Respondents is that the Arbitral Tribunal did not have jurisdiction to direct the Respondents to transfer its shareholding in the Respondent No. 3 Company to the Petitioners and the same renders the arbitral award unenforceable in India.

181. To determine the enforceability of arbitral awards in India, it is essential to first ascertain the nature of the awards itself. In the present case, the arbitral awards were rendered by the ICC. Thus, the enforceability of the awards would be governed by the provisions applicable to foreign awards. The

[3] Russell on Arbitration, twenty-third edn. 2007, p. 115, para 4-002.

primary question, thus is, whether the impugned arbitral awards are valid foreign arbitral awards under Section 44 of the A&C Act, 1996.

182. For an arbitral award to be a foreign arbitral award, it ought to fulfil the ingredients provided under Section 44 of the A&C Act, 1996. The Supreme Court of India, in the judgment, ***Gemini Bay Transcription Pvt. Ltd. v. Integrated Sales Service Limited and Another [(2022) 1 SCC 753]*** provided that that there are six ingredients to an award being a foreign award under Section 44 of the A&C Act, 1996. The relevant portion of the judgment is extracted hereunder:

> *"A reading of Section 44 of the Arbitration and Conciliation Act, 1996 would show that there are six ingredients to an award being a foreign award under the said section. First, it must be an arbitral award on differences between persons arising out of legal relationships. Second, these differences may be in contract or outside of contract, for example, in tort. Third, the legal relationship so spoken of ought to be considered "commercial" under the law in India. Fourth, the award must be made on or after the 11th day of October, 1960. Fifth, the award must be a New York Convention award — in short it must be in pursuance of an agreement in writing to which the New York Convention applies and be in one of such territories. And sixth, it must be made in one of such territories which the Central Government by notification declares to be territories to which the New York Convention applies."*

183. As per the above, an arbitral award arising out of disputes between parties involving a legal relationship, whether contractual or not, but is of a commercial nature, would be a foreign arbitral award, provided it is governed by the New York Convention.

184. Following these principles, the primary issue to consider in the present case is whether a legal relationship existed between the parties.

185. A perusal of the SHA would show that the same is an agreement between Petitioner No.1, Respondent No.1 and the Respondent No. 3 company. Each of the parties would also be deemed to mean and include successors and permitted assigns, as provided under the recitals portion of the said agreement, and also as discussed above.

186. To determine whether a legal relationship exists between the parties, it is essential to examine their intention to create such a relationship. This principle is further elaborated by the Supreme Court in the judgment, ***Mahanagar Telephone Nigam Limited v. Canara Bank and Others***, ***[(2020) 12 SCC 767]*** wherein the Supreme Court *inter alia* held that intention of the parties is essential to bind the parties to an arbitration agreement. Intention ought to be inferred from terms of the contract, conduct of the parties and correspondence exchanged between them. Further, if the documents on record show that the parties were *ad idem* and they had actually reached an agreement, then the same is to be construed as a binding contract. The relevant portion of the judgment is as under:

> *"9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.*

9.3 Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement [Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd., (2015) 13 SCC 477 : (2016) 1 SCC (Civ) 733] .

9.4. ***Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties****. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract.* *The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation. [Union of India v. D.N. Revri & Co., (1976) 4 SCC 147]*

9.5 ***A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities****."*

187. In the present set of facts, the intention of the parties to enter into a legal relationship ought to be determined by an examination of the SHA.

188. Recitals 'D' and 'E' of the SHA clearly reflect mutual intention of the parties to establish a binding legal relationship through formation of a joint venture *i.e.,* the Respondent No. 3. The relevant recitals of the SHA are extracted hereunder:

> *"D. The Parties are interested in forming a joint venture in India, which is proposed to be engaged in the Activities. For this purpose, the Parties have agreed to deem ICO to be their joint venture company and ICO by execution hereof agrees to be so constituted as such joint venture company and further agrees to abide and be bound by the terms contained herein.*
> *E.* ***Roger Shashoua and Mukesh Sharma are now desirous of recording, in writing, a binding agreement containing the terms and conditions of their final understanding, in respect of their investment in ICO*** *as also the manner in which they shall act inter se, and the manner in which the affairs of ICO shall be conducted for the purpose mentioned in Recital D hereinabove and hereinafter."*

189. Further, under Articles 2.3 to 2.5 of the SHA, it is clearly stated that the parties will enter into a joint venture and allocate shareholding in equal proportions. This in itself affirms the existence of a legal relationship which is commercial in nature. Relevant portion of the SHA is extracted below:

> *"2.3 Subject to the terms and conditions of this Agreement, ICO shall issue to and Mukesh Sharma and Roger Shashoua shall subscribe to shares in ICO in equal proportions, in the manner set out in Article 2.4 hereinbelow.*
> *To the extent applicable and necessary, Mukesh Sharma undertakes to cause ICO to issue to Roger Shashoua and Roger Shashoua hereby agrees to purchase shares as indicated hereinbelow (relying on the representations and warranties made by Mukesh Sharma with regard to ICO in this Agreement and which*

representations and warranties have been confirmed by ICO).

2.4 The initial issued and paid up share capital of ICO shall be held by Roger Sbashoua and Mukesh Sharma in the following manner:

Party	*Number of shares*	*Percentage*
Roger Shashoua	*1,500,000*	*50%*
Mukesh Sharma	*1,500,000*	*50%*

2.5 Either Party shall be free to sell, pledge, transfer, or in any manner alienate possession of the shares held by it in ICO, to any third party, subject however to the rights of pre-emption as set out in Article 12 hereinbelow."

190. The SHA also contemplates for composition of the Board of ITEL, which would be instrumental in the dispute resolution process. The relevant portion of the SHA is as under:

"3. BOARD OF ICO

3.1 Composition of the Board

a. At all times while this Agreement is in effect, the Board shall consist of six (6) directors Roger Shashoua shall have the right to nominate three (3) directors to the Board, and Mukesh Sharma shall have the right to nominate three (3) directors to the Board. Both parties will co-operate with each other, and vote accordingly, to give effect to their understanding in this behalf.

In this connection, it is agreed that the following individuals shall be the first nominees of Roger Shashoua or Mukesh Sharma, respectively, to act as directors of ICO.

Roger Shashoua' nominees	*Mukesh Sharma's nominees*
Roger Shashoua	*Mukesh Sharma*

Marie Claude Shashoua	*Kiran Sharma*
Anil Gadhia	*Vishwanath Sharma*

b. The term of appointment of the directors of ICO shall be three (3) years, subject to Article 3.1(d) below. Provided, however, that Roger Shashoua and Mukesh Sharma shall be non-retiring directors on the Board.

C The number of directors can be increased or reduced by the mutual written consent of the Parties. It is understood that the same relative representation shall be maintained at all times.

d. Roger Shashoua and Mukesh Sharma shall each have the right to remove the directors nominated by them at any time. In the case of death, retirement resignation, removal of a director from the Board, the Parties shall exercise their voting rights to appoint his replacement, from the among the nominee(s) of the Party that had nominated the original director who is being replaced.

3.2 Chairman of the Board

a. Mr Vishwanath Sharma shall be the first Chairman of the Board and shall act as such for the first three (3) years from the Effective Date. Thereafter, the directors shall elect one amongst then as the Chairman of the Board.

b. The Chairman shall not have a casting vote in the event of equality of votes on any matter arising at a meeting of the Board.

