IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 17.02.2022

\+ **<u>ARB.P. 975/2021 and IA Nos. 12836/2021 & 14638/2021</u>**

VIJAY KUMAR MUNJAL AND ORS. ..... Petitioners

versus

PAWAN MUNJAL & ORS. ..... Respondents

<u>Advocates who appeared in this case:</u>

For the Petitioner: Mr Gopal Subramaniam, Senior Advocate, Mr Parag P. Tripathi, Senior Advocate with Mr Sanjeev Kapoor, Mr Sahil Narang, Mr Ankur Sangal, Mr Dhritiman Roy, Ms Pragya Mishra, Ms Ananya Bhat, Mr Madhavam Sharma, Mr Ayushman Kacker, Mr Vishakha, Advocates.

For the Respondents: Dr. Abhishek Manu Singhvi, Senior Advocate, Mr. Rajiv Nayar, Senior Advocate, Mr. B.B. Gupta, Senior Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit Banati, Ms. Manavi Agarwal, Mr. Saurabh Seth, Mr. Aman Sharma and Mr. Achal Gupta, Advocates for Respondent Nos.1 and 3.

Mr Mukul Rohatgi, Senior Advocate Mr Sandeep Sethi, Senior Advocate, Mr Akhil Sibal, Senior Advocate with Mr Sidharth Chopra, Mr Kanishk Kumar, Mr Muktesh Maheshwari, Ms Abhiti Vachher, Ms Asavari Jain, Ms Shriya Misra, Advocates for Respondent No. 2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

Introduction

1. The petitioners have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter '**the A&C Act**'), *inter alia,* praying that an arbitrator be appointed, on behalf of the respondents, to adjudicate the disputes that have arisen between the parties in relation to the Family Settlement Agreement dated 20.05.2010 (hereafter the '**FSA**') and Trade Marks and Name Agreement dated 20.05.2010 (hereafter the '**TMNA**').

2. The Munjal Family, a well-known business family, comprises of family members of four brothers (since deceased) – Late Shri Dayanand Munjal, Late Shri Satyanand Munjal, Late Shri Brij Mohan Lall Munjal and Late Shri Om Prakash Munjal (hereafter the '**Munjal Brothers**').

3. The petitioners state that the Munjal Brothers established the business of bicycle spare parts in Amritsar, India in 1944. In 1956, the Munjal Brothers commenced manufacturing key components of bicycle and established a manufacturing plant in Ludhiana. Over a period of time, the Munjal Group diversified its business in the automotive sector, manufacture of bicycles and its components, and the financial sector

including other such services. The Munjal Group comprises of several operating and investment companies (‘**Munjal Group Companies**’), Hindu Undivided Families of the members of the Four Family Groups (‘**Munjal HuFs**’), partnerships (‘**Munjal Partnerships**’), trusts (“**Munjal Trusts**”) and association of persons (‘**Munjal AoPs**’). The Munjal Group Companies, Munjal HuFs, Munjal Partnerships, Munjal Trusts and Munjal AoPs are hereafter collectively referred to as the ‘**Munjal Group Entities**’.

4. The petitioners state that the Munjal Group started using the name / brand / trademark “Hero” and its variants in connection with its businesses from 1953 onwards. On 13.06.1966, the Munjal Brothers, through their partnership firm, M/s. Hero Cycles Industries, applied for and obtained registration of the trademark “Hero” in Class 12 under application no. 235780. Further, the Munjal Brothers/entities of the Munjal Group also applied for registration of other trademarks containing the word “Hero” and/or its variants.

5. It is stated that on 02.03.1993, the Munjal Brothers established a firm, named Hero Exports. The said entity is engaged in exporting bicycles under the brand/trademark “Hero” to certain specified territories. Thereafter, in the year 2007, members of the Munjal Family commenced the business of Electric Vehicles under the brand/ trademark “Hero” and its variants through the firm Hero Exports.

