Coral Telecom Ltd vs Elcom Innovations Private Limited And ... on 15 November, 2022

Author: V. Kameswar Rao

Bench: V. Kameswar Rao

Neutral Citation Number:2022/DHC/004837

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 15,

\+ ARB.P. 1185/2021, I.As. 5437/2022 & 8869/2022
CORAL TELECOM LTD ..... P
Through: Mr. Samar Bansal and
Mr. Supratik Sarkar, Ad

versus

ELCOM INNOVATIONS PRIVATE LIMITED ANDANR.
..... Respondents
Through: Mr. Deepak Khurana and
Mr. Abhishek Bansal, Advs.
CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J I.A. 5437/2022 (for condonation of delay) For the reasons stated in the application, the same is allowed and the delay is condoned. Application is disposed of.

1. The present petition is filed seeking appointment of an Arbitral Tribunal under Section 11(6) of the Arbitration and Conciliation Act, 1996, with the following prayers:-

> "In light of the facts and circumstances narrated above, the Petitioner respectfully prays that this Hon'ble Court may be pleased to:
>
> (i) Appoint an appropriate arbitral tribunal to adjudicate the disputes that have arisen between the parties; and Neutral Citation Number:2022/DHC/004837
>
> (ii) Pass such other or further order(s) as may be deemed fit and proper in facts and circumstances of the present case."

2. An invocation notice dated October 20, 2021 was sent by the petitioner invoking Article IV (Arbitration) of the Memorandum of Understanding (hereinafter "MoU") dated July 10, 2012 read

with MoU dated February 01, 2013, due to the failure to resolve issues with regard to willful non-adherence of contractual obligations and responsibilities, breach of Gross Contribution Sharing Terms and the resultant unjust enrichment of the respondent. The arbitration clause is reproduced as under:

> "ARTICLE IV ARBITRATION Either Party may cause to be submitted to arbitration all disputes, controversies or questions of interpretation arising out of this MOU or any breach or default hereunder by giving to the other Party notice to that effect. The Arbitration shall be held in New Delhi, India and shall be conducted in accordance with the rules set out by the Indian Arbitration & Conciliation Act of 1996 as in effect at the time of such arbitration except as follows. The Party desiring arbitration shall include in its notice to the other Party the name of the arbitrator chosen by it. Within twenty days after receipt of such notice the Party receiving notice shall, by written notice to the Party desiring arbitration, name the Arbitrator chosen by it and within 20 days of the appointment of the second arbitrator an "additional .arbitrator shall be selected by the two arbitrators theretofore appointed. No Arbitrator shall be an employee or former employee of the CTL, either Party, or an Affiliate of either Party....."

3. The petitioner, Coral Telecom Ltd. („Coral Telecom for short), is a company duly incorporated and registered under the Neutral Citation Number:2022/DHC/004837 provisions of the Companies Act, 1956;having its registered office at 404, 2 Electronic Complex Charnbaghat, Distt Solan, Solan Himachal Pradesh 173213 and corporate office at E2, Sector 93, Noida 201 301, UP. The petitioner is engaged in the business of designing, developing, manufacturing, marketing and/or sale of telecommunications related products which support some of the most demanding, mission critical and sensitive installations that include Indian Army Head Quarters, Indian Navy Head Quarters, various core and command centers of Indian Defence Forces.

4. The respondent No.1, Elcom Innovations Pvt. Limited (hereinafter referred to as „respondent No.1) is a company incorporated under the provisions of Companies Act, 1956 having its registered office at M41/4&5 Speed Bird House, Connaught Circus, New Delhi 110001. The respondent No.1 is part of Elcom Group of Companies constituted of Elcom Systems Pvt. Ltd. (under aegis of SUN Group of Companies) and engaged in the business of Aerospace, Communications and Electronics particularly in the area of avionics, tactical communications and homeland security, amongst others.

5. The respondent No.2 is the Managing Director of the respondent No.1 and is one of the first/founder Directors of the Respondent No.1. The respondent No.2 is a signatory of MoUs dated July 10, 2012.

6. The petitioner in the year 2010 collaborated with a Norwegian Company involved in the field of Defence equipment by the name of Kongsberg Defence & Aerospace AS (hereinafter 'KDA') by entering into a Non-Disclosure Agreement (NDA) dated March 10, 2010 for Neutral Citation Number:2022/DHC/004837 the purpose of marketing and implementation of projects both in India and abroad and the proposed collaboration involved integration between communication

products both from Coral as well as KDA. The petitioner also entered into a General Purchase Agreement with KDA in the year 2011, in the field of Military Communication Equipment i.e. Field Exchange and Field Telephone for a project undertaken by KDA in Algeria, inter-alia for sale of defense materials.

7. Thereafter the petitioner to streamline its business model, entered into a Memorandum Of Understanding (MoU) dated July 10, 2012, thereby bifurcating its Management team into 2 groups; namely, 'Commercial Team' (hereinafter Comm. Team) comprising of enterprise business, ERP and other commercial and marketing functions and 'Technical Team' (hereinafter Tech Team) comprising of factory, R & D and such other technical product development and production functions. Tech Team had agreed to disengage from Coral Telecom Ltd. /petitioner herein and form a separate business entity and the said MOU represented articles of arrangements of such proposed business venture.

8. The teams, under MoU dated July 10, 2012, agreed to work together in „Present Domain that included development of existing repertoire of products under General Sales and any developments thereof, where order requires customisation, Transfer of Technology or substantial technical inputs under Project Sales and the pricing of products under General Sales was agreed to be computed at 129% of the Bill of Material under Article II, Clause 2 (a), while pricing of products under Project Sales was agreed to be computed on basis of Neutral Citation Number:2022/DHC/004837 Division of Gross Margins under Article II, Clause 2 (b) and the ratio of distribution of such gross margin was agreed at 32.76% and 67.24% to the Tech Team and Comm. Team respectively.

9. It is the case of the petitioner that the MoU was binding upon the parties and their respective successors and permitted assigns under Article IV (General), Clause 7. It was further agreed between the parties that petitioner would transfer its Plant & Machinery and Technical Know How (Transfer of Technology) to the Tech Team whenever the new company consisting of members of Tech Team is formed in terms of said MoU. CODAS Innovations Pvt. Ltd. (hereinafter 'CODAS') was formed by eight members of the Tech Team on July 24, 2012, as a stop-gap arrangement and same was to take up all responsibilities of the Tech Team till a proper business venture could be floated in terms of the said MOU. M/s. Elcom Systems Pvt. Ltd. (hereinafter 'Elcom Systems') involved in Electronic Manufacturing Services (EMS) approached the CODAS (Tech Team) to set up such new business venture.

10. Thereafter, the CODAS / Tech Team and Elcom Systems entered into a Share Purchase and Shareholder Agreement and became shareholders in Elcom Innovations (P) Limited, respondent No.1 herein. The eight members of Tech Team has a total of 30% share and the rest 70% of share is with the Elcom Systems.

11. It is stated that in March 2019, the petitioner came to know for the first time that one of the major clients under Specialized Project (project sales), KDA, has shared product designs and manufacturing processes of the petitioner with respondent No.1, which has executed a Neutral Citation Number:2022/DHC/004837 project worth 100 Crores with KDA, one of the petitioner s client, during the Financial Year 2020-21. It is the case of the petitioner that when the petitioner

company confronted the respondent No.1, the respondent No.1 denied the petitioner the profit sharing arrangement and other liabilities / responsibilities as agreed under MoU dated February 01, 2013.

12. The petitioner had sent a demand notice dated June 26, 2021 through its Advocate to the respondent No.1 on the same subject matter and made demand for its share under said MOUs. That the respondent duly received such demand notice by email on the same day, by courier and by Speed Post.

13. Thereafter the petitioner invoked the Arbitration Clause incorporated in Article IV of the MoU dated July 10, 2012 read with MOU dated February 01, 2013 and served the notice to the respondent No.1's Delhi and Noida office on October 21, 2021, October 22, 2021 and October 23, 2021.The respondent No. 1, replied to above notice, denying any dispute to invoke arbitration dated October 27, 2021.

14. Mr. Samar Bansal, the learned counsel appearing for the petitioner stated, that the Comm. Team and Tech team has specifically agreed that orders from KDA came within the category of Project Sales under Article II, Clause 1 (b) and under the arrangement the purchase orders were to be routed through the Comm. Team. All sales were to be exclusively made through Comm. Team by Tech Team after designing developing and manufacturing products as per purchase order under Article I, Clause 6.

15. He also stated that the final sale/marketing to end-customer Neutral Citation Number:2022/DHC/004837 was to be made by Comm. Team under Article II, Clause 8 and both teams were to maintain full transparency qua negotiation of price, payment terms, commercials, deliverables and technical specifications for such Project Sales under Article II, Clause 3 and all advances, payments or other financial benefits received from Project Sale customer were to be shared by both parties on a back to back basis under Article II, Clause 5.