3.3 Managing Director

a. It has been decided by the Parties that Mukesh Sharma shall be the first MD of ICO for a term of

five (5) years. Upon the completion of the term, the Parties shall agree mutually on the appointment of the next MD.

b. *The MD shall act and perform his functions subject to the supervision and control of the Board. Subject to Article 4.6 below, the terms of which shall be incorporated in the Articles of Association of ICO and such directions as may be issued from time to time by the Board, the MD shall be in charge of the day to day management and activities of ICO including but, not limited to operations, personnel, employment and remuneration of personnel, customer services, marketing and sales, accounting, finance and credit collections. It is also understood that unless otherwise agreed to in writing by the Parties or approved through budget duly sanctioned by the Board, the MD shall not, in relation to ICO, undertake or give any financial commitment in excess of Rs 600,000 whether in aggregate or otherwise and further that no cheques for amounts/withdrawals in excess of Rs 600,000 shall be effected/ undertaken/ made by the MD except against an approved budget and with the signature of at least one director nominated by Roger Shashoua.*

c. *At the end of the each fiscal quarter, the MD shall report to the Board, the progress made in achieving the quarterly targets as per the business plan(s) agreed to from time to time by and between the Parties, or if the Parties so agree in writing, agreed to by the Board.*

3.4. Remuneration of the directors

The remuneration of the MD may be fixed and varied, from time to time, by the Board, within the

limits prescribed under the Act/guidelines issued by the Government of India in this respect.

No remuneration shall be paid to any of the directors save the MD, other than expenses incurred by them (fully supported by invoices) on travel, board and lodging for attending a meeting of the Board.

3.5 Alternate Director

a. It is a term of this Agreement that ICO function as a close knit unit with the existing directors constituting the Board. As such, both Parties agree that there is no imminent or pressing need to have any alternates. However, if exigencies so demand, an alternate director may be appointed with the concurrence and pre approval of the Party other than that which wishes to appoint such alternate.

b. An alternate director (who shall not be an individual practising as a solicitor or as an advocate), so appointed shall be empowered to attend, speak and vote at any meetings of the Board, at which the absentee director (in whose place the alternate has been appointed) is not present."

191. The meetings undertaken by the Board of ITEL as also its functions are provided under Article 4 of the SHA. The same read as under:

*"**4. MEETINGS OF THE BOARD***

4.1 The meetings of the Board shall be convened and conducted in the manner laid down in the Articles of Association of ICO, subject to the provisions of the Act in this behalf.

4.2 All questions arising at a meeting of the Board shall be decided by a majority of votes. Provided, however, that the Board may decide upon any matter by passing a circular resolution, subject to the provisions of the Act.

4.3 The quorum for the meeting of the Board shall be four (4) directors, provided that the presence of atleast two (2) directors nominated by each Party, or their alternates, shall be essential to constitute the quorum.

4.4 The powers of the Board shall be subject to, and all decisions taken at a meeting of the Board shall be taken, in accordance with the provisions of the Act, and the Articles of Association of ICO

4.5 The Articles of Association of ICO shall provide that notice of every meeting of the Board shall be sent to all the directors of ICO atleast twenty one (21) days prior to the date of such Board meeting and such notice shall be in the English language, conforming to the Act and the rules framed thereunder.

4.6 Provided however, that none of the following actions/steps shall be undertaken by ICO without the prior approval of the Board:

(i) Any increase in the authorised share capital of ICO;
(ii) Any investment, whether directly or indirectly, in any other company or venture;
(iii) Give loans, stand guarantee, or extend credit to any firm or company, except in the ordinary course of business of ICO;
(iv) Give commissions or incentives of any kind to any person or entity in excess of Rs 600,000;

(v) Declaration of Dividends on Equity Shares;

(vi) To create any lien or charges over any of the assets or undertakings of ICO or to acquire, sell, lease, transfer, licence or in any way dispose off any assets or undertakings of ICO;

(vii) To establish subsidiaries or acquire or merge with any other company;

(viii) To acquire or sell shares, debentures, bonds in any other company;

(ix) To permit any indebtedness of ICO in excess of Rupees six hundred thousand (Rs 600,000) whether by way of issue of debentures, deposits or any other financial instruments or in any other manner whatsoever;

(x) To enter any license/sub-license agreements, know-how/technical assistance or consultancy agreements with third parties and to make amendments to existing agreements;

(xi) To appoint or remove the legal advisors, bankers, financial advisors and institutions and recommend auditors of ICO;

(xii) To adopt or change the Accounting Policy, Business Plan, and/or Fiscal Year of ICO;

(xiii) To commence, institute, defend, settle, compromise or abandon any legal or arbitration proceedings, claims, actions or suits relating to ICO in excess of Rs1,000,000;

(xiv) To approve and adopt the operating budget, capital expenditure budget, operating plans and annual financial statements of ICO;

(xv) To establish or change the profit sharing or benefit plans granted to the employees of ICO;

(xvi) To recommend amendment to the Memorandum of Articles of Association of ICO;

(xvii) Granting of credits, financing, prepayments and any other transactions inconsistent with business principles normal and acceptable in the field of the activity of ICO;

(xviii) Pricing policies;

(xix) To acquire, license, encumber or otherwise dispose off intellectual property rights (including, without limitation, patented and unpatented technology, trade secrets, trademarks and copy rights) of ICO;

(xx) Voluntary winding up of ICO;

(xxi) Purchases involving expenditure in a single instance in excess of Rupees six hundred thousand (Rs 600,000); and,

(xxii) Appointment of the Chief Executive Officer, Chief Technical Officer and Chief Financial Officer of ICO."

192. The SHA, under Article 4.7, provides for resolution of deadlocks at the board level. The SHA also provides that if a particular issue arises at a board meeting, the same will be referred to the parties. However, if the parties fail to reach at a consensus, the said issue will be referred to arbitration. Article 4.7 of the SHA reads as under:

> *"4.7* ***Deadlock***
>
> *The Parties agree that in the event of a Deadlock on a particular issue at a Board meeting, such issue shall be referred to the Parties, by the Board, for their decision. The Parties shall discuss such issue and attempt to reach a consensus on such issue. In the event the Parties reach such a consensus in writing, the same shall be recorded by way of a Board Resolution and ICO shall at all times adhere to such decisions reached by and between the Parties, even pending recording of the same by way of a Board Resolution. Provided however that in the event the Parties fail to discuss the issue within fifteen (15) days from the date on which such issue was referred to them by the Board, or in the event the Parties fail to reach a consensus on such issue within a period of thirty (30) days from the date on which the issue was referred to them the said issue shall be referred to Arbitration in*

terms of Article 13 as if the negotiation period referred to therein has expired. The award/ decision of the Arbitrator shall be recorded by way of a Board Resolution. It is understood that the Parties and ICO shall at all times adhere to such award/decision, even pending recording of the same by way of a Board Resolution."