6. By the year 2010, the Munjal Group had significantly expanded its business operations and other activities.

The Agreements

A. The FSA

7. The Munjal Family, comprising of four Family Groups, entered into the FSA (Family Settlement Agreement) on 20.05.2010 through their respective family heads (referred to as the '**Patriarchs**'). The four Family Groups were designated as the F1 Family Group (Late Dayanand Family Group); F2 Family Group (Satyanand Family Group); F3 Family Group (Brijmohan Lall Family Group); and F4 Family Group (Om Prakash Family Group).

8. The heads of the family felt – and the same was accepted by the other family members of the Munjal Family – that it is inevitable that "*the second and third generations below the Patriarchs harbour diverse interests, different ambitions and varying perceptions as to, inter alia, the strategic direction, growth and governance of the Munjal Group Entities, and … due to uneven growth, differing perceptions and expectations, and ambitions including matters relating, amongst others, to the strategic direction, growth and governance of the Munjal Group Entities, differences arising in future in the succeeding generations of Munjal Family Members could not be ruled out*".[1] They were of the view that "*where the family grows in this manner, with diverse members spanning two generations running different segments of the business, family disputes tend to arise*"[2] and *"for the sake of peace and harmony*

[1] Recital F of the FSA.
[2] Recital G of the FSA.

amongst the Munjal Family Members, and in order to preserve the mutual respect goodwill and to avoid any dispute or differences at a later date between them and to manage the diverse expectations, ambitions, and strategic directions desired by various Munjal Family Members"[3] it was *"necessary to reorganise the family businesses"*[4].

9. The FSA was premised on the broad principle *"that as far as possible the family member managing the business shall continue to run that business and similarly the residential houses occupied by a family member shall belong to that family Member"*[5].

10. The four Family Groups agreed that they would separate ownership and control of the properties and "*for the purposes of separation of the business and property interests of the Munjal Group among the four distinct Family Groups, each Family Group and respective Munjal Family Members agreed to the cessation of joint ownership and control over business and property interests of Munjal Group and establishment of sole ownership, management and control of designated Family Group as more particularly set out in Schedule 7"*[6] to the FSA.

11. The businesses and properties of the Munjal Group were divided into four packages as set out in Schedule 7 to the FSA, which the Family Groups agreed was a fair allocation of the Munjal Group Entities and

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[3] Recital H of the FSA.
[4] Ibid.
[5] Recital I of the FSA.
[6] Clause 1.2 of the FSA.

properties. This is clear from Clause 1.4 of the FSA, which is set out below:

> "1.4 The Four Family Groups, pursuant to their desire to attain lasting peace amongst each of the Family Groups have by consensus and mutual agreement arrived at the four blocks listed in Schedule 7, as realigned and rearranged ("Packages"). The Four Family Groups acknowledge and confirm that these four Packages constitute fair allocation of Munjal Group Entities and properties between the Four Family Groups and their respective Munjal Family Members."[7]

12. It was agreed that the shares of the Munjal Group of Companies would be realigned and exchanged and if necessary, the Board of Directors would be re-constituted to ensure transfer and control of the Munjal Group of Companies to the respective Family Groups. In addition, the four Family Groups agreed that they shall cause each of the Munjal Group Entities to agree to be bound by the terms of the FSA[8].

13. The Four Family Groups also agreed that the "Hero" trademark and brand shall be separated

B. The TMNA

14. Hero Cycles Limited was the registered proprietor of the trademark "Hero" and other word marks and devices using the term "Hero" (hereafter referred to as '**Hero Marks**'). However, each of the

[7] Clause 1.4 of the FSA
[8] Clause 8.2 of the FSA

Munjal Group Entities were using and continue to use one or more Hero Marks. Hero Cycles Limited was included in the package allocated to the F4 Family Group (Family Group of Mr Om Prakash Munjal). Thus, it was necessary to separate the ownership of the Hero Marks.

15. On 20.05.2010 – same date as that of the FSA – the heads of each of the four Family groups and Hero Cycles Limited entered into the TMNA and agreed that the ownership and use of the trademark "Hero" be divided in respect to the businesses, which were allocated to each Family Group under the FSA.