16. He stated that Elcom Systems during the negotiations with the Tech Team represented that it had the backing of Sun Group of Companies and it would provide all financial sponsorship necessary to set up the new business venture under the MoU dated July 10, 2012. Elcom Systems further represented that in return for such financial backing and/or partnership, it would retain the majority stake in such new business venture and have majority seats in the Board of Company, however, its Nominee Directors would be merely part time Directors and / or Independent Directors and they would not exercise management or operational control but would be limited to supervising and guiding in Board meetings alone. He also stated that the respondent No.1, wanted to be under the leadership of the Tech Team.

17. Furthermore, he stated that, to cement the collaboration agreed upon between petitioner and Elcom Systems, they entered into a separate MOU dated September 05, 2012, in light of earlier MoU dated July 10, 2012, thereby agreeing to form a collaboration where under, inter-alia, it was agreed that all responsibilities assigned to CODAS would be undertaken by Elcom's Facilities or the entity formed consequent to such collaboration. He also submitted that the Neutral Citation

Number:2022/DHC/004837 collaboration and in terms of said MoU dated July 10, 2012 there was formation of a new company, named Elcom Innovations Pvt Ltd. (respondent No. 1 herein) between members of Tech Team and Elcom Systems on October 13, 2012.

18. Furthermore, he stated that the parties have agreed that the majority shareholding of 70% will belong to Sun Group through Elcom Systems as financial partners and remaining 30% to team of 8 shareholders, i.e., members of the Tech Team under the MoU dated February 01, 2013, who now formed part and head of the respondent No.1 Management.

19. He stated that, the respondent No. 2 Mr. Arun Sharma, a prominent member of the Tech Group and signatory of the MoU dated July 10, 2012, was appointed as the Managing Director by the majority shareholders of the respondent No.1, in order to take day to day decisions of the Company. He also stated that the team of 8 shareholders consisting of members of the Tech Team also entered into a Shareholder's Agreement dated December 24, 2012 with the respondent No.1, which expressly stated the arrangement between Tech Team and the respondent No.1 and its parent companies including Elcom Systems of Sun Group.

20. Furthermore, he stated that the Director - Operations and Member of the Board of the respondent no.1 vide email dated December 27, 2012, formally called upon the members of the Tech Team to join the respondent No.1, on the same terms and conditions as with the petitioner and merge with respondent's Management. He also stated that the respondent No.2 always represented itself to be in full Neutral Citation Number:2022/DHC/004837 agreement with the terms and conditions of the MoU dated July 10, 2012 and willingly undertook responsibilities and business relations under such MoU as the successor of the Tech Team.

21. He further stated that, there is an additional MoU dated February 01, 2013 between the respondents and the petitioner; consequently, it is a binding commercial contract after formation of the new entity in the form of respondent. He also stated that the respondents have duly acknowledged and accepted all terms and conditions under the MoU dated July 10, 2012, as a successor of the Tech Team / CODAS and further, agreed that it will manufacture and supply technical goods based on the technology owned by the petitioner. The additional MoU entered into by petitioner executed through its Managing Director and respondent as a Company, expressly confirm that the same was prepared in the background of the MoU dated July 10, 2012 entered between Comm. Team and the Tech Team.

22. Mr. Bansal also submitted that, inter-alia, it was agreed that, for Specialised Projects (Project Sales), the two companies would work by sharing the Gross Contribution from such projects in the ratio of 30:70 in favor of respondent No.1 and the petitioner. In pursuance of such understanding, an Escrow Account was opened for sharing of such gross contribution. He emphasised on the percentage of sharing of' gross contribution under additional MoU, directly derived from Clause 2 of the MoU dated July 10, 2012, which provided for "Pricing from Tech Team to Comm. Team", wherein under such additional MoU the Tech Team was now being represented by the respondent Neutral Citation Number:2022/DHC/004837 No.1 herein.

23. He submitted that on the respondent's representations and assurances, the petitioner transferred its plant & machinery and Technical Know How (Transfer of Technology) to the Tech Team's New Entity (Elcom Innovative) in terms of said MoU. Further, the respondent started undertaking specialised projects (Project Sales) and General Sales as per MoU dated July 10, 2012 and additional MoU dated February 01, 2013, which was being handled by the petitioner. He also stated that, in the course of the new collaboration with the respondent, the petitioner duly and promptly informed its component vendors/suppliers to directly supply to the respondent in light of bifurcation of responsibilities as already agreed under said MoUs. Furthermore, the petitioner issued NOCs in favor of respondent to its customers to directly allow respondent to transact with the petitioner's customers.

24. The parties have ever since inter-alia continued this business arrangement of sharing the Gross Contribution for sales in the „Present Domain in the agreed ratio not only for profits but also for taking account of losses suffered under such agreement. He has illustrated that the petitioner, in the year 2015-2016, agreed to bear 70% cost for replacement of all material lost in a project sale to KDA and same is reflected in a series of emails dated January 15, 2016. He also produced a detailed ledger showing continued transactions under said MoUs for the period 2014-15 to 2020-21. In the year 2015, accounting for loss of materials in a KDA project and there is a communication with regard to the same and stated that, it is evident that the business Neutral Citation Number:2022/DHC/004837 model and profit sharing arrangement under MOUs was relied on and followed by both parties.

25. He stated that the petitioner confronted the respondent with regard to an apprehension of possible misappropriation of the petitioners proprietary products 'IP@Core Systems' vide emails between the period October 07, 2017 and October 08, 2017 in favor of a company, namely Accord Communications Ltd. However, the respondent merely sought to blame the petitioner of granting Original Equipment Manufacturer („OEM for short) authorisation for ULSB to Accord Communications Ltd. He also stated that the respondent relying on terms of the MoUs and alleged that the OEM authorisation was against the contracted arrangements under the said MoUs. In the year 2018, the respondent had an apprehension that the petitioner might have obtained alternate suppliers, and confronted the petitioner regarding the same and petitioner duly replied to the respondent's query where respondent sought to remind petitioner of their arrangement under said MoUs and a series of emails dated July 16, 2018 and July 19, 2018 were exchanged between the parties.

26. Further, in March of 2019, the petitioner s major Clients under category of Specialized Projects/project sales with KDA, was buying Field Exchanges and Ruggedized Telephone Sets, directly from the respondent, thereby grossly disregarding the terms and conditions and arrangements under the MoU s, as also proprietary rights of the petitioner in such products. Thereafter, the petitioner repeatedly confronted and communicated to its customer, KDA with several emails dated March 27, 2019, April 10, 2019, June 27, 2019 and Neutral Citation Number:2022/DHC/004837 October 17, 2019, pointing out that the actions of dealing directly with respondent was in blatant breach of contract for non-disclosure of the MoU dated March 10, 2010 between petitioner and KDA, where under, the petitioner inter-alia had agreed for Transfer of

Technology of said product in favor of KDA, on the condition that its proprietary information would be safeguarded from unauthorized use. He also stated that, KDA had forwarded such emails to the respondent, thereafter; respondent No.l s Director in or around December 2019 had telephonically contacted the Managing Director of the petitioner providing various false assurances and clarifications.

27. It is stated that the petitioner came to know that the respondent has successfully executed the KDA project worth about 100 Crores during pandemic in the Financial Year (FY) 2020-21, thereafter, the petitioner has obtained such information both from the website of the respondent No. 1 as well from a report released by an Independent Credit Rating Agency regarding the executed project. He also stated that the petitioner had sent an email dated April 28, 2021 to the respondent and demanded its share of the gross contribution between the respondent and petitioner as per the MoUs, an amount of 43,09,00,000/- (Rupees Forty three Crores and Nine Lakhs Only) is due and payable by respondent to petitioner towards overall gross contribution for KDA Purchase Order as principal amount, as under:

> Sr Product % Indian % Unit Order Total Order Gross Gross No. Name Content Imported Selling QTY VALUE Contribution of Contribution of Content Price as Indian content Imported per @ 44% content @ 38% KDAPO 1 FX301 69 31 4622.00 9 41598.00 12629.15 4900.24 2 FX302 72 28 5739.00 72 413208.00 130904.29 43965.33 Neutral Citation Number:2022/DHC/004837 3 FX304 73 27 8.017.00 34 2.72.578.00 87552.05 27.966.50 4 FX310 75 25 10356.00 4 41,424.00 13669.92 3935.28 5 PTRI000 96 4 242.00 3527 853534.00 360532.76 12973.72 16,22,342.00 6,05,288.18 93,741.08 Total Order Value 16,22.342.00 Total Gross Margin 6,99,029.26 (Indian+lmported content) Overall % Gross contribution 43.09 for the KDA order Total Amount payable (Rs.) (for the KDA PO of 100 Crores) Rs.43,09,00,000

28. Mr. Bansal has contended that the respondent is liable to pay interest on such principal amount calculated @9% p.a. compounded quarterly on account of its default in making payments in that regard from the date of such claim till date of payment. He also stated that the respondent is liable to disclose its accounts with regards to projects pertaining to „Present Domain undertaken by it during the period 2013-2021, when the petitioner was not offered scrutiny of respondent's accounts on account of wrongful suppression of same by the respondent. Further, payments may be made to the petitioner of such sum as may be found to be due to it under said MoUs on the taking of accounts.