193. The mechanism outlined in the SHA for resolving deadlocks is not limited to the Board level but also extends to shareholders' meetings. Article 5 of the SHA provides that in case of a deadlock between the parties at a shareholder level, the procedure set forth in Article 4.7 of the SHA, shall apply. Article 4.7 of the SHA reads as under:

"5. SHAREHOLDERS' MEETINGS

All matters relating to the place, the manner and convocation of, voting at, voting by proxy and keeping of minutes of meetings of shareholders of ICO, shall be as provided by the Act and the Articles of Association of ICO.

All notices and agenda of meetings of shareholders shall be in the English language.

The Parties agree that even in case of a Deadlock at the shareholder level the procedure set forth in Article 4.7 hereinabove with regard to Deadlock shall apply mutatis mutandis."

194. Article 12 of the SHA outlines the procedure for transfer of shares. It provides that either the Petitioner No. 1 or the Respondent No. 1 may transfer their shares held in ITEL to a third party, provided that consent of the other party is taken. Article 12 of the SHA is extracted below:

"12. TRANSFER OF SHARES

12.1 Roger Shashoua or Mukesh Sharma may, at any time during the term of this Agreement, transfer any or all of its shares to a Third Party with the written

consent of the other in the manner contained in this Article.

12.2 In the event, cither Roger Shashoua or Mukesh Shanna wish to transfer any or all of their shares in accordance with Article 12.1 above, he ('Selling Shareholder') shall serve a notice containing all terms and conditions of such transfer to a Third Party ('Sale Notice') on the other shareholder (Non Selling Shareholder'), in writing to that effect.

12.3 Upon service of the Sale Notice, the Non Selling Shareholder shall be entitled to purchase all or a part of the shares offered by the Selling Shareholder to such Third Party, upon the terms and conditions offered by/to such Third Party, within a period of thirty (30) days (provided however that to the extent regulatory approvals are required for such purchase, the time taken for obtaining the same shall be excluded from the computation of this period of 30 days), failing which, the Selling Shareholder shall be free to sell the shares to the Third Party only on terms and conditions specified in the Sale Notice. Provided however that in the event such sale is not completed within a period of thirty (30) days from the date of expiry of the abovementioned period of thirty (30) days then the Selling Shareholder shall be required to comply with the terms of and procedure prescribed in this Article 12.

12.4 The Parties agree that they have not and shall not pledge all or any part of the shares held by them in ICO with any bank or financial institution. Provided however, that if both Parties so agree, a Party may pledge all or a part of the shares held by him in ICO with such bank or financial institution that may have been so agreed to by the Parties."

195. The above Articles of the SHA not only reflect mutual intention of the parties to establish a binding commercial relationship but also demonstrates

their willingness to resolve disputes not resolved with the intervention of Directors, through arbitration.

196. Further, the said Articles of the SHA show that, broadly, the arrangement was that Petitioner No. 1 and Respondent No.1, or their respective nominees, would have equal shareholding in the ITEL. The composition of the Board of ITEL would be based on nominations by both Petitioner No. 1 and Respondent No. 1, with each party nominating an equal number of directors. The SHA also provided for the process of Board meetings, which would involve a quorum of four directors, with the presence of at least two from each party. It is further clarified that the approval of the Board is required for any increase in the authorized share capital of Respondent No. 3, as well as for obtaining any further investments (directly or indirectly), extending loans or credit to any third party, or creating any lien over the assets of Respondent No. 3, etc. Thus, for almost all major activities of the Respondent No.3 company, the approval of the Board was essential.

197. The most contentious Clause in the SHA was Clause 4.7. A perusal of the said Clause would show that if Petitioner No.1 and Respondent No.1 (including their nominees/assigns) had a deadlock on any particular issue at the Board meeting, the matter was to be referred to the parties for their decision. If the parties, fail to reach a consensus on such issue within 30 days from the date on which the issue was referred to them, the said issue shall be then be referred to Arbitration. All parties would adhere to the decision of the Arbitral Tribunal.

198. EQUAL REPRESENTATION, EQUAL CONTROL AND EQUAL POWERS of the Petitioner No.1 and Respondent No.1 either by themselves or through their nominees or entities controlled by them was the essence of the SHA.

199. In the present set of facts, it can be clearly seen that disputes arose between the parties, as captured in the factual narration above. This led to a deadlock, resulting in both parties approaching different fora. Subsequently, in April, 2005, the Respondent No. 3 filed a suit being, ***Suit No.257/2005***, before the Civil Judge, Gautam Budh Nagar, thereby seeking an injunction to restrain IEM for conducting competing business as that of the ITEL. The Petitioner No. 1 on the other hand, invoked arbitration on 26th May, 2005.

200. The fact that the Respondent No.1 approached the Court of law, itself shows that the mechanism as contemplated for arriving at a consensus in Article 4.7 of the SHA did not work. The deadlock was obvious and staring in the face of the parties. On this issue of the deadlock, the Arbitral Tribunal clearly observes as under:

> *"8.32 It is also significant that Articles 4.7 and 3 of the SHA recognise that there may be deadlocks in the working of the company, and that if they occur they are to be resolved by arbitration. These Articles evince the intention of the parties to confer a wide jurisdiction on the Tribunal. More generally, the Tribunal considers that, the parties having put into the Tribunal's hands the power to resolve disputes concerning the implementation and breaches of the SHA, they must necessarily have accepted that the Tribunal had power to resolve those disputes in the same way that the parties might be expected to have done (most obviously by board or shareholder resolutions but for their disagreements). In the circumstances it is the Tribunal's*

view that it has jurisdiction to decide all disputes that have been raised by the parties."

201. The above observations by the Arbitral Tribunal coupled with the outlined Articles of the SHA, confirm that the parties intended to vest with the Arbitral Tribunal, the jurisdiction to resolve all disputes arising from the SHA.

202. Accordingly, vide the final award dated 1st August, 2011, the Arbitral Tribunal *inter alia* directed Respondent No. 2 to transfer to the Petitioners/Claimants all shares held by it in the Respondent No. 3 company. This direction of the Arbitral Tribunal is challenged on various grounds by the Respondents.

III. The mandate to transfer shares in the Respondent No. 3 company falls within the exclusive jurisdiction of the NCLT.

203. It is contended by the Respondents that the Arbitral Tribunal does not have the jurisdiction to direct a party to transfer its shareholding in favour of the other party. In the absence of any provision in the SHA with regard to buying out or selling of shareholding of the Respondent No. 3 company, the Arbitral Tribunal could not have directed transfer of shareholding. It is further contended by the Respondents that the mandate to transfer shareholding of the Respondent No. 3 company lies with the CLB/NCLT under the Companies Act and not the Arbitral Tribunal.

204. On the aspect of the appropriate forum being CLB/NCLT, the Arbitral Tribunal observes that violation of contractual rights would be arbitrable, only violation of statutory obligations would fall under Sections 397 and 398 of the Companies Act, 1956.