The Dispute

16. The present dispute, which the petitioners seek to refer to arbitration, arises between the F1 Family Group and the F3 Family Group.

17. Mr Vijay Kumar Munjal (petitioner no. 1) is the eldest son of Late Shri Dayanand Munjal. Being the patriarch of the F1 Family Group, petitioner no. 1 signed and entered into the FSA and TMNA on 20.05.2010 on behalf of the F1 Family Group. M/s Hero Exports (petitioner no. 3) is a partnership firm that was established by the Munjal Brothers on 02.03.1993 and was involved in the business of export of bicycles under the brand/trademark "Hero" to certain specified territories. Subsequently, in the year 2007, the members of the F1 Family Group began conducting the business of Electric Vehicles through petitioner no. 3. In 2010, the F1 Family Group incorporated Hero Electric Vehicles Pvt Ltd. (petitioner no. 2) under the Companies

Act, 1956 which is, *inter alia,* engaged in the business of electric vehicles. M/s V.R. Holdings (petitioner no. 4) is also a partnership firm. Petitioner nos. 2, 3 and 4 are constituted and/or controlled by the members of the F1 Family Group.

18. Mr Pawan Kumar Munjal (respondent no. 1) has been nominated as the alternate patriarch of the F3 Family Group. In 1981, the Munjal Group also incorporated Puja Investments Private Limited, now known as Hero InvestCorp Private Limited (respondent no. 3). Admittedly, in terms of Clause 8.2 of the FSA, respondent no. 3 has signed a Deed of Adherence and agreed to be bound by the provisions of the FSA as if it was an original party thereto. Hero MotoCorp Limited (respondent no. 2) earlier known as Hero Honda Company was incorporated in 1984 by the Munjal Group and is, *inter alia*, engaged in the business of manufacturing and selling of two-wheeler motor vehicles. There is some controversy whether respondent no.2 has signed the Deed of Adherence in terms of Clause 8.2 of the FSA. Whilst respondent no. 2 states that it has not, the petitioners claim that it has. In terms of the FSA[9], respondent nos. 2 and 3 are included in the package allocated to the F3 Family Group.

19. The petitioners (who belong to the F1 Family Group) allege that the respondents (who belong to the F3 Family Group) have violated the terms of the FSA and TMNA as they now intend to conduct the business relating to electric/eco-friendly vehicles, including their components

[9] Schedule 7 of the FSA.

and related infrastructure and services, under the brand or trademark "Hero". The petitioners claim that under the terms of the FSA and TMNA, the F1 Family Group has the exclusive right to use the brand/trademark "Hero" for the business in certain goods being *"electric /environment friendly vehicles i.e., non-fuel land vehicles and components and related infrastructure and services in relation thereto"* (hereafter '**Electric Vehicles**'). They claim that the F3 Family Group has the exclusive right to use the trademark "Hero" in respect of the business that are allocated to their share under the FSA but cannot use the trademark "Hero" or any variant thereof in respect of Electric Vehicles. The petitioners are aggrieved as respondent no. 2 now proposes to launch Electric Vehicles and Electric Mobility Solutions under the brand name "Hero". Respondent no.1 has, as the CEO of respondent no.2, made public statements to that effect.

20. It is not disputed that respondent no. 2 is intending to launch an Electric Scooter or Motorcycle shortly under the trademark "Hero" or its variant. Although the petitioners do not dispute that the F3 Family Group or other Family Groups can enter into the business of Electric Vehicles; they claim that the other Family Groups cannot do so under the trademark "Hero" or any variant thereof.