29. The petitioner accordingly sent a notice invoking arbitration dated October 20, 2021 to the respondent and proposed the name of Mr. Rakesh Kumar Bhatnagar, former ITS Group A officer who retired as Advisor (Technology) at Department of Telecommunication under Ministry of Communication, Govt. of India holding rank equivalent to Special Secretary to Government of India to act as an Arbitrator. He also stated that a further request was proposed for the Neutral Citation Number:2022/DHC/004837 name of second Arbitrator of the respondent s choice within 20 days from the date of receipt of such notice as per Clause IV of the Arbitration clause.

30. The respondent No.1 replied to notice invoking arbitration by an Advocate's letter dated July 27, 2021, denying presence of any valid subsisting arbitration agreement between the parties. Thereafter, respondent No.1 through an Advocate's letter dated November 06, 2021, sought to unilaterally close the dispute between the parties.

31. As per the arbitration agreement, the arbitration proceedings shall take place in Delhi / New Delhi and accordingly all disputes will be settled in the Courts in Delhi/New Delhi and therefore, this Court shall have the jurisdiction to adjudicate the disputes and differences between the parties.

32. Mr. Bansal submitted that the cause of action arose for the first time in March 2019, when the petitioner came to know for the first time that the respondent has wrongfully solicited the clients of the petitioner in breach of the terms of the MoU; and on December 2019 when the respondent assured that it will pay the dues of the petitioner; and further when respondent conducted specialized projects under KDA during the period FY 2020-21 without paying petitioner's share. It also arose when petitioner addressed demand notices dated April 28, 2021 and May 31, 2021 through its MD and further sent demand notices dated June 26, 2021 and August 04, 2021 through its Advocate and on all occasions when the respondent did not reply to such notices. The cause of action again arose when petitioner issued the letter dated October 20, 2021 invoking the dispute resolution clause and seeking Neutral Citation Number:2022/DHC/004837 appointment of arbitrator to resolve the disputes between the parties; and again accrued when the respondent replied through his advocate's letters dated October 27, 2021 and November 06, 2021 denying existence of any valid arbitration clause and further seeking to unilaterally close the dispute.

33. Further, the cause of action accrued upon expiry of 30 days from date of said reply to the above notice, as the respondent failed to participate in the appointment process or suggest or nominate any arbitrator as per procedure agreed between the parties. Thereafter the cause of action has been continuing to accrue.

34. According to Mr. Bansal, respondent No.1 stepped into the shoes of the Tech Team after such team disengaged from petitioner and jointly formed the respondent No. 1 in association with Elcom Systems Pvt. Ltd as per MoU dated July 10, 2012. He submitted that the MoU specifically binds the successors / permitted assigns of the parties under Clause 7 and also, the MoU dated July 10, 2012, contemplates under clause 8 r/w addendum, that a binding commercial contract would be entered into between Petitioner (CTL) and the new entity (Respondent no. 1) and such parties would adopt MoU dated July 10, 2012, as Articles of such business venture.

35. He has also submitted that there is an express incorporation of the entirety of the MoU dated July 10, 2012, in the MoU dated February 01, 2013 by using the following words of reference:

> "Background: Agreement signed between Coral Telecom Ltd. & Arun Sharma along with his team who are now part of the Blcom management."

36. The additional MoU dated February 01, 2013, was contemplated in the Article IV (General), Clause 8 (Survival) of MoU dated July 10, 2012, itself and therefore reference to 'Agreement signed between Coral Telecom Ltd. & Arun Sharma along with his team' is wholly and solely intended to incorporate the terms and conditions of MoU dated July 10, 2012, into MoU dated February 01, 2013.

37. He stated that the respondent No.1 was fully aware of the said MoU as the MoU dated July 10, 2012, was specifically referred in its entirety in the Shareholder s Agreement dated December 24, 2012 which was executed after the said MoU dated July 10, 2012, between the respondent no. 1, Members of the Tech Team and the parent organisation of the respondent No. 1 i.e., Elcom Systems Pvt. Ltd, as stated under;-

> "AND WHEREAS Tech Group has been engaged in the business of developing, manufacturing of the telecommunication and electronics products as their association with Coral Telecom Private Limited (CTL) as employees! shareholders ofCTL and possesses expertise and varied experience in the said business. Tech Group, pursuant to the MOU dated July 16 (sic), 2012 executed between Tech Group and others shareholders of CTL, has disengaged their interest in CTL.
>
> AND WHEREAS the parties have agreed that Tech Group shall farm in to the share capital of the Company by acquiring shares from Elcom, the existing shareholder of the Company, to the extent and on the terms and' conditions as mentioned hereinafter and accordingly the parties are entering into this Agreement to record such terms & conditions of owning, operating and managing the Company and their interrelationship as contained Neutral Citation Number:2022/DHC/004837 hereinafter."

38. It is submitted that the transition from Tech Team to Elcom s Management of the respondent No. 1 and retention of entire terms and conditions of the MoU dated July 10, 2012, is evident from email dated December 27, 2012, addressed by the Director of the respondent No. 1 to members of the Tech Team which specifically stated that the terms and conditions of the of joining the new Joint Venture will be same as in Coral.

39. He stated that the genesis of the respondent No. 1 as a separate legal entity is itself contemplated in the MoU dated July 10, 2012; therefore, the applicability of MoU on respondent No. 1 in its entirety is evident from a conjoint reading of the two MoUs. He also stated that the fresh Certificate of Incorporation of the respondent No. 1 is dated October 30, 2012 and admittedly within a few days of its incorporation, i.e. on December 24, 2012, the respondent No.2 and Mr. Pradnyil Usgaonkar were inducted as directors of the respondent No. 1 for carrying out day to day operations of the company; the then Directors of Elcom Systems Pvt. Ltd. remained as independent directors of respondent no.1 with no day to day duties.

40. He stated that the purpose outlined above ex-facie does not limit the applicability of the Escrow Account to Arya & KDA PO alone and is in the nature of a general arrangement in terms of the

MoUs subsisting between the parties on date of writing such letter. Therefore, any attempt to twist the relationship between the parties to bring it outside the ambit of the MoUs is clearly an afterthought. He also stated that the petitioner's account maintained with ICICI Bank Neutral Citation Number:2022/DHC/004837 was a stressed account. He submitted that a letter dated January 30, 2013 was addressed to the bank requesting opening of an escrow account.

41. He stated that there was no transfer of technology, technical inputs or know-how in favor of the respondent No.1 by petitioner under MoU dated July 10, 2012, and that the technology has been gained by the respondent No.1 both directly and also obtained by respondent No.1 through KDA, through improper solicitation by disregarding terms and conditions of the MoU dated July 10, 2012.

42. He stated that the petitioner was not made aware of such orders from project sales clients, therefore, it could not assert its rights under the MoU qua project sales and it is only in or around 2020-2021 that petitioner came to know of such wrongful solicitation.He also stated that the respondent No. 1 is not the proprietor or owner of the trademark "IP@Core systems" and the design registration of Telephone with the respondent No.1 came to the knowledge of the petitioner and that design registration has been challenged and is currently pending both before this Court and the appropriate forum.

43. He also stated that the Coral Telecom/ petitioner had developed and designed this category of products against specifications of a specific overseas customer. He further stated that the invoices raised by KDA shows these model names which were earlier supplied by Coral Telecom and on later dates have been supplied by Elcom without knowledge of Coral Telecom, which is a clear violation of agreed terms as per MoU.

44. The learned counsel for the petitioner submitted that the Neutral Citation Number:2022/DHC/004837 decision of the Supreme Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, as summarized in the case of the Pravin Electricals v. Galaxy Infra, (2021) 5 SCC 671, states that the requirement under Section 11, involves only a "primary first view"

> and "mend only" to "trim the deadwood in the straightforward cases where dismissal is barefaced and pellucid". He also submitted that the Pravin Electricals (Supra) has been referred to arbitration even though there is dispute in validity of the agreement and the petitioner in the present case is in a far better position to pray for appointment of an Arbitrator

45. Mr. Bansal stated that the Investment Committee Note of the respondent shows that the respondent No.1 is a successor vehicle to carry out the rights and obligations of Tech Team under the MoU dated July 10, 2012. Furthermore, he stated that, on an analysis of the documents, the respondent No. 1 was created in its present avatar by change of name of an existing subsidiary of Elcom Systems vide change of name dated October 30, 2012 and the SHA specifically records the history of Tech Team and that it had disengaged from Coral Telecom vide MoU dated July 10, 2012. He further stated that in Clause 7, the roles of parties are set out and reference is made to obligations of Tech Team as per a „Business Plan and this „Business Plan is entirely based on the

"Committed Revenue" to be generated from business transferred from Coral Telecom to Tech Team under the MoU dated July 10, 2012, namely KDA, IAF and assured General Sales in terms of the Minimum Guarantee.

46. He stated that the commitments to provide loan would be Neutral Citation Number:2022/DHC/004837 triggered only upon receipt of revised Letter of Credit from KDA and Arya Communications, already given in favor of CODAS Innovations. Therefore, the Investment Committee Note referred, and demonstrates beyond doubt that respondent No. 1 is nothing more than the successor vehicle which is to step into the shoes of Tech Team.