205. The Arbitral Tribunal, on this aspect, *inter alia* observed that as long as rights of the parties are rooted in a contract and the alleged violation is of such rights, it would constitute part of a contractual cause of action and a Civil Court/Arbitral Tribunal would have necessary jurisdiction to deal with such a dispute. The Arbitral Tribunal while reaching this observation in the Award No.3, considered the judgment passed by the Supreme Court being, ***Sangramsinh P. Gaekwad and Others v. Shantadevi P. Gaekwad and Others [(2005) 11 SCC 314]*** and observed as under:

> *"8.11 In a more recent case, relied upon by both parties, the Indian Supreme Court restated the earlier principles. In that case, the appeal arose from proceedings under Section 397 of the Companies Act as well as civil suits decided between parties and their representatives. Contrasting the scope of proceedings in a civil court and proceedings under Section 397, the Supreme Court observed that:*
>
> > *"It is also not in dispute that the matter relating to her claim to succeed FRO as his Class I heir is pending adjudication in Civil Suit No. 725 of 1991 in the Baroda Civil Court. She claimed title in respect of 8000 shares by inheritance in terms of the Hindu Succession Act. Indisputably, in terms of Section 15 of the said Act she is a Class I heir but the appellants herein contend that the said provision has no application having regard to Section 5(2) thereof as inheritance in the family is governed by the rule of primogeniture. A pure question of title is alien to an application under Section 397 of the Companies Act wherefor the lack of probity is the only test.* ***Furthermore, it is now well settled that the jurisdiction of the civil court is not completely ousted by the provisions of the Companies Act. 1956. (See Dwarka Prasad Agarwal v. Ramesh Chander Agarwal****…."*

8.12 The observations in this judgment of the Supreme Court are decisive of the matter. ***In the present case, the Claimants complain of violation of contractual rights, and the jurisdiction of an arbitral tribunal is limited to disputes arising from contractual rights. Where contractual rights embody a code of conduct, then lack of probity, or misconduct may, apart from being a civil wrong (and therefore a tort) also constitute a violation of a contractual right or a fundamental implied term of a contract. As long as the relationship between the parties is rooted in contact, and as long as the allegations ultimately constitute a part of a contractual cause of action, a civil count (and therefore an arbitral tribunal) would have the necessary jurisdiction to deal with such dispute****.*

8.13 A lack of probity in the conduct of a majority of a Board of Directors, arising from a breach of their statutory obligations as directors or from the relationship between the majority and minority shareholders, is capable of redress under Section 397 not on account of any contract between the parties but on account of a statutory cause of action (oppression and mismanagement) created by law. On the other hand, where there is a contract between the parties creating obligations of transparency and probity in conduct, a lack of probity may give rise to a contractual cause of action, and there is no reason why a civil court (or arbitral tribunal) cannot maintain an action for relief for breach of such contractual obligations.

8.14 As regards the relief that can be granted, obviously the jurisdiction of the Tribunal is limited to such reliefs as is within the scope of the arbitration clause. The relief may (expressly or by necessary implication) flow from the

contract between the parties, or could be relief which can generally be granted under the law of specific relief or general principles of common law. Unlike a body exercising powers under Section 397 or Section 398 of

> *the Companies Act -which can grant all relief necessary to remedy either oppression or mismanagement irrespective of the absence of a contract between the parties - an arbitral tribunal can only grant such relief as is made available by the arbitration clause pursuant to which the reference to arbitration is made. The arbitration clause in this case is drawn in very wide terms and covers not only disputes arising tom breaches of the contract but disputes arising in connection with the "validity, interpretation, implementation or breach" of the agreement (underlining added) 8.15 As long as this distinction is kept in mind while considering the Claimants' case, the Tribunal will be within its powers and jurisdiction and will not transgress into, the wider jurisdiction available to a court or tribunal under Sections 397 and 398 of the Companies Act."*

206. The issues determined by the Arbitral Tribunal above, are contended to be incapable of settlement by arbitration. This Court does not agree with this submission.

207. A perusal of Clause 4.7 of the SHA, itself makes it clear that if there is a deadlock between the parties on a particular issue, and a consensus cannot be arrived at, such dispute would be referred to arbitration. Further, Clause 5 of the SHA, also makes it clear that even if there is a deadlock between the parties at the shareholder level, the procedure set forth in Clause 4.7 shall apply.

208. The word 'deadlock' in the Black's Law Dictionary is defined as, ***a state of inaction resulting from opposition or lack of compromise***. [4]

209. In the present case, the term 'deadlock' needs to be understood in the context of the SHA. It clearly means a situation wherein the Board of directors

[4] [(2007) 137 Comp Cas 569

and the shareholders of the Respondent No. 3 company do not see eye to eye and there arises a situation wherein effective communication has stood completely impeded. The reasons for this could be because of the conduct of either of the parties or even position taken by both parties.

210. However, once there is a deadlock and the Arbitral Tribunal is vested with the jurisdiction to resolve the deadlock, in terms of the SHA, it cannot thereafter be argued that Arbitral Tribunal lacked jurisdiction, or that it exceeded its jurisdiction, or that the deadlock was not capable of settlement by arbitration.

211. Further, it is the contention of the Respondents that matters relating to winding up or oppression and mismanagement of a company, do not fall within the jurisdiction of the Arbitral Tribunal. Reliance has been placed on the judgment, ***Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. (supra)*** wherein it was *inter alia* observed that disputes relating to winding up of the company cannot be referred to arbitration. The Respondents have also referred to the judgment, ***Apex FRP Chemicals Pvt. Ltd. and Ors. v. Om Prakash Gupta and Ors. (supra)*** wherein it is held that the power to direct relief outside the scope of the agreement lies under the Companies Act. It is submitted that the Arbitral Tribunal cannot do the same as the Tribunal is a creature of the contract.

212. The submission that the disputes were in the nature of allegations of oppression and mismanagement under the Companies Act and hence, the jurisdiction of the Arbitral Tribunal was excluded, may at first blush appear to be an appealing argument. However, a deeper probe would reveal that the disputes between the Petitioners' group and the Respondents' group were beyond simple allegations of oppression and mismanagement. The disputes

involved control of the Respondent No. 3 company, in which, the Petitioner No.1 had made a substantial investment. It also involved allegations of misconduct by transfer of shares without following the procedure under the SHA. It also involved movement of funds from the Respondent No.3 company, without approval of the Board. Finally, it involved a situation in which one group had, in effect, hijacked Respondent No. 3 company by increasing its shareholding through the issuance of additional share capital to entities and individuals affiliated with Respondent No. 1. This went to the root of the SHA itself which contemplated and stipulated equal representation in Management, Shareholding, Control and Representation to both sides.

213. In fact, the allegations in the claim petition and the subsequent developments which took place clearly showed that Petitioner No.1 had no other option but to invoke arbitration.

214. Thus, while the disputes may appear, on the surface, to traverse the domain of statutory oppression and mismanagement, a closer examination reveals that they are, in substance, predicated on alleged breaches of contractual obligations under the SHA. Accordingly, the observations in the judgments, ***Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. (supra)*** and, ***Apex FRP Chemicals Pvt. Ltd. and Ors. v. Om Prakash Gupta and Ors. (supra)*** do not apply to the present set of facts.

215. The Arbitral Tribunal, being a creature of the contract, derives its jurisdiction from the agreement between the parties. In the present case, jurisdiction of the Arbitral Tribunal is derived from the SHA. The parties have submitted to arbitration under the SHA. Once the said Tribunal has rendered its decision and has directed transfer of shares which is in effect, contemplated

in the SHA, the Respondents cannot now renege from the same and challenge the jurisdiction of the Arbitral Tribunal.