21. Respondent no. 1 disputes that, in terms of the FSA or TMNA, the F1 Family Group has the exclusive right to use the trademark "Hero" in respect of the business of Electric Vehicles. He claims that in terms of the TMNA, the FI Family Group is entitled to exclusively use only certain trademarks referred to as the 'FI Family Group Trade

Marks', which are specified under Clause 1.1.7 of the TMNA. The said clause is set out below:

> "1.1.7 **"F1 Family Group Trade Marks" means:**
>
> a. the trademark HERO EXPORTS, registered or unregistered, owned and/or used upon or in relation to or in connection with the trading business of M/s Hero Exports for exports relating to sale, marketing of its trading items, other than those items covered in clause 1.1.7(d) below, and import in India of two wheeler electric vehicles & parts thereof and bicycle parts:
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> b. the trademark HERO ELECTRIC, registered or unregistered, owned and/or used upon or in relation to or in connection with the electric/environment friendly vehicles (i.e. non fuel land vehicles) and components, and related Infrastructure;
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> c. the trademark HERO ECO, registered or unregistered owned and/or used upon or in relation to or in connection with the business relating to projects, plants & equipment, components in the field of Solar Energy, Wind Energy and other Renewable Energy, and Medical Products & Lifestyle Care equipment for Hospitals, Rehabilitation and Homes; and
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> d. the trademark HERO registered or unregistered and used for export of Bicycles and Bicycle parts by F1 family Group for all territories, other than USA, Russia, Australia, New Zealand, Japan and European Union (except UK, Germany & Turkey), which exclusively are retained by F4 Family Group."[10]

[10] Clause 1.1.7 of the TMNA.

22. Respondent no.1 contends that whilst the F1 Family Group can use the trademark “Hero Electric”, it does not have the right to use any other variant of the trademark “Hero”.

Arbitration Agreements

23. Clause 19.5 of the FSA and Clause 5.6 of the TMNA embody agreements to refer the disputes to arbitration. Clause 19.5 of the FSA reads as under:

> 19.5 The Parties further agree that the Facilitator is fully authorized to settle all issues, questions and disputes among two or more Family Groups arising out of or in connection with this Family Settlement Agreement, by acting as mediator and upon failure of the mediation process, the Four Family Groups shall submit their disputes to the joint arbitration by Mr. Satish Bansal and two other persons to be appointed jointly by the four Patriarchs. The three persons so appointed shall constitute the arbitral tribunal. The arbitration proceedings shall be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996 and the venue of arbitration shall be New Delhi. The arbitrators shall have the power to decide the disputes by majority by following summary procedure and shall also have the power to award specific performance.

24. Clause 5.6 of the TMNA is set out below:

> “**5.6 Dispute Resolution**
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> Each Party and the Confirming Party hereby agrees that Mr. Satish Banal, senior partner of M/s B.D. Bansal & Co.; Delhi/Amritsar is fully authorized to settle all issues, questions and disputes among two or more Family Groups

and/or the Confirming Party arising out of or in connection with this Agreement, by acting as mediator and upon failure of the mediation process, the Four Family Groups and the Confirming Party shall submit their disputes to the joint arbitration by Mr. Satish Bansal and two other persons to be appointed jointly by the four Patriarchs. The three persons so appointed shall constitute the arbitral tribunal. The arbitration proceedings shall be conducted in accordance with the Indian Arbitration and Conciliation Act, 1996 and the venue of arbitration shall be New Delhi. The arbitrators shall have the power to decide the disputes by majority by following summary procedure and shall also have the power to award specific performance."

Other relevant facts

25. On 10.02.2011, respondent no. 3 had applied for registration by assignment of the mark "Hero" registered under Class 12, from Hero Cycles Limited. The Registrar of Trade Marks approved the application on 31.01.2014 and accordingly, respondent no. 3 was recorded as the subsequent proprietor of the trademark "Hero".

26. In the year 2012, the respondents showcased the model of an electric scooter in an Auto Expo. The respondents did so again in the year 2014: the respondents exhibited an Electric Vehicle as a concept, in the Auto Expo, under the name "Hero Leap". The petitioners objected to it and alleged that the same was in violation of the FSA and TMNA. The respondents denied the allegation that the F3 Family Group had violated the terms of the TMNA and claimed that the F3 Family Group could use the mark "Hero", with or without suffixes, for any product

category except the names, marks or monograms, which were assigned to other Family Groups.