47. He also stated that a third party stepping into the shoe of the signatory to an agreement containing an arbitration clause and claims its benefits, then such third party is equally bound by the arbitration clause as an assignee thereof notwithstanding that it is not a signatory to the same. In support for his submission, he has relied upon the judgments in the cases of Rajesh Gupta v Mohit Lata Sunda, MANU/DE/1149/2020, and judgments cited therein of the Supreme Court in Khardah Company Ltd. v. Raymon& Company Pvt Ltd, AIR 1962 SC 1810, Delhi High Court Divison Bench in Nirmala Jain v. Jasbir Singh, 2019 (256) DLT 186&A.D. Chawla v. Navrang Pictures, (1974 RLR 417), Rajasthan High Court in Aerens Gold Souk v SamitKavadia, 2008 (2) Arb LR 545 and Court of Appeals in Shayler v. Woolf, ((1946) 2 All ER 54.

48. He has also referred to the emails with regard to the knowledge of and intention to avail benefits under the MoU dated July 10, 2012 evinced in SHA/SPA, Investment Committee Note and MoU dated February 01, 2013.

49. In support of his submissions, he relied upon the judgments of the Supreme Court as shown below, wherein it is held that the existence of an arbitration agreement can be inferred even in absence of a formal signed agreement as inference can be drawn from Neutral Citation Number:2022/DHC/004837 documents exchanged between the parties like emails, letters, telex, telegrams and/or other means of communication.

a) Trimex International Fze Ltd. vs. Vedanta Aluminium Ltd. (2010) 3 SCC 1.

b) Govind Rubber Ltd. v. Louis Dreyfus Commodities (2015) 13 SCC477.

c) Buildmyinfra Pvt. Ltd. v. Gyan Prakash Mishra (Del HC) (Arb P.340/2022).

d) AmeetLalchand Shah. v. Rishabh Enterprises, 2018(15) SCC 678.

e) Power Grid Corporation of India Ltd. v. RPG Transmission Ltd. 2001 SCC Online Del 878.

50. He has contended that the judgments of the Supreme Court in MR Engineers & Contractors Pvt. Ltd. v. SomDutt Builders Ltd., (2009) 7 SCC 696 and Inox Wind Ltd. v. Thermo Cables Ltd., (2018) 2 SCC 519, are not applicable to the facts & circumstances of the present case.

51. He seeks prayers as made in petition.

52. Mr. Deepak Khurana, the learned counsel for the respondents at the outset stated that he is confining his submissions to the existence of a valid and subsisting arbitration agreement, which is the sine qua- non for appointment of an arbitral tribunal, and the same is without prejudice to the other rights, contentions and remedies of the respondent No.1 with regard to the averments / allegations / claims / dispute etc. in the petition.

53. He stated that the respondent No. 1 is not a party to the MoU Neutral Citation Number:2022/DHC/004837 dated July 10, 2012, which has been purportedly entered into between the Tech Team and Comm. Team of the petitioner Company. The arbitration clause being relied upon by the petitioner and pursuant to which the present petition has been filed for appointment of arbitrator is contained in the MoU dated July 10, 2012 to which the respondent No.1 is not a party.

54. He also stated that since the petitioner company is also not a signatory to the MoU dated July 10, 2012; the invocation of arbitration clause by the petitioner is wholly absurd, untenable and misconceived. He also stated that the respondent No.1 has never agreed to the terms and conditions contained in the said alleged MoU, much less the purported arbitration agreement contained in the said MoU.

55. He stated that the respondent No.2 is not the Managing Director of respondent No. 1. He was inducted as an additional director in the respondent No. 1 Company w.e.f. December 24, 2012 and was appointed as whole time director of respondent No.1, only on February 09, 2015. He also stated that it is incorrect to state that the respondent No. 2, is one of the first/founder directors of the respondent No.1 Company and is incorrect on the part of the petitioner to state that all activities of the respondent No.1 are conducted under the supervision and direction of the respondent No.2, as the respondent No.1 company is managed and run by its Board of Directors. He also stated that the contentions of the petitioner to state that the representing or agreeing that the Nominee Directors of the Elcom system would merely be a part time directors /independent directors, or would not exercise management of operational control or that their Neutral Citation Number:2022/DHC/004837 role would be limited to supervising and/or guiding the board meeting are incorrect.

56. He also stated that MoU dated July 10, 2012, shows that the signature of the respondent No.2 is as a witness and signature on the alleged MoU is not and cannot be on behalf of and/or under any official capacity which he holds for the respondent No. 1 Company inasmuch as whilst the alleged MoU was executed on July 10, 2012, the respondent No. 2 was inducted as a Director in the respondent No.1 Company from December 24, 2012 onwards, and it is therefore, only an attempt by the petitioner to somehow link the signature of the respondent No.2 on the alleged MoU with the respondent No. 1 Company without any basis.

57. He also submitted that the Clause 5 (Third Party) of Article IV(General) of the MoU dated July 10, 2012, states as under:

> "5. Third Parties- No person not a party to this MOU (including any employee of either Party or its Parent) shall have or acquire any rights by reason of this MOU nor shall any party hereto have any obligations or liabilities to such other person by reason of this MOU."

58. The learned counsel for the respondent No.1 stated that the contention, that "As already agreed between the parties the majority shareholding of 70% belonged to Sungroup through Elcom Systems as financial partners and remaining 30% to team of 8 shareholders consisting of members of the Tech.", does not amount to respondent No.1 company having agreed to or bound by the terms and conditions contained in alleged MoU dated July 10, 2012, as the 'Tech Team' purportedly constituted only 30% of the shareholding in the Neutral Citation Number:2022/DHC/004837 respondent No.1 and 70% of the shares of the respondent No.1 is owned by Elcom Systems Pvt. Ltd., which admittedly never executed or agreed to the terms and conditions in the MoU dated July 10, 2012, much less the arbitration clause contained therein. He also stated that the Share Purchase and Shareholders Agreement dated December 24, 2012 relied upon by the petitioner itself records that the aforesaid 30% shareholders had disengaged their interest in the petitioner Company.

59. It is his contention that the respondent No. 1 does not have any record of any such MoU dated February 01, 2013 alleged to have been executed with the petitioner and petitioner has failed to produce original of the said MoU with the respondent No.1 and/or before this Court. He also stated that the respondent No.1 does not have any record of any authorization conferred upon respondent No.2 to sign any such document on behalf of respondent, therefore, for the sake of argument, the MoU dated February 01,2013 was executed the same shall not be binding upon respondent No.1. He also stated that the MoU dated February 01, 2013 is a self-contained document containing its own terms & conditions.

60. Mr. Khurana also submitted that the petition having been filed after almost 9 years of the date of the said alleged MoU dated February 01. 2013, seeking appointment of arbitrator in respect of the alleged disputes between the parties is frivolous and the same is liable to be dismissed.

61. Further, the reference in the alleged MoU dated February 01, 2013 to an Agreement purported to have been signed between the petitioner and respondent No.2 as 'Background' has no significance or Neutral Citation Number:2022/DHC/004837 relevance, as ex-facie the alleged MoU dated July 10, 2012 has purportedly been executed between one Mr. Rajesh Tuli and one Mr. Rajeev Vats, with neither the petitioner nor the respondent No.1, being a party to it, and reference to an agreement signed between the Petitioner and the respondent No. 2, thus cannot be to the purported MoU dated July 10, 2012. Therefore, in the absence of an arbitration agreement between the parties hereto, the present petition under Section 11(6) is not maintainable and the same is liable to be dismissed.

62. He also submitted that during the year 2012 name of the respondent No.1 Company was changed from SRM Engineering Services India Pvt. Ltd. to Elcom Innovations Pvt. Ltd., at the time of name change of the respondent No.1, Mr. Shiv Vikram Khemka (inducted on December 05, 2002), Mr. Amar Singh Sehgal and Mr. Deepak Mehta (both inducted on January 03, 2003) continued to be the Directors in the respondent No.1 from Elcom Systems. Mr. Pradnyil Usgaonkar

and the respondent No.2 were inducted in the Board of the respondent No. 1 as Additional Directors w.e.f. December 24, 2012.

63. The respondent No. 1 placed various purchase orders pertaining to Electronics Manufacturing upon Elcom Systems and also have business transactions with the petitioner and there were various purchase orders pertaining to manufacturing which were placed by the petitioner on the respondent No.1.

64. He further stated that the respondent No.1 has been directly dealing with its clients including KDA and received orders in respect of its products from such clients and there was no profit/margin etc. Neutral Citation Number:2022/DHC/004837 sharing done, not even requested or demanded by the petitioner.

65. As regards the two manufacturing orders received by the petitioner from KDA and Arya Communications Ltd., it is stated that the petitioner collaborated with the respondent No.1 and expressed its interest in executing the said orders through the respondent No.1. The respondent No. 1 agreed to execute the said two orders received by the petitioner on the condition that the amount realized from execution of the said purchase orders would be credited into an Escrow Account as the petitioner's account maintained with ICICI Bank was a stressed account, the respondent No.1 insisted on opening of the Escrow account in respect of the purchase orders. It was agreed that the entire amount realised in the Escrow Account would be credited into the Beneficiary's Account i.e. of the respondent No.1. In support of this submission he has produced a letter dated January 30, 2013 and there has not been any profit/margin/liability sharing as claimed/stipulated under the purported MoU dated July 10, 2012 and/or the alleged MoU dated February 01, 2013.