216. The scope and power of an Arbitral Tribunal is rooted to the arbitration agreement. In the present case, the arbitration clause is contemplated in Clause 14 of the SHA. Clause 14 contains the expression:

> "*In the event a dispute arises in connection with the validity, interpretation, implementation or breach of any provision of this Agreement…"*

217. The jurisprudence on this point, in the United States, suggests that arbitration clauses in general, containing the phrase, *'relating to'* or *'in connection with'*, are usually construed broadly. [5] Indian law follows these principles and it has been held by the Supreme Court in a catena of judgments that the expression, 'in connection with' is of the wildest amplitude.[6]

218. Thus, in view of the broad and inclusive language used in Clause 14 of the SHA, it is observed that the Arbitral Tribunal, deriving its authority from the SHA itself, was fully empowered to direct transfer of shares of the Respondent No. 3, as such relief is inherently linked to and arises out of the contractual arrangement between the parties.

219. Accordingly, the Arbitral Tribunal's findings, both on facts and law, are not vitiated under Section 48(1)(c) of the A&C Act, 1996.

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[5] Justice R.S. Bachawat, Law of Arbitration & Conciliation, 5th edn., Vol. 2 (2010), p. 2378

[6] Renusagar v. General Electric, (1984) 4 SCC 679; Olympus Superstructures, Pvt. Ltd. v. Meena Vijay Khetan, (1999) 2 Arb LR 695 : AIR 1999 SC 2102 : (1999) 5 SCC 651.

IV. The change of shareholding of the Respondent No. 3 company and the manner in which it has been effected is not contrary to public policy.

220. It is the submission of the Respondents that the manner in which the Arbitral Tribunal changed the shareholding of Respondent No. 3 company is contrary to the public policy of India. It was further submitted that Article 12 of the SHA, which contemplated transfer of shares of the Respondent No.3 company, did not permit such a transfer. It only permitted Petitioner No.1 and Respondent No.1 to sell shares with the written consent of the other. Article 12 of the SHA thus, was merely a right of first refusal and provided for modalities for the same. This could not have been used for directing sale of shares to Petitioner No.1.

Scope of Section 48(2)(b) of the A&C Act, 1996

221. Section 48(2)(b) of the A&C Act, 1996 provides that enforcement of a foreign arbitral award (New York Convention) may be refused, if the Court finds that the award is in conflict with the public policy of India. This exception of public policy further contemplates within the provision itself, Explanations. The said Explanations, *inter alia* provide that an award is in conflict with public policy of India, only if, it is induced with fraud or corruption, is in contravention with the fundamental policy of Indian law or is in conflict with the most basic notions of morality or justice.

222. The scope of the exception of public policy in the context of foreign arbitral awards was first considered by the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co.(supra).*** In the said decision, while considering the defence of public policy to the enforcement of arbitral awards, the Supreme Court held that the same must be construed in a narrow sense

while dealing with awards containing a foreign element. The relevant portion of the judgment is extracted hereunder:

> *"51. A distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved. (See : Vervaeka v. Smith [(1983) 1 AC 145, 164 : (1982) 2 All ER 144, 158] ; Dicey & Morris, The Conflict of Laws, 11th Edn., Vol. 1 p. 92; Cheshire & North, Private International Law, 12th Edn., pp. 128-129). The reason for this approach is thus explained by Professor Graveson:*
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> > *"This concern of law in the protection of social institutions is reflected in its rules of both municipal and conflict of laws. Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than would purely local transactions." (R.H. Graveson : Conflict of Laws, 7th Edn., p. 165)."*

223. This observation was consistently followed in the Indian jurisprudence. The Law Commission in its 246th report[7] dated August, 2014 recommended that the scope of 'public policy' is restricted in Sections 34 and 48 of the A&C

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[7] https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081615.pdf

Act, 1996. It is confined only to the fundamental policy of Indian law and the most basic notions of justice or morality. The relevant portion of the report is extracted hereunder for ready reference:

> *"37. In this context, the Commission has further recommended the restriction of the scope of "public policy" in both sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in Renusagar Power Plant Co Ltd v General Electric Co, AIR 1994 SC 860 where the Supreme Court while construing the term "public policy" in section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". The formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds only if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice".*

224. A three Judge Bench of the Supreme Court, in the judgment, ***Shri Lal Mahal Ltd. v. Progetto Grano Spa [(2014) 2 SCC 433]*** further clarified the scope of the public policy exception to foreign awards. In this judgment, the Supreme Court observed that the expression 'public policy of India' in Section 48(2)(b) of the A&C Act, 1996 has a narrow scope and meaning attached to it. Unlike Section 34 of the A&C Act, 1996, which permits a broader interpretation of public policy in the context of setting aside domestic awards,

Section 48(2)(b) of the Act mandates a more circumscribed and limited application when it comes to the enforcement of foreign awards. The Supreme Court in this judgment observed that the scope of Section 48(2)(b) of the A&C Act, 1996 did not extend to objections based on mere errors in foreign awards, including decisions allegedly contrary to the agreement between the parties. The relevant portion of the judgment is as under:

> *"43. Thus, having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded that wheat loaded on the vessel Haci Resit Kalkavan was soft wheat and the sellers were in breach of the description condition of the contract.*
>
> 44. *It is pertinent to state that the sellers had challenged the award (No. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions: (i) Agroexport [Agroexport Enterprise d'Etat pour le Commerce Exterieur v. Goorden Import Cy SA NV, (1956) 1 Lloyd's Rep 319 (QBD)] by the Queen's Bench Division, (ii) Toepfer [Alfred C. Toepfer v. Continental Grain Co., (1974) 1 Lloyd's Rep 11 (CA)] by the Court of Appeal, and (iii) Gill & Duffus [Gill & Duffus S.A. v. Berger & Co. Inc. (No. 2), 1984 AC 382 : (1984) 2 WLR 95 : (1984) 1 All ER 438 : (1984) 1 Lloyd's Rep 227 (HL)] by the House of Lords, were holding the field at the time of consideration of the sellers' appeal by the High Court of Justice at London. In Agroexport [Agroexport Enterprise d'Etat pour le Commerce Exterieur v. Goorden Import Cy SA NV,*

(1956) 1 Lloyd's Rep 319 (QBD)] , it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in Toepfer [Alfred C. Toepfer v. Continental Grain Co., (1974) 1 Lloyd's Rep 11 (CA)] has laid down that where the seller and the buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering damages from the seller, even if, the person giving the certificate has been negligent in making it. Toepfer [Alfred C. Toepfer v. Continental Grain Co., (1974) 1 Lloyd's Rep 11 (CA)] has been approved by the House of Lords in Gill & Duffus [Gill & Duffus S.A. v. Berger & Co. Inc. (No. 2), 1984 AC 382 : (1984) 2 WLR 95 : (1984) 1 All ER 438 : (1984) 1 Lloyd's Rep 227 (HL)] . The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in Agroexport [Agroexport Enterprise d'Etat pour le Commerce Exterieur v. Goorden Import Cy SA NV, (1956) 1 Lloyd's Rep 319 (QBD)] , Toepfer [Alfred C. Toepfer v. Continental Grain Co., (1974) 1 Lloyd's Rep 11 (CA)] and Gill & Duffus [Gill & Duffus S.A. v. Berger & Co. Inc. (No. 2), 1984 AC 382 : (1984) 2 WLR 95 : (1984) 1 All ER 438 : (1984) 1 Lloyd's Rep 227 (HL)] yet it found no ground or justification for setting aside the award (No. 3782) passed by the Board of Appeal. If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award. Accordingly, we are not persuaded to accept the submission of Mr Rohinton F. Nariman that the Delhi High Court ought to have refused to enforce the foreign awards as the Board of Appeal has wrongly rejected the certificate of quality obtained from the buyers' nominated certifying agency and taken into

consideration inadmissible evidence in the nature of certificates obtained by the buyers for the purposes of forwarding contract.