27. The petitioners contend that the respondents once again showcased the model of an electric scooter under the mark "Hero Leap" as a concept in the Auto Expos in 2016. In 2017, the petitioners came across several media reports wherein Hero MotoCorp Limited (respondent no. 2) announced the launch of an Electric Vehicle under the brand name "Hero Duet E" by September 2018 and its commercial rollout thereafter. The petitioners state that the petitioners and the respondents met in November 2017 to resolve the issue amicably. The petitioners contend that thereafter, the respondents held several press conferences publicly wherein it confirmed the release of its Electric Vehicle under the brand name "Hero Duet E" and its promotion at the upcoming Auto Expo being held in Delhi between 09.02.2018 to 14.02.2018.

28. The petitioners aver that the acts of the respondents violated the terms of the FSA and the TMNA and accordingly, it filed a petition[11] under Section 9 of the A&C Act in this Court praying that the respondents be restrained from using, manufacturing and selling any two-wheeler electric vehicles and its components under the trademark "Hero Leap", "Hero Duet", "Hero Duet E", "Hero Moto" or any trademark/trade name containing "Hero" or under the trade name "Hero Motocorp Limited" and "Hero Investcorp Limited". However, the

[11] OMP(I) (Comm) 49/2018

petitioners sought leave to withdraw the aforesaid petition with liberty to invoke the Arbitration Agreement. By an order dated 15.03.2018, this Court dismissed the said petition as withdrawn.

29. The petitioners state that in April 2021, the petitioners came across media reports/articles concerning a collaboration between Hero MotoCorp Limited (respondent no. 2) and Gogoro, a Taiwanese based company, for the launch of two-wheeler Electric Vehicles under the brand/ trademark "Hero".

30. Accordingly, the petitioners representing the F1 Family Group issued a legal notice dated 27.04.2021 to the representatives of the F3 Family Group calling upon them to refrain from using the brand or trademark "Hero" in respect of any Electric Vehicle. Respondent No. 2 replied to the aforesaid legal notice, on 28.06.2021, denying F1 Family Group's exclusive right to use the trademark "Hero" and further stated that the F1 Family Group only has a limited right to use the mark "Hero Electric" in respect of Electric Vehicles.

31. On 19.07.2021, the petitioners issued a notice under Section 21 of the A&C Act to commence arbitration under Clause 19.5 of the FSA and Clause 5.6 of the TMNA. In terms of the Arbitration Agreement, the disputes were required to be resolved by meditation before the Facilitator, Mr Satish Bansal. In the event of failure of the mediation process, the disputes would be referred to arbitration by an arbitral tribunal constituted of the Facilitator, Mr Satish Bansal, and two other arbitrators, jointly appointed by the four patriarchs.

32. The petitioners claim that Mr Satish Bansal is ineligible for being appointed as an arbitrator under Section 12(5) of the A&C Act on the grounds that (i) he is acting as an advisor to the other Family Groups; (ii) he has furnished evidence in support of claims against the petitioners; (iii) he/his firm had been engaged by the F3 Family Group as an Auditor; and, (iv) he derives significant financial benefit from the other Family Groups. The petitioners averred that in two recent arbitrations arising out of the FSA and TMNA, Mr Satish Bansal was also excluded from the constitution of the Arbitral Tribunal. Accordingly, the petitioners nominated a former Chief Justice of India as its nominee arbitrator and, further called upon the respondents to appoint their nominee arbitrator.

33. The respondents replied to the aforesaid notice by its letter dated 30.07.2021 denying the allegations of the petitioners. The respondents disputed the Notice Invoking Arbitration on grounds that the disputes raised are non-arbitrable; the notice has not been invoked in terms of the Arbitration Agreement; the claims of the petitioners are *ex-facie* barred by limitation; and that the F3 Family Group has acted in accordance with the terms of the FSA and TMNA.

34. The petitioners claim that on 09.09.2021, Mr Pawan Munjal (respondent no. 1) during the celebrations of the tenth anniversary of Hero MotoCorp Limited (respondent no. 2) announced the launch of Electric Vehicles and Electric Mobility Solutions. The petitioners further rely on the Annual Report dated 06.05.2021 of respondent no. 2, wherein it had made statements that it would be launching Electric

Vehicles under the brand name "Hero". Aggrieved by the conduct of the respondents, the petitioners have filed the instant petition for appointment of an arbitrator on behalf of the respondents.