66. It is the case of the respondents that there has been no transfer of Technical Know How or technology or any technical inputs in favor of the respondent No. 1 by the petitioner under the MoU dated July 10, 2012 as alleged by the petitioner or otherwise. He also stated that the respondent No.1, ever since October, 2012, has been running its own independent business and has been directly receiving and executing orders from various parties including KDA. The purchase orders are not routed through the petitioner as alleged. At no point of time the respondent No. 1 was making exclusive sales to the petitioner or the Neutral Citation Number:2022/DHC/004837 Comm. Team. There has been no back to back or otherwise sharing of any financial benefits by or between the parties.

67. Mr. Khurana stated that the MoU dated September 05, 2012 entered into between respondent and Elcom Systems with neither the petitioner nor the respondent No. 1 being a party to it and it is submitted that the MoU dated February 01, 2013 does not appear to be a document in public domain. The respondent stated that the documents filed with the petition have been unlawfully obtained by the petitioner and the petitioner cannot be permitted to rely on such documents.

68. He also contended that the Shareholders Agreement dated December 24, 2012, is a confidential document executed between Elcom Systems, the shareholders members and the respondent No.1 herein, with the petitioner not even being a party/signatory to it. He denied that the Elcom facilities

and/or the entity formed consequent to the MoU dated July 10, 2012. He stated that the formation of respondent No.1 was not in furtherance of any collaboration and denied that the members of the Tech Team under the SHA headed the management control of the respondent No. 1, nor was anything of such nature agreed between the parties.

69. He has submitted that respondent No.1 is the proprietor and owner of the trademark 'IP@Core systems' which is registered under the Trademarks Act, 1999 in its favor under no. 2943483 in Class 9 and 38 and the respondent No. 1 also has a design registration over the shape and configuration of Telephone under no. 264378 dated July 30, 2014. He stated the allegation of the petitioner is malicious over Field Neutral Citation Number:2022/DHC/004837 Exchanges and Ruggedized Telephone Sets and that petitioner does not have any proprietary or any right to the exclusive use of Field Exchanges and Ruggedized Telephone Sets, as the said Field Exchanges and Ruggedized Telephone Sets are being used/sold by many companies including the respondent No. 1 herein who are in the business of defence telecommunication.

70. Mr. Khurana argued that it is not the case of the petitioner that the arbitration clause in the alleged MoU dated July 10, 2012 stands incorporated by reference into the alleged MoU dated February 01, 2013. The respondents No.1 does not have any record of any such investment committee note and the filing of such alleged document which does not even bear any signature and passing it off as of respondent No.1, is an attempt to drag the respondent No.1 into a frivolous arbitration and make unlawful and illegitimate gains.

71. According to him, the sole question that arises for consideration of this Court, is whether the additional MoU dated February 01, 2013 was incorporated by reference to the arbitration clause/agreement contained in the MoU dated July 10, 2012. In the absence of such incorporation by reference, the present petition would not be maintainable. He also submitted that the additional MoU dated February 01, 2013, does not incorporate by reference to the arbitration clause contained in the MoU dated July 10, 2012 and it is evident from a bare reading of the additional MoU dated February 01, 2013.

72. In support of his submissions he has relied upon the judgment of the Supreme Court in the case of M.R. Engineers (supra) and Inox Wind Ltd. v. Thermocables Ltd. (2018) 2 SCC 519.

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73. He has also relied upon the judgment of this Court in the case of SMS Limited v. Oil and Natural Gas Limited 277(2021) DLT625, wherein it was held that the intent to incorporate must be apparent from the face of the later contract, and, that such incorporation should not result in repugnancy vis-à-vis any other covenant of the later contract.

74. He submitted that the petitioner cannot be permitted to take a somersault from its case set up by it in its petition and the Notice for Invocation of Arbitration. He stated that the scope of Article IV, Clause 7 of the MOU dated July 10, 2012 which provides that the MoU shall be binding upon the parties and their respective successors and permitted assigns, is very limited.

75. If read in the manner as the petitioner is reading the said provision i.e. there is an automatic succession, it would completely negate and render nugatory Clause 8, Article IV, which specifically stipulates that that the petitioner shall enter into a binding commercial contract after formation of the new entity. If the argument of the petitioner that by virtue of Article IV, Clause 7, the MoU dated July 10, 2012, shall be binding upon the successors and assigns of both parties and that the respondent No.1 is deemed to have agreed to and accepted the terms of the said MoU, and the arbitration clause provided there under, were to be accepted, the same would result in negating the agreement between the parties contained under Article IV, Clause 8 envisaging a separate binding commercial contract between the petitioner and the new entity. This would amount to doing violence to Article IV, Clause 8 of the MoU dated July 10, 2012 and Neutral Citation Number:2022/DHC/004837 would in-fact make the said clause under the MoU completely redundant.

76. He also stated that the judgment of a co-ordinate bench of this Court in the matter of Rajesh Gupta (Supra), shall not be applicable here, as the facts of that case are wholly different and distinct from the facts of the present case.

77. He also stated that the petitioner cannot be permitted to sail in two boats at the same time inasmuch as on the one hand it is stated that the parties were required to enter into a separate binding contract, and on the other hand, it is stated that by virtue of being a successor of the Tech Team, the respondent No.1 agreed to be bound by the terms of the MoU dated July 10, 2012. It is not the case of the petitioner that the respondent No.1 was the successor or assignee or transferee of all rights and obligations of the Tech Team under the MoU dated July 10, 2012. He seeks the dismissal of the petition.

ANALYSIS:-

78. Having heard the learned counsel for the parties and perused the record, the issue which arises for consideration is whether the petitioner is entitled to the prayer made in the petition for appointment of an Arbitral Tribunal. The petitioner has sought the appointment of an Arbitral Tribunal on the basis of Article IV of the MoU dated July 10, 2012 read with MoU dated February 1, 2013.

79. The MoU dated July 10, 2012 was executed between the Comm Team and the Tech Team of Coral Telecom, i.e. the petitioner Company for maintaining mutual non-compete arrangement in the „Present Domain , inasmuch as the Comm Team was confined to the Neutral Citation Number:2022/DHC/004837 sales and marketing of products and Tech Team was confined to the design, development, manufacture and technical support. The Tech Team was to confine to the „Present Domain and not take up any marketing activity in the „Present Domain . It included developments / modification / enhancement and additions which may be required to enhance the value of products or customer requirement. The MoU also contemplates, the parties were free to design / develop / manufacture / trade / buy / sale / rent / lease and / or deal in any product outside the „Present Domain . It was obligated that the sale of the products in the „Present Domain shall be, by the Comm. Team. The sale includes general sales, project sales and it is clearly

stated such sales can be exemplified by the orders from the KDA.

80. In substance, the MoU would reveal that the Tech Team had obligated with respect to "Present Domain" products to the Comm Team which continued to operate under the aegis of the Petitioner. It also contemplates that the MoU shall be binding upon the parties, their respective "successors" or "permitted assigns".

81. Thereafter the Tech Team had formed a Company called as CODAS Innovations Pvt. Ltd., which entered into a MoU with Elcom Systems Pvt. Ltd. on September 05, 2012. This MoU contemplated that the parties to the MoU are desirous to join hands to expand the business jointly by way of setting up a joint-venture between them or by taking over equity stake by Elcom in CODAS or in some other manner as may be mutually agreed between the parties. Accordingly, a Share Purchase and Holders Agreement was executed between 8 members of the "Tech Group", Elcom Systems Pvt. Ltd. and Elcom Neutral Citation Number:2022/DHC/004837 Innovations Pvt. Ltd., whereby it was agreed that the 8 members of the "Tech Group" shall purchase 30% shares in Elcom Innovative Pvt. Ltd. and Elcom Systems remaining with 70% of the shares in the Elcom Innovations Pvt. Ltd. The case of the petitioner in the Notice Invoking the Arbitration is primarily the following:

> "4. That our client owing to needs of diversification in an ever expanding telecom market had sought to streamline its business model by entering into a Memorandum Of Understanding [MOU) dated 10.07.2012 (hereinafter referred to as the 'said MOU') thereby bifurcating its Management team into 2 groups; namely, 'Commercial Team' or 'Comm Team' comprising of Enterprise business, ERP and other commercial and marketing functions and 'Technical Team' or 'Tech Team' comprising of factory, R&D and such other technical, product development and production functions.
>
> 5. That under said MOU the 'Technical Team' in furtherance of streamlining the business model of our client had agreed to disengage from Coral Telecom Ltd. and form a separate business entity and the said MOU represented articles of arrangements of such proposed business venture. It is pertinent to mention that, such proposed separate business entity was to be solely formed for furtherance of an efficient business model in the Present Domain while giving freedom to the two teams to diversify and expand independently in other unrelated domains. It in no way represented a competing business with our client. It was specifically agreed that such was an enabling arrangement so that both parties could engage themselves in their strength areas (Article III, Clause 1).
>
> 6. That it is pertinent to mention that the teams formed under said MOD had expressly agreed to work together in Present domain that included development of existing repertoire of products under General Sales and any developments thereof where order requires customization, Transfer ofTechnology or substantial technical inputs under Project Sales. Further, pricing of products under General Sales was agreed to be computed @ 129% of the Bill of Material [Article II, Clause 2 Neutral

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(a)], while pricing of products under Project Sales was agreed to be computed on basis of Division of Gross Margins [Article II, Clause 2 (b)] and the ratio of distribution of such gross margin was agreed at 32,76% and 67.24% to the Tech Team and Comm Team respectively. Further, it was specifically agreed that orders from M/s Kongsberg Aerospace &Defence AS, Norway (KDA) came within the category of Project Sales [Article II, Clause 1 (b)].