45. ***Moreover, Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy****.*

46. ***In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by the buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12-5-1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal****.*

47. ***While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to: (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b)****.*

48. The contention of the learned Senior Counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in

dispute and, therefore, these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected.
49. In the circumstances, we hold that the appeal has no merit. It is dismissed with no order as to costs."

225. Thus, even if an assumption is made that the Arbitral Tribunal's direction to transfer shares is beyond what is contemplated in the agreement, the same would not bar the enforceability of the arbitral awards passed by the Arbitral Tribunal, on the ground of the public policy exception.

226. In the present case, a perusal of the SHA clearly shows that it had a broad structure, with Petitioner No. 1 and Respondent No. 1 being at the centre, both as shareholders and as directors of the Respondent No. 3 company. The said two parties constituted two separate groups in the company, who were, in effect, Equal partners in the business. However, there was a complete breakdown between the said two parties, with allegations and counter-allegations made against each other. A deadlock between the parties arose and the same was unresolvable. The disputes hence were referred to arbitration in terms of the SHA. The Arbitral Tribunal, on various counts, held that the Respondent No. 1 was in breach of the SHA.

227. While passing the impugned arbitral awards, the Arbitral Tribunal examined the SHA in its entirety. This included clauses dealing with the induction of third parties and the binding effect of the agreement on successors and assigns.

228. The Arbitral Tribunal observed that the SHA itself contemplated induction of third-party shareholders and directors of the Respondent No. 3 company. As already been observed above, in terms of the SHA, assigns and successors of the agreement would be bound to it. Accordingly, the directions

given by the Arbitral Tribunal were well within the scope of arbitration proceedings and flowed directly from the contractual framework agreed upon by the parties.

229. Moreover, the Respondent No.1 had itself filed an application on 2nd February, 2008 before the Arbitral Tribunal praying that he be permitted to purchase the shares of the Respondent No. 3 company at the price at which they were allotted. The said application was rejected on 7th March, 2008. Though the Arbitral Tribunal observed that the filing of such an application would not constitute an admission, however, the fact that such an application was moved, itself goes to show that the issue of shareholding of the Respondent No. 3 company fell within the scope of the arbitration proceedings. In fact, even in paragraph 4.8 of the Award No. 3, the Arbitral Tribunal records as under:

> *"4.8 In Mr Kapur's email dated 1 August 2008, under cover of which Mr Sharma's draft Order was sent, Mr Kapur stated that "The primary and only relief sought by the First Respondent is a dismissal of the Claims of the Claimants and award of damages, as set out in the Draft Order attached. There is no alternative relief sought by way of an award."*
> *Also attached to Mr Kapur's email of 1 August 2008, although not forming part of the draft Order, was a with prejudice offer from Mr Sharma to the Claimants. Mr Sharma reiterated his offer in his written post-hearing submissions of 24 November 2008. The offer read as follows:*
>
> > *"Notwithstanding that the Claimants Claim was false & dishonest, and subject to the Claimants first making payment to the Respondent of the damages awarded, the First Respondent is willing to refund/repay the total amount received by the 3rd Respondent (as per the Claimants RFA) from*

Rodemadan Holdings Limited & Stancroft Trust Limited for equity (all prior loans having been converted into equity) i.e. Rs. 247,971,000 (Rs 82,771,000 t0 Rodemadan Holdings Ltd & Rs. 165,200,000 to Stancroft Trust Ltd), on Rodemadan Holdings Ltd. & Stancroft Trust Ltd transferring & delivering all the shares held by them in Respondent No 3 i.e. 4,000,000 shares (i.e. 2,000,000 shares held by Rodemadan Holdings Ltd & 2,000,000 shares held by Stancroft Trust Ltd) to Respondent No 1 or his nominees. This offer of repayment is expressly made, subject to the Claimants first confirming in writing that on receipt of such amounts all alleged claims made by the Claimants against the Respondents are expressly released, remised/given up & waived and on the Claimants confirming that they will have no outstanding claim against Respondents on any ground/basis whatsoever."

4.9 Mr Sharma's offer was rejected by the Claimants in their post-hearing submission of 29 August 2008."

230. As observed from the above, the Petitioners/Claimants and the Respondents prayed for the relief of buying of each other's shares, that they respectively held in the Respondent No. 3 company. Further, the Petitioners had invested Rs.24.79 crores in the Respondent No. 3 company while the Respondent No.1 had invested only Rs.3.50 crores. This disparity in the quantum of investment was also observed by the Arbitral Tribunal, which, in paragraph 9.18 of the Award No. 3 gave a clear finding that the Exhibition Centre of Respondent No.3 was established mostly from the funds provided by the Petitioner. The relevant portion of the Award No. 3 reads as under:

"9.18 Considering the fact that the Exhibition Centre was not only conceived to be a joint venture but was established for the most part from funds provided by the

Claimants, and also that the Claimants have been kept out of their share of the business and the gains of the Third Respondent from the end of 2003 - definitely from September 2004 – the Tribunal considers that it is in the interest of justice and equity to peg the marker value of these 1.5 million shares at Rs.96.189 ignoring any increase that may have happened thereafter. It would be fair and just if the benefit of any increase beyond 96.189 per share inures to the benefit of the Claimants. It is for this reason that the Tribunal has also not awarded any mandatory damages or compensation for the series of breaches that have been committed by the Respondents and also for the liabilities (including but not limited to the Indian Bank loan) created by Mr Sharma which, after the transfer of shares. would be a matter to be dealt with by the Claimants."

231. In view of the above, the Arbitral Tribunal's approach and the decision thereafter, to direct transfer of shares held by the parties in Respondent No. 3 company, cannot be held to be contrary to the public policy of India. In fact, it would be within the public policy of India to allow a foreign investor, who has invested in an Indian joint venture company and has been in effect, been duped of the entire investment, to be allowed to take over the business and turn it into a successful venture.

232. In the instant case, there was clearly a breach of faith and trust between Petitioner No.1 and Respondent No.1, resulting in a complete deadlock. There was no other effective modality by which the said deadlock could have been resolved. The Arbitral Tribunal, in fact, has taken the most pragmatic course of action, considering the facts and the extent of investment made by the Petitioners. Further, the Arbitral Tribunal considered in detail the conduct of Respondent No.1, which, according to the Tribunal, was lacking in probity,

fairness, and *bona fides*. The Tribunal also observed that Respondent No.1 had misled the Arbitral Tribunal and had been an unreliable witness.