35. The respondents have opposed the present petition on several grounds including that the disputes are not arbitrable; the disputes are barred by limitation; the petitioners have waived and acquiesced in the respondents using the trademark "Hero"; the petition is not maintainable for non-joinder of parties; there is no real dispute as the terms of the TMNA are clear; and, the petitioners are entitled to use "Hero Electric" and other trademarks specifically reserved for the F1 Family Group and no other trademark.

Submissions

36. Mr Mukul Rohatgi and Mr Sandeep Sethi, Senior Advocates advanced oral submissions on behalf of respondent no.2. They opposed the present petition on, primarily, three grounds. First, they submitted that respondent no.2 was not a party to the Arbitration Agreement. They stated that respondent no.2 was a public company. It was a Munjal Group Entity and included in the package allocated to the F3 Family Group. But it was not a party to the FSA or the TMNA. The F3 family Group owned only 35% of the issued equity share capital and, the balance was held by public and other institutions.

37. Second, they stated that as the petitioners had not included other Family Groups as parties to the present petition, the petition was liable to be dismissed for non-joinder of necessary parties.

38. Third, they stated that the petitioners had not invoked the arbitration in terms of the Arbitration Agreement. The petitioners had not made any endeavor to resolve the disputes by mediation by the named Facilitator or Arbitrator. The petitioners had not called upon the other three patriarchs of the Munjal Family Group to constitute the Arbitral Tribunal. In addition, the petitioners had removed the Facilitator as the named Arbitrator, in terms of the Arbitration Agreements.

39. They relied upon the decision of the Supreme Court in ***Atul Singh and Ors. v. Sunil Kumar Singh***[12] and ***Vimal Kishor Shah v. Jayesh Dinesh Shah***[13], in support of their contention that non-signatories cannot be joined in arbitration proceedings and merely naming a party in an agreement would be of no effect, unless the said party had signed the Arbitration Agreement. They also referred to the decisions of this Court in ***Avantha Holdings Ltd. v. CG Power and Industrial Solutions Ltd.***[14] and ***M/s Spentex Industries Ltd. v. O.P. Lohia***[15]. In addition, they also referred to the decision of the Supreme Court in ***Iron and Steel Co. Ltd. v. Tiwari Road lines***[16] and contended that the parties cannot re-write the Arbitration Clause. The written submissions also refer to the decision of the Supreme Court in ***Reliance Natural Resources Ltd. v. Reliance Industries Ltd.***[17]

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12 (2008) 2 SCC 1.
13 (2016) 8 SCC 788.
14 2021 SCC OnLine Del 5202.
15 2009 SCC OnLine Del 2815.
16 (2007) 5 SCC 703.
17 (2010) 7 SCC 1.

40. Dr Singhvi and Mr Nayar, learned senior counsels advanced submissions on behalf of respondent nos.1 and 3. Dr Singhvi opposed the present petition on, essentially, three grounds. First, he submitted that the disputes raised were not arbitrable as the dispute pertained to respondent no.3's right to use the trademark "Hero", which was registered in its favour. He contended that the registration of a trademark operates *in rem*. Thus, in effect, the petitioners were seeking to question the registration of the trademark in favour of respondent no.3 and were seeking to circumscribe the registration by limiting the use of the trademark to vehicles using Internal Combustion Engines. He submitted that the said disputes could only be adjudicated by the IPR Division of the High Court and no other forum could decide the said disputes. He referred to the decisions of the Supreme Court in the case of ***Vidya Drolia v. Durga Trading Corporation***[18]; ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.***[19] and ***A. Ayyasamy v. A. Paramasivam & Ors.***[20].