7. That under such arrangement the purchase orders were to be routed through the Comm Team and onwards to the Tech Team, while all sales were to be exclusively made to Comm Team by Tech Team after designing developing and manufacturing products as per purchase order (Article I, Clause 6). Further, final sale/marketing to end customer was to be made by Comm Team (Article II, Clause 8). Both teams were to maintain full transparency qua negotiation of price, payment terms, commercials, deliverables and technical specifications for such Project Sales (Article II, Clause 3) and all advances payments or other financial benefits received, from Project Sale customer were to be shared by both parties on a back to back basis (Article II, Clause 5).

8. That the said MOU was agreed to be binding upon the parties and their respective successors and assigns (Article IV, Clause

7). Further Article IV, Clause 8 of said MOU provided that Coral Telecom Ltd would enter into a binding contract after formation of a new entity represented by the Comm Team and Tech Team respectively.

9. That it was further agreed between the parties that our client would transfer its Plant & Machinery & Technical Know How (Transfer of Technology) to the Tech Team whenever new company is formed in terms of said MOD.

10. That subsequently in terms of the said MOD a new company CODAS Innovations was formed by members of the Tech Team.

However, owing to such company aspiring for further growth in its place there was formation of a new company, named Elcom Innovations Pvt Ltd. (noticee herein) between members of CODAS, a team of 8 key members (Tech Team) and Elcom Systems (Sungroup company). The majority shareholding of Neutral Citation Number:2022/DHC/004837 70% belonged to Sungroup and remaining 30% to team of 8 shareholders constituting of members of the Tech Team under said MOD who now formed part of Elcom Management. It is pertinent to mention that such team of 8 shareholders constituting of members of the Tech Team also entered into a Shareholder's Agreement with you noticee.

11. You the Noticee represented yourself to be in full agreement with the terms & conditions of the said MOU and willing to undertake responsibilities and business relations under such MOU as successor of the Tech Team. Consequently, another additional MOU dated 01.02.2013 was entered into between you noticee and our client in terms of Article IV, Clause 8 of said MOD dated 10.07.2012. That under such additional MOD, you noticee duly acknowledged and accepted all terms and conditions under the said pre-existing MOD dated 10.07.2012 and further agreed that you noticee will manufacture and supply technical goods based on technology owned by our client. It was interalia further agreed that for Specialised Projects (Project Sales) the two companies would work by sharing the Gross Contribution from such projects in the Ratio of 30:70 in favor ofyounoticee (Elcom) and our client (Coral).

12. That on the basis of you noticee's representations and assurances, our Client transferred its abovementioned plant & machinery and Technical Know How (Transfer of Technology) to the Technical Team (now Elcom's Management) in terms of said MOU. Further, you noticee started undertaking specialised projects (Project Sales) as per said MOD and additional MOD, which were hitherto being handled by our client.

13. That our client being constantly involved in expansion of its business in telecom sector during the period from 2013 to 2019 and trusting the actions of you noticee and members of Tech Team constituting your management in good faith did not keep thorough check on activities being carried out by you and your management as regards dealings made under Specialized Projects and merely allowed you noticee to exploit the technology owned by our client for carrying out such Project Sales without scrutiny. That our client was always kept under the impression by you noticee and your management that all Neutral Citation Number:2022/DHC/004837 dues under the said original MOU and additional MOU would be properly shared between the parties as and when Specialized Project Orders were received from clients. It is pertinent to mention that unknown to our client, you noticee had started suppressing details of Specialized Projects and other sales under present domain after a certain period thereby taking wrongful advantage of the trust reposed on you by our client.

14. However to the dismay of our Client, in March of 2019 it carne to light for the first time that one of its major clients under category of Specialized Projects being one Kongsberg Defense & Aerospace, was buying Field Exchanges & Ruggedized Telephone Sets directly from you noticee (Elcom Innovations Pvt Ltd.) by grossly disregarding the terms and conditions and arrangements under the said MOU and additional MOU as also proprietary rights of our client in such products. That our client had been completely kept in the dark as regards direct solicitation by you noticee of its aforesaid client and failure to honor commitments of profit sharing and other liabilities under the said MOUs (both Original and Additional MOU). That the product being directly procured from you noticee, is technology owned and possessed by our client (Coral Telecom Ltd.) and our client at no point of time allowed you noticee to directly solicit its clients while ignoring all obligations and arrangements under the said MOUs.

15. That our client repeatedly confronted and communicated to its customer Kongsberg Defence& Aerospace with several emails pointing out that the actions of dealing directly with you noticee was in blatant breach of contract for nondisclosure dated 10.03.2010 between our client and Kongsberg,

whereunder our client interalia had agreed for Transfer of Technology for said product in favor of Kongsberg on the condition that its proprietary information would be safeguarded from unauthorizeduse.

16. That our client had extensively shared product designs and manufacturing processes of said product with Kongsberg and same had been unauthorizedly shared by Kongsberg with you noticee on account of alluring and wrongful solicitation by management of you noticee. Further, such proprietary Neutral Citation Number:2022/DHC/004837 information has been used by you noticee in an unauthorized manner to directly solicit business qua said product under Specialized Project category by ignoring the terms and conditions under the said MODs. That our client has no MOD or Agreement in place with you noticee and Elcom doesn't have any right, whatsoever, to sell our client's products without our client's consent and applicable payment of royalty/profit sharing under the said MODs.

17. That on receiving no reply from Kongsberg our client confronted you noticee as regards wrongful business solicitation and misuse of its proprietary information. That you Noticee constantly assured our Client that you would make the necessary payments towards royalty/profit sharing but were currently unable to make payments on account of certain unforeseen financial difficulties. You the Noticee had alleged that as you had not received payments in your business transactions, you the Noticee were unable to make payments to our Client as per the agreed terms. You the Noticee assured our Client that as soon as such payments were received by you, a lumpsum payment towards repayment of the outstanding royalty/profit sharing would be made by you the Noticee. However despite such repeated assurances and acknowledgments by you the Noticee and despite repeated reminders and follow-ups by our Client in that regard, no payments were made by you the Noticee towards royalty/profitsharing while you noticee surreptitiously continued to conduct Specialized projects behind our client's back in complete breach of said MODs.

18. That our client has recently come to know that you noticee have successfully executed the KDA (Kongsberg) project worth about Rs. 100Cr during these difficult times of pandemic during FY 2020-21. Accordingly, our client had sent you an email dated 28.04.2021 and demanded its share of the gross contribution between Tech Team (now Elcom) and Coral as per said MODs. A reminder email was sent on 31.05.2021, but there has been no reply from your end.

19. That such non-responsive attitude from the end ofyou notice is most shocking to our client as our client till date continues to Neutral Citation Number:2022/DHC/004837 have business relationship with you under General sales category. In light, of such continued business relations it is unacceptable to our client that you noticee have diverted all clients/ profits under Specialised Projects in your own account and still continue to reap benefits of the said MODs qua General Sales.

20. That in light to aforesaid agreement between our client and you noticee, such gross contribution is due and payable by you noticee at the earliest. As such as on date of this notice and after accounting/calculating the total order value, gross margin under KDA Purchase Order the gross contribution is calculated as tabulated in 'Annexure A' to this notice and an amount of Rs. 43,09,00,000/ - (Rupees Forty three Crores and Nine Lakhs Only) is due and payable by you the

Noticee to our Client towards overall gross contribution for KDA Purchase Order as principal amount. That you noticee are further liable to pay interest on such principal amount calculated @9% p.a. compounded quarterly on account of your default in making payments in that regard from the date of this notice till date of payment.

21. Our client is currently not in a position to give an exhaustive list of Project Sales & General Sales under Present Domain undertaken by you noticee behind our client's back and our client has a reasonable apprehension that the above instance is just one of Specialised Projects/Project sales which has been surreptitiously carried out by you noticee to deny our client's right to profit/royalty under the MODs and its proprietary right in said product.