233. The Arbitral Tribunal further observed that there was manipulative conduct in the manner in which the construction contract was awarded to Mr. H.S. Oberoi in 2001-2002. The relevant portion of the Award No.3 is extracted hereunder:

> *"6.35. The evidence for the Claimants (given by Mr Abrahams and Mr Manek) was that the "comparative chart(s)" seen by them in March showed a number of bids of which Oberoi's was the lowest at about US$5 million. That evidence, which the Tribunal accepts as truthful, is damaging to Mr Sharma's case. This is because it is common ground that the only competitive bids received were for the civil works, at the levels evident from the Chawla tender and Mr Agarwal's electronic chart. If there were no bids at the US$5 million plus level (other than Oberoi's proposed fixed contract price), then the presentation of a chart which showed several bids at that level was thoroughly misleading. The Tribunal should add that it is not suggested by either party (or by Mr Agarwal, who gave evidence for Mr Sharma) that the US$5 million contract price in some way represented an extrapolation from the earlier civil works bids. This matter was one of the significant issues in cross-examination of the witnesses. No explanation was forthcoming from Mr Sharma as to the basis of this chart, and accordingly the only inference that the Tribunal can draw is an adverse inference that there was some chart prepared, possibly based on contrived figures, which suggested that the Oberoi Contract was the lowest, and the object of which was to mislead the Claimants, and this chart was deliberately witheld from the Tribunal because its production would have damaged the Respondents' case.*

> *6.36 The allegation of presentation of a false picture that Oberoi's price was the lowest of several competitive bids is closely linked in the Claimants' case to the allegation that the US$5 million figure itself grossly over-priced the contract works. Putting matters shortly, the Claimants say that both steps were part of a scheme to procure the award of the construction contract to Oberoi at a level which allowed Oberoi to earn inflated profits, which could then be used for the joint benefit of the Sharma parties and Oberoi (in the Expocentre and other projects).”*

234. Further, while proceedings were pending before the Courts and Tribunals, Respondent No.1 had engaged in the transfer of shares. Till date, the allotment by the Noida Authority, of the land on which the Exhibition Centre stands has been jeopardized by Respondent No.1 by failing to pay the lease rentals and other dues. The transfer of shares of the Respondent No. 3 company have also been effected in a back dated manner so as to render the proceedings before the Arbitral Tribunal ineffective and *fait accompli*. This was done by modifying annual returns of the Respondent No.3 company, for various financial years including 2006-07, 2007-08 and 2011-12. In fact, these modifications were carried out after the final award was passed on 1st August, 2011.

235. The Respondents had also indulged in forum shopping by filing various proceedings, including those before the District Judge, Gautam Budh Nagar, Uttar Pradesh, the Delhi High Court, etc. These included proceedings challenging the jurisdiction of the Arbitral Tribunal, the arbitral awards rendered by it as also a suit challenging the transfer of shares of the Respondent No. 3 company by the Petitioner No. 1 to the Petitioner No.3, etc.

Insofar as the allegation of competing business was concerned, the same is denied by the Petitioners.

236. In view of the foregoing, the conduct of Respondent No.1 clearly demonstrates a deliberate attempt to frustrate the arbitral process and evade the binding directions of the Tribunal. The Arbitral Tribunal's findings were the result of a comprehensive evaluation of the parties' conduct, contractual obligations, and the factual matrix, and were aimed at providing a resolution, to what had become a commercially unworkable and irreconcilable deadlock. There is no ground to suggest that the awards rendered are in conflict with the fundamental policy of Indian law or against the interests of justice.

V. The power of the Arbitral Tribunal to act on equitable considerations

237. The legal framework governing arbitration has traditionally emphasized on the Arbitral Tribunal being a creature of the contract and thus, being bound by the terms of the contract. The power of the Arbitral Tribunal to decide on equitable considerations is limited to the framework provided in Section 28 of the A&C Act, 1996.

238. Section 28(2) of the A&C Act, 1996 provides that an Arbitral Tribunal shall decide *'ex aequo et bono'* or as *'amiable compositeur'* only if the parties have expressly authorised it to do so. This, in effect, means that any recourse to equitable principles by the Arbitral Tribunal must remain within the framework of the agreement between the parties. The said phrases set out in Section 28(2) of the A&C Act, 1996 are explained in the judgment, ***DMRC v. Kone Elevators India (P) Ltd., [(2021 SCC OnLine Del 5048].*** In the judgment, the ld. Single Judge clarified that the Arbitral Tribunal has the power to consider a dispute in accordance to what is fair and just, provided

the parties to the agreement have expressly authorised it to do so and not otherwise. The relevant portion of the judgment is extracted hereunder:

> *"50. It is also relevant to refer to section 28(2) of the A & C Act. The Arbitral Tribunal might decide "ex aequo et bono or as amiable compositeur" only if the parties have expressly authorized it to do so and not otherwise. The phrase "ex aecquo et bono" means according to equity and conscience. It empowers the arbitrator to dispense with consideration of the law and to take decisions on notions of fairness and equity. The term "amiable compositeur" is a French term and means an unbiased third party who is not bound to apply strict rules of law and who may decide a dispute according to justice and fairness. In view of section 28(2) of the A & C Act, the Arbitral Tribunal was required to decide the disputes in accordance with law and not render a decision in disregard of the same, in the interest of justice and equity."*

239. Over time, however, there has been a shift in the legal approach in determining the scope of the Arbitral Tribunal's jurisdiction, particularly in relation to equitable considerations. While the Tribunal continues to derive its authority from the arbitration agreement, there has been a growing recognition of the need for a more flexible approach in arbitral proceedings. This shift reflects a broader acceptance of equity and fairness in arbitral proceedings, so long as the Arbitral Tribunal does not stray from the legal framework of the A&C Act, 1996.

240. This has also been recognised by the Supreme Court in the judgment, ***Batliboi Enviornmental Engineers v. Hindustan Petroleum Corpn. Ltd. & Ors. (MANU/SC/1043/2023)*** wherein the Supreme Court *inter alia* observed that, at times, decisions are taken by the Arbitral Tribunal while acting on

equity and such decisions can be just and fair. The relevant portion of the judgment is extracted hereunder:

> *"43. Referring to the third principle in Western Geco, it was explained that the decision would be irrational and perverse if (a) it is based on no evidence; (b) if the arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (c) ignores vital evidence in arriving at its decision. The standards prescribed in Excise and Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons 1992 Supp (2) SCC 312, (for short, Gopi Nath & Sons) and Kuldeep Singh v. Commissioner of Police MANU/SC/0793/1998: (1999) 2 SCC 10 should be applied and relied upon, as good working tests of perversity. In Gopi Nath & Sons it has been held that apart from the cases where a finding of fact is arrived at by ignoring or excluding relevant materials or taking into consideration irrelevant material, the finding is perverse and infirm in law when it outrageously defies logic as to suffer from vice of irrationality. Kuldeep Singh clarifies that a finding is perverse when it is based on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it. If there is some evidence which can be acted and can be relied upon, however compendious it may be, the conclusion should not be treated as perverse. This Court in Associate Builders emphasised that the public policy test to an arbitral award does not give jurisdiction to the court to act as a court of appeal and consequently errors of fact cannot be corrected. Arbitral tribunal is the ultimate master of quality and quantity of evidence.* ***An award based on little evidence or no evidence, which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Every arbitrator need not necessarily be a person trained in law as a Judge. At times, decisions are taken acting on equity and such decisions can be just and fair should not be overturned***

Under Section 34 of the A&C Act on the ground that the arbitrator's approach was arbitrary or capricious.