41. Second, he submitted that the disputes are barred by limitation and that the petitioners had acquiesced the use of the trademark "Hero" by the respondents in respect of Electric Vehicles. He referred to an email dated 04.06.2013 sent by one Mr Ashok Goyal of the F1 Family Group confirming that the respondents could use the trademark "Hero", with or without suffix, except the trademark "Hero Electric", in respect of Electric Vehicles. He also submitted that the Power of Attorneys

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[18] (2021) 2 SCC 1.
[19] (2011) 5 SCC 532.
[20] (2016) 10 SCC 386.

issued by the respective branches of the Munjal Family also recorded their consent for registration of the trademark "Hero", in favour of respondent no.3. Consequently, the Registrar of Trade Marks had passed an order recording respondent no.3 as the subsequent proprietor in respect of TM nos. 235780, 659053 and 813245, in respect of the trademark "Hero" in Class 12.

42. Fourth, he submitted that the petitioners had not followed the mandatory procedure for appointment of an arbitrator. He also relied on the decision of the Supreme Court in ***Iron and Steel Co. Ltd. v. Tiwari Road Lines***[16].

43. Mr Nayar, learned senior counsel, also contended that the disputes were barred by limitation; that the disputes were not arbitrable; and, the invocation was not in terms of the Arbitration Agreements. In addition, Mr Nayar also submitted that petitioner no.2 and respondent nos. 2 and 3, were not parties to the Arbitration Agreement. Petitioner no.2 was also not a Munjal Group Entity as it was incorporated subsequent to the FSA. He contended that petitioner no.2 and respondent nos. 2 and 3 could not be joined as parties to the arbitral proceedings.

44. He further submitted that the petitioners were indulging in forum shopping as they had filed objections before the Registrar of Trade Marks relying on the terms of the FSA and TMNA. Thus, it was not open for the petitioners to now seek reference of the disputes to arbitration.

45. Mr Nayar also submitted that the TMNA had been implemented by the Family Groups. He submitted that the four Family Groups had taken necessary steps for registration of the trademarks in respect of their respective group entities and therefore, the said agreement stood discharged by performance. In the circumstances, recourse to the Arbitration Agreement under the TMNA was no longer available. He submitted that the clock cannot be rolled back once the TMNA had been performed and had resulted in statutory rights.

46. Mr Tripathi, learned senior counsel appeared on behalf of the petitioners and countered the submissions made on behalf of the respondents. He referred to the decisions of the Supreme Court in ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman***[21] as well as ***Vidya Drolia v. Durga Trading Corporation***[18] and contended that the scope of examination under Section 11 of the A&C Act was confined to examining the existence of an arbitration agreement.

47. Next, he submitted that the present petition was not barred by limitation as the dispute regarding the respondents, proceeding to commercially launch an Electric Vehicle under the brand name "Hero" had arisen in the year 2021. He submitted that the conduct of the respondent to showcase concept vehicles did not extinguish the rights and remedies of the petitioners.

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[21] (2019) 8 SCC 714.

48. Mr Tripathi relied upon the decisions of the Supreme Court in ***Hari Shankar Singhania v. Gaur Hari Singhania***[22] and ***Kale v. Dy. Director of Consolidation***[23], and submitted that family settlements should be treated differently to commercial settlements and thus, issues concerning limitation ought not impede the implementation of a family settlement.

49. He referred to the decisions of this Court in ***M/s Foodworld v Indian Railway Catering and Tourism Corporation Ltd.***[24] and ***M/s Jyoti Sarup Mittal v The Executive Engineer-XXIII, South Delhi Municipal Corporation***[25] and contended that Courts would endeavor to make arbitration agreements workable.

50. He submitted that the dispute between the parties is not *in rem* but is an issue concerning the entitlements of the F1 and F3 Family Groups arising under the FSA and TMNA. He submitted that the grievance of the petitioners is that the respondents have violated the provisions of the FSA and TMNA. The rights under these agreements are rights *in personam* and hence, arbitrable. He further referred to a recent decision of this Court in ***Hero Electric Vehicles Private Limited & Anr. v. Lectro E-Mobility Private Limited & Anr.***[26], in support of his contention. He submitted that the aforesaid decision was in connection with a somewhat similar dispute arising under the FSA and TMNA. He stated that this Court had authoritatively upheld that such disputes

[22] (2006) 4 SCC 658.
[23] (1976) 3 SCC 119.
[24] 2021 SCC OnLine Del 4264.
[25] 2021 SCC OnLine Del 3674.
[26] 2021 SCC OnLine Del 1058.

between the parties requires a holistic interpretation of the terms of the FSA and the TMNA, which is required to be decided in arbitration. Accordingly, the Court had allowed the application under Section 8 of the A&C Act and, referred the parties to arbitration.