22. That in view of the above stated facts it is evident that you theNoticee have intentionally refused, neglected and failed to pay the outstanding amounts due and payable to our Client despite repeated reminders and communications. By your actions, you the Noticee have committed material breach qua agreed terms on which the said MODs were entered into & caused wrongful loss to our Client whilst unlawfully enriching yourself. As such you the Noticee have unlawfully withheld the aforementioned amount (Gross Contribution under Specialized Projects) and have failed to make payment of your outstanding Neutral Citation Number:2022/DHC/004837 and admitted dues to our Client amounting to a material breach of the said MODs. That you noticee have committed material breach of said MODs by evading arrangement for placing of orders & marketing/ sales, thereby wrongfully soliciting customers of our client. That you notice have committed material breach of said MODs by evading requirements of transparency qua negotiation of price, payment terms, commercials, deliverables and technical specifications for project sales. Further, you noticee have committed material breach of said MODs by misusing plant & Machinery & Technical Know-How duly transferred to you by our client and/or obtained unauthorizedly from Kongsberg Defence& Aerospace.

23. That on account of such default in making payment, you the Noticee are liable for payment of the principal amount plus interest thereon. Further, you noticee are liable to disclose your accounts with regards to projects pertaining to Present Domain undertaken by you noticee during the period 2013-2021 when our client was not offered scrutiny of your accounts on account of wrongful suppression of same by you. Further, payments may be made to our client of such sum as may be found to be due to it under said MODs on the taking of accounts."

(Emphasis Supplied)

82. In substance, it is the case of the petitioner that the petitioner has transferred the plant and machinery and the technical know-how to the Tech Team, which is / who are now shareholders of respondent No.1. The petitioner had also relied upon a further MoU executed between the petitioner and the respondent No.1 dated February 01, 2013, to contend that the respondent No.1 has acknowledged and accepted all the terms and conditions under the pre-existing MoU dated July 10, 2012 and further agreed that the respondent No.1 will manufacture and supply semi-finished cards and modules based on the technology owned by the petitioner. The MOU dated February 01, Neutral Citation Number:2022/DHC/004837 2013 is reproduced as under:

"Memorandum of understanding between Coral Telecom Ltd &Elcom Innovations Pvt Ltd.

Background: Agreement signed between Coral Telecom Ltd & Arun Sharma along with his team who are now part of the Elcom management.

It is agreed between Coral Telecom Ltd &Elcom Innovations Pvt. Ltd. that Elcom will manufacture & supply semi-finished cards & modules manufactured based on the technology jointly owned by Coral Telecom Ltd and the Elcom management. Normally these supplies will be at the rate of 1.25 time the Bill of Material but for specialized projects the two companies will work on sharing the gross contribution from such projects in the ratio of 30: 70 in favor of Elcom& CTL.

Elcom team will continue to develop & support future development on this technology at mutually agreed commercial terms.

This is also to confirm that, that both companies operate at an arm's length relationship & are independent and unrelated legal entities while they would continue to support 'each other in mutual business Interest."

83. The case of the petitioner is that the parties having agreed for Specialised Projects, the two companies will work by sharing the gross contribution from such projects in the ratio of 30:70 between the respondent No.1 and petitioner, but the respondent No.1 has failed to adhere to and the disputes need to be adjudicated through the process of arbitration in terms of Article IV of the MoU dated July 10, 2012, read with the MoU dated February 01, 2013.

84. The submissions of Mr. Khurana, primarily are the following:

i. The additional MoU dated February 01, 2013, does not incorporate the arbitration clause contained in the MoU dated Neutral Citation Number:2022/DHC/004837 July 10, 2012, and in the absence of such incorporation by reference, the petition is not maintainable. According to him, the law of incorporation by reference as propounded by the Supreme Court in the case of M.R. Engineers (supra) clearly contemplates that a mere reference to a document would not have the effect of making arbitration clause from that document part of the contract. It requires a conscious acceptance of the arbitration clause from any document of the parties as part of their contract, before such arbitration clause could be read as part of the contract between the parties. ii. The purported agreement between the petitioner and the respondent No.1 under the alleged MoU dated February 1, 2013 is different and at variance with the purported MoU dated July 10, 2012, inasmuch as;

(a) the MoU dated July 10, 2012, is in respect of revenues derived from finished products listed in Exb.-A (in the said MoU), whereas the additional MoU dated February 01, 2013, is in respect of manufacturing and supply of raw-material, i.e.,

semi-finished cards and modules;

(b) Article II, Clause 2(a) of the MoU dated July 10, 2012 provides that, in case of Joint sales, the price shall be computed at 129 % of the bill of material exclusive of such taxes, duties etc. whereas the MoU dated February 1, 2013 provides that normally the supplies will be at the rate of 1.25 time the Bill of Material, Neutral Citation Number:2022/DHC/004837

(c) Article II Clause 2(a) of the MoU dated July 10,2012 provides that in case of project sales, ratio of distribution of gross margin shall be 32.76% and 67.24% to the Tech Team and the Commercial Team respectively.

Whereas, the MoU dated February 1, 2013 provides that for specialized projects the two companies will work on sharing the gross contribution from such projects in the ratio of 30: 70 in favor of Elcom, (respondent No.1)& CTL, (petitioner herein). Pertinently the distribution of gross margin between the Tech Team and Commercial Team and distribution of gross contribution between the respondent No.1 and the petitioner is changed in additional MoU dated February 01, 2013.

Therefore, according to him, the terms and conditions contained in the two MoUs are different. That apart, there is no incorporation of arbitration clause contained in MoU dated July 10, 2012 into additional MoU dated February 1, 2013.

85. He also stated that the petitioner cannot be allowed to take a somersault from its case set up in the petition and notice for invocation of arbitration inasmuch as the scope of Article IV (General), Clause 7 of the MoU dated July 10, 2012, which provides that the MoU shall be binding upon the parties and their respective successors and permitted assigns, is very limited. Firstly, if read in the manner the petitioner is reading, the said provision, i.e., there is an automatic succession, it would completely negate and render Clause 8 of the Article IV, which specifically stipulates that the petitioner shall enter into a binding Neutral Citation Number:2022/DHC/004837 commercial contract after formation of the new entity, otiose.

86. The plea of Mr. Khurana is that the arbitration clause in the MoU dated July 10, 2012, having not been incorporated in the MoU dated February 01, 2013, this petition is not maintainable. To answer this plea, it is necessary to have a closer look at both the MoUs.

87. I have already referred to the nature of the MoUs above. Mr. Khurana is right in differentiating the MoU dated July 10, 2012 and the MoU dated February 01, 2013, as the products in both the MoUs are different. If the MoU of February 01, 2013, was relatable to „Present Domain products, as mentioned in Exh.A to the MoU dated July 10, 2012, there was no necessity / requirement to execute a fresh MoU dated February 01, 2013, with regard to the same products. There are other aspects, which brings out the difference / variation in both the MoUs. The MoU dated July 10, 2012 provides for general sales and price to be computed at 129% of the bill of material. Whereas, MoU dated February 01, 2013 provides for supplies at the rate of 1.25 times the bill of the material.

88. Similarly, in case of product sales the distribution of gross margins shall be 32.76% and 67.24% respectively to the Tech Team and Comm Team. Whereas the MoU dated February 1, 2013 stipulates the sharing of gross contribution from such projects in the ratio of 30:

> 70 in favor of respondent No.1 and the petitioner respectively. This variation surely suggests that the MoUs dated July 10, 2012 and February 01, 2013 operate in different spheres / with different conditions. If that be so, the arbitration clause in MoU dated July 10, 2012, having not been incorporated in MoU dated February 01, 2013, Neutral Citation Number:2022/DHC/004837 any dispute involving the MoU dated February 01, 2013 cannot be the subject matter of invocation, for appointment of an Arbitrator.

89. Mr. Khurana is justified in relying upon the judgment of the Supreme Court in the case of M.R. Engineers (supra) wherein the Supreme Court has, in paragraphs 22 and 24, held as under:-

> "22. A general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.
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> xxx xxx xxx
>
> 24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:
>
> i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled:
>
> (1) the contract should contain a clear reference to the documents containing arbitration clause, (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract, Neutral Citation Number:2022/DHC/004837 (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.
>
> (ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made),only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the executionor performance of that contract shall be in terms of another contract(which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and, conditions or Neutral Citation Number:2022/DHC/004837 that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form apart of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties."

90. Even in Inox (supra), the Supreme Court by referring to the M.R. Engineers (supra), has in paragraph 19, held as under:-

"18. We are of the opinion that though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause. In M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 :

(2009) 3 SCC (Civ) 271] this Court restricted the exceptions to standard form of contract of trade associations and professional institutions. In view of the development of law after the judgment in M.R. Engineers [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] case, we are of the opinion that a general reference to a consensual standard form is sufficient for incorporation of an arbitration clause. In other words, general reference to a standard form of contract of one party will be enough for incorporation of arbitration clause. A perusal of the passage from Russell on Arbitration, 24th Edn. (2015) would demonstrate the change in position of law pertaining to incorporation when read in conjunction with the earlier edition relied upon by this Court in M.R. Engineers case [M.R. Neutral Citation Number:2022/DHC/004837 Engineers & Contractors (P) Ltd. v. Som Datt Builders

> Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] . We are in agreement with the judgment in M.R. Engineers case [M.R. Engineers & Contractors (P) Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696 : (2009) 3 SCC (Civ) 271] with a modification that a general reference to a standard form of contract of one party along with those of trade associations and professional bodies will be sufficient to incorporate the arbitration clause."