Referring to the third ground of public policy, justice or morality, it is observed that these are two different concepts. An award is against justice when it shocks the conscience of the court, as in an example where the claimant has restricted his claim but the arbitral tribunal has awarded a higher amount without any reasonable ground of justification. Morality would necessarily cover agreements that are illegal and also those which cannot be enforced given the prevailing mores of the day. Here again interference would be only if something shocks the court's conscience. Further, 'patent illegality' refers to three sub-heads: (a) contravention of substantive law of India, which must be restricted and limited such that the illegality must go to the root of the matter and should not be of a trivial nature. Reference in this regard was made to Clause (a) to Section 28(1) of the A&C Act, which states that the dispute submitted to arbitration under Part I shall be in accordance with the substantive law for the time being in force. The second sub-head would be when the arbitrator gives no reasons in the award in contravention with Section 31(3) of the A&C Act. The third sub-head deals with contravention of Section 28(3) of the A&C Act which states that the arbitral tribunal shall decide all cases in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction. This last sub-head should be understood with a caveat that the arbitrator has the right to construe and interpret the terms of the contract in a reasonable manner. Such interpretation should not be a ground to set aside the award, as the construction of the terms of the contract is finally for the arbitrator to decide. The award can be only set aside under this sub-head if the arbitrator construes the award in a way that no fair-minded or reasonable person would do."

241. This evolving jurisprudence, thus reflects a broader shift towards ensuring that arbitral awards are not only legally sound but also commercially meaningful. Arbitral decision-making is increasingly expected to balance legal principles with commercial sensibilities, thereby reinforcing arbitration as an effective and realistic mechanism for dispute resolution. If arbitral tribunals cannot grant effective relief, the same may even pose a threat to Arbitration being an effective Alternative Dispute Resolution mechanism.

242. The solutions and reliefs in arbitral proceedings must account for market realities and commercial consequences. Any arbitral award which does not consider market realities and commercial consequences, would render itself in rendering mere paper awards with only theoretical meaning with no practical consequences. If arbitration, particularly international arbitration, has to be an effective remedy, such reliefs, which would ensure continuation of businesses in the most equitable manner would be the need of the hour. If Arbitral Tribunals cannot keep fairness and equity in mind, while granting relief, the same would be contrary to fundamental tenets of law.

243. Having said that, it is clear that on the facts of this case, considering the long drawn battle the parties have engaged in, the nature of the disputes, the unresolvable deadlock, the relief granted by the Arbitral Tribunal is not merely an equitable relief, but a relief in terms of the SHA.

244. The allegation that the transfer of shares in the Respondent No. 3 company, constitutes expropriation, that too by the Petitioners, is a completely specious and untenable allegation, considering the conduct of the Respondents in this case, especially Respondent No.1 who had himself illegally and unlawfully taken the joint venture company under his own

control. The manner in which the Respondent no.1 transferred shareholding, diluted the Petitioners' shareholding from 50% to almost 25%, removed the Petitioners' side from Management simply point towards a brazen attempt of usurping control. The fact that Respondent No.1 was able to file pleadings on behalf of the Respondent No.3 clearly shows that the Respondent No.3, which was a joint venture, in effect, became a singular venture of Respondent No.1, contrary to both the letter and spirit of the SHA.

245. Under these circumstances, the relief granted by the Arbitral Tribunal is completely justified and cannot be held to be contrary to the public policy of India. The public policy in India, is for ease of doing business and not for winding up businesses especially, which have had considerable foreign investment.

Objections raised by the Respondent No. 2:

246. Insofar as objections raised by the Respondent No.2 are concerned, the decision in ***CS No. 926/2005*** as also its appeal and the dismissal by the judgment in ***RFA(OS) 09/2006*** clearly show that Indian Courts have also found that Respondent No.2 was merely an *alter ego* of Respondent No.1.

247. The Respondent No.1 has in fact admitted and given evidence in respect of Respondent No.2. The Arbitral Tribunal, in Award No. 4 has arrived at a clear finding that the Respondent No.2 was owned and controlled by Respondent No.1 and/or his immediate family members. Further, the findings in the suit filed by the Respondent No.2 being, ***CS (OS) 926/200***5, which was later decided in ***RFA (OS) 09/2006*** shall be binding on the Respondent No. 2 till a Special Leave Petition *('SLP')* is filed in this regard. These findings include the observation of the Court in ***RFA (OS) 09/2009*** wherein it was

categorically held that the Respondent No.2 is an alter-ego or an entity controlled by the Respondent No.1.

248. The Respondent No.2 was also given opportunities repeatedly to participate in the arbitration proceedings. Thus, the allegation that there is a violation of principles of natural justice is totally baseless. The Tribunal has in fact taken pains to ensure that repeated notices are issued in terms of the ICC Rules to all the Respondents including Respondent No.2. Thus, the Respondent No.2 was fully aware of the proceedings before the Arbitral Tribunal.

249. The conduct of the Respondent No.2 which was controlled by the Respondent No.1, would suggest clearly that the same was an attempt to avoid the impact of the proceedings before the Arbitral Tribunal and to somehow escape the consequences of an adverse Award. The Arbitral Tribunal's proceedings could not have been rendered ineffective and hence the participation by Respondent No.1 who is the controlling person behind Respondent No.2 is held to be sufficient for the purpose of complying with the principles of natural justice.

250. The findings against Respondent No.2 in ***CS(OS) 926/2005*** operate as *res judicata* and the same would also be binding in the arbitral proceedings as well. Thus, the objections by Respondent No.2 are also unsustainable.

251. The objections to enforcement of the arbitral awards filed by the Respondents are accordingly dismissed with costs of Rs. 5,00,000/- payable to the Petitioners, considering the long drawn proceedings spanning over several years and litigations in various fora. Thus, the arbitral awards being, Award No.1 dated 12th February, 2007, Award No.2 dated 15th November,

2007, Award No.3 dated 5th January, 2010 and Award No.4 dated 1st August, 2011 are held to be enforceable.

252. Accordingly, ***EX.APPL.(OS) 3127/2022*** and ***EX.APPL.(OS) 3501/2022*** in ***O.M.P.(EFA)(COMM.) 3/2018*** and ***I.A.13271/2017, I.A.16586/2010*** and ***I.A.13273/2017*** in ***O.M.P.(COMM) 88/2020*** are all dismissed in the above terms.

I.A.903/2014 (for early hearing) in *O.M.P.(COMM) 88/2020*

253. This application for early hearing has become infructuous and is disposed of accordingly.

I.A. 5000/2018 (for Oral Examination of R-1 and R-2) and *O.M.P.(EFA)(COMM.) 3/2018*
I.A.12734/2017 (for appointment of receiver) and *O.M.P.(COMM) 88/2020*
I.A.13341/2021 (for appointment of receiver) and *O.M.P.(COMM) 88/2020*

254. Considering the judgment passed today, these applications as also the petitions now directed to be listed before the Roster Bench for further proceedings on 11th September, 2025.

PRATHIBA M. SINGH
JUDGE

SEPTEMBER 01, 2025/*dk/rahul/kk/**rks***