91. In SMS Limited (Supra), a Coordinate Bench of this Court has, in paragraph 69 held as under:-

> "69. As to when such incorporation may be said to have taken place, albeit in thecontext of Section 7(5), the very first test, as postulated by the Supreme Court, in M.R.Engineers & Contractors Pvt. Ltd. v. SomDatt Builders Ltd. MANU/SC/1150/2009 :(2009) 7 SCC 696, was the following:
>
> "An arbitration clause in another document, would get incorporated into acontract by reference, if the following conditions are fulfilled: (i) The contractshould contain a clear reference to the documents containing arbitration clause,(ii) the reference to the other document should clearly indicate anintention toincorporate the arbitration clause into the contract, (iii) The arbitration clauseshould be appropriate, that is capable of application in respect of disputesunder the contract and should not be repugnant to any term of the contract."

Neutral Citation Number:2022/DHC/004837 This test, though prescribed in the context in Section 7(5), in my opinion, underscorestwo of the fundamental principles governing the answer to any question regardingincorporation, by reference, of the covenants of one contract into another, viz.,firstly,that intent to incorporate must be apparent from the face of the later contract, and,secondly, that such incorporation should not result in repugnancy vis-a-vis any othercovenant of the later contract."

92. Having said that, the issue which now arises for consideration is whether the arbitration clause in the MoU dated July 10, 2012, shall bind the petitioner and the respondent No.1, so as to refer them to arbitration with regard to dispute in respect of MoU dated July 10, 2012. The MoU dated July 10, 2012 do state that the Comm Team and Tech Team to mean its "successor" and "permitted assigns".

93. It is the case of the petitioner, that the petitioner owing to need of diversification in an ever expanding telecom market had sought to streamline the business model by entering into an MoU dated July 10, 2012 thereby bifurcating the Management Team into two groups; (i) Commercial Team or Comm. Team and; (ii) Technical Team or Tech Team. Under the said MoU, the Tech team had agreed to disengage from Coral Telecom and form a separate business entity whereas the Comm. Team will continue to operate under the ageis of Coral Telecom. In that sense, the petitioner is the successor or the permitted assign, and was to carry out the sales of the „Present Domain products manufactured by the Tech Team.

94. It is the case of the petitioner as urged by Mr. Bansal that, in Neutral Citation Number:2022/DHC/004837 terms of Article IV, Clause 8 of the MoU dated July 10, 2012; the Tech Team has become part of the respondent No.1, and that the petitioner has transferred its plant and machinery, and Technical Know-how to the Tech Team, which is now respondent No.1 and pursuant thereto, the respondent No.1 is undertaking Specialised Project (project sales) which were to be realised through the petitioner.

95. The case of the petitioner in the notice, as reproduced above, is that the respondent has executed the project in „Present Domain worth 100 crores during FY 2020-21 with KDA against which it had demanded the share of the gross contribution between the Tech Team (now respondent No.1) and the petitioner. The products which are in the „Present Domain are being sold to KDA by respondent No.1, which according to the petitioner should have been sold through the Comm Team / petitioner who shall be entitled to the benefits. In this regard, reference may be made to paragraphs 18, 20 and 21 of the above said notice, which I have reproduced above.

96. Whereas, Mr. Khurana has controverted the pleas of Mr. Bansal by stating as under:-

> (i) The majority shareholding of 70% belonged to the Sun Group through Elcom Systems as financial partners and remaining 30% to team of eight shareholders consisting of members of the Tech does not amount to respondent No.1 Company having agreed to or bound by the terms and conditions contained in the MoU dated July 10, 2012 as the Tech Team had only 30% of the shareholding.

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(ii) The petition, having been filed after almost 9 years from the date of the MoU dated February 01, 2013, seeking appointment of arbitrator in respect of the alleged disputes between the parties, is liable to be dismissed.

(iii) The respondent No.1 has been directly dealing with the clients including KDA and received orders in respect of the products from such clients including KDA and there was no profit sharing margin done, not even requested or demanded by the petitioner.

(iv) There is no transfer of technical knowhow, technology or any technical inputs in favor of the respondent No.1 by the petitioner under the MoU dated July 10, 2012 as alleged by the petitioner or otherwise.

(v) The respondent No.1 since October 2012 has been running its own independent business and has been directly receiving and executing orders from various parties including KDA.

(vi) The respondent No.1 is the proprietor and owner of the trademark „IP@Core System and as such, selling Field Exchange and Ruggedised Telephone Sets, as are being sold by many other companies.

Suffice to state that, the above submissions are the defenses of the respondent No.1 against the claim(s) of the petitioner. The same cannot be gone into, given the limited scope of Section 11(6) of the Act of 1996. The respondent No.1 can raise all the aforesaid Neutral Citation Number:2022/DHC/004837 pleas in arbitration, and it is the Ld.Arbitrator who shall be competent to decide the same.

97. Even on limitation, it is the case of the petitioner that, it has come to know about the fact that one of its major clients, KDA, was buying Field Exchange and Ruggedised Telephone Sets directly from the respondent No.1 disregarding the terms and conditions and arrangements under the MoU. The question of limitation is a mixed question of fact and law, which requires evidence to be lead to prove the same. Even such a plea can be urged before the Ld.Arbitrator for a decision.

98. It is true that Tech Team has formed a company CODAS Innovations Pvt. Ltd. but it is also a fact that eight members of the Tech Team who signed the MoU dated July 10, 2012, had bought equity in respondent No.1 company to the extent of 30%. The Share Purchase and Shareholder Agreement give reference to the MoU dated July 10, 2012 and it is the case of the petitioner that Share Purchase and Shareholder Agreement recognise that the aforesaid 30% shareholding had disengaged the Tech Team s in the petitioner company.

99. In that sense, the respondent can be called the "successor" of the Tech Team or a "permitted assign". So, it needs to be decided whether respondent No.1 is selling the "present domain" products to third parties including KDA, by not routing it through the petitioner. If yes, then the sale will be at variance with MoU dated July 10, 2012. Under both the eventualities, the arbitration clause in the MoU dated July 10, 2012 shall be binding on the respondent No.1.

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100. So, it is necessary to determine in what capacity and under what arrangement, the respondent No.1, was / is selling the „Present Domain products to KDA and the consequences thereof.

101. The law with regard to the scope of Section 11(6) of the Act of 1996, is quite well settled by the Supreme Court. In the case of Vidya Drolia and Ors. (supra) the Supreme Court has in paragraphs 154 to 154.3 and 244 to 244.4, held as under:

> "154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:
>
> 154.1. Ratio of the decision in Patel Engg. Ltd.

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

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

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-

arbitrability post the award in terms of sub-

clauses (i), (ii) or (iv) of Section 34(2)(a) or sub- clause (i) of Section 34(2)(b) of the Arbitration Neutral Citation Number:2022/DHC/004837 Act.

xxx xxx xxx

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

> 244.1. Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.
>
> 244.2. Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood. 244.3. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.
>
> 244.4. The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer""
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> xxx xxx
>
> (Emph

> 102. In Sanjiv Prakash v. Seema Kukreja (2021) 9 SCC 732, a three judge bench of the Supreme Court had opined on the interference of the Court under Section 11 (6), and held that the Court at the referral stage can interfere only when it is manifest that the claims are ex-facie time barred and dead, or there is no subsisting dispute. The relevant paragraphs 20 & 21 are reproduced as under:-
>
> Neutral Citation Number:2022/DHC/004837 "20. The Court in Vidya Drolia case then concluded, on the facts of that case, that it would be unsafe to conclude one way or the other that an arbitration agreement exists between the parties on a prima facie

> review of facts of that case, and that a deeper consideration must be left to an arbitrator, who is to examine the documentary and oral evidence and then arrive at a conclusion.
>
> 21. Likewise, in BSNL v. Nortel Networks (India) (P) Ltd.

another Division Bench of this Court referred to Vidya Drolia and concluded:

> "46. The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felguera and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not resurrected the pre-amendment position on the scope of power as held in SBP & Co. v. Patel Engg. Ltd.
>
> 47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal."

(Emphasis Supplied)

103. In view of the above position of law, this Court holds that an Arbitrator need to be appointed to adjudicate the disputes between the parties.

104. Accordingly, this Court appoints Justice Dipak Misra, Former Chief Justice of India (Mob.No.9560333111) as the Ld. Arbitrator, who shall adjudicate the disputes between the parties, through claims and counter claims, if any. All the pleas of the parties, both on facts and in law are left open to be decided by the Ld. Arbitrator. The fee of Neutral Citation Number:2022/DHC/004837 the learned Arbitrator shall be regulated in terms of Fourth Schedule of the Act of 1996. He shall give his disclosure under Section 12 of the Act.

105. A copy of this order shall be sent to Justice Dipak Misra (Retd.) through WhatsApp.

106. The petition is disposed of. No costs.

I.A. 8869/2022 (for directing the petitioner to file the original MoU dated February 01, 2013 on record) Dismissed as infructuous.

V. KAMESWAR RAO, J NOVEMBER 15, 2022/aky/jg