51. Mr Gopal Subramanium, learned senior counsel appearing for the petitioners, submitted that respondent nos. 2 and 3 are bound by the Arbitration Agreement. He submitted that even though the FSA and TMNA were only signed between the patriarchs of the respective Family Groups, nonetheless, the parties had intended to bind each member of the four Family Groups and the Munjal Group Entities under the terms of the FSA and TMNA. He submitted that respondent nos. 2 and 3. being Munjal Group Entities, had executed a Deed of Adherence under Article VIII of the FSA wherein they have agreed to be bound by the FSA as if they were original parties of the same.

52. He submitted that in the pleadings filed by respondent no. 2 in proceedings under Section 9 of the A&C Act, respondent no.2 had admitted that it had signed the Deed of Adherence in terms of Clause 8.2 of the FSA. Further, he submitted that the question whether respondent no. 2 has or has not signed the Deed of Adherence is a matter of a factual dispute and should be adjudicated by an Arbitral Tribunal.

53. He submitted that in any event, even non-signatories could be joined in arbitration in given circumstances. He referred to the decision of the Supreme Court in ***Chloro Controls India Private Limited v.***

Severn Trent Water Purification Inc. and Ors.[27] and the decision of this Court in ***Shapoorji Pallonji and Co. Pvt. Ltd. v. Rattan India Power Ltd. and Anr.***[28], in support of his contention. He also referred to the *travaux préparatoires* of the New York Convention and contended that similar to the New York Convention, the drafters of the A&C Act consciously chose the word 'party' and not 'signatory' under Section 7 of the A&C to allow non-signatories to join arbitral proceedings in certain circumstances.

54. The learned senior counsels for the respondents have filed note of the written submission referring to a number of decisions. Some of them were not cited during the course of the arguments and this Court is confining itself to the submissions made before this Court.

Reasons and Conclusion

55. It is well settled that in terms of Sub-section (6A) of Section 11 of the A&C Act, the scope of examination is confined to the existence of an arbitration agreement. In ***Duro Felguera, S.A. v. Gangavaram Port Limited***[29], the Supreme Court had held as under:

> "*48*. … From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple—it needs to be seen if the agreement contains a clause which provides for

[27] (2013) 1 SCC 641.
[28] 2021 SCC OnLine Del 3688.
[29] (2017) 9 SCC 729.

arbitration pertaining to the disputes which have arisen between the parties to the agreement.

*** *** ***

59. The scope of the power under Section 11(6) of the 1996 Act was considerably wide in view of the decisions in *SBP & Co.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] and *Boghara Polyfab* [*National Insurance Co. Ltd.* v. *Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] . This position continued till the amendment brought about in 2015. After the amendment, all that the courts need to see is whether an arbitration agreement exists—nothing more, nothing less. The legislative policy and purpose is essentially to minimise the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11(6-A) ought to be respected."

56. In ***Mayavati Trading Pvt. Ltd. v. Pradyuat Deb Burman***[21], the Supreme Court had referred to the aforementioned decision and observed as under:

"10. This being the position, it is clear that the law prior to the 2015 Amendment that has been laid down by this Court, which would have included going into whether accord and satisfaction has taken place, has now been legislatively overruled. This being the position, it is difficult to agree with the reasoning contained in the aforesaid judgment [*United India Insurance Co. Ltd.* v. *Antique Art Exports (P) Ltd.*, (2019) 5 SCC 362 : (2019) 2 SCC (Civ) 785] , as Section 11(6-A) is confined to the examination of the *existence* of an arbitration agreement and is to be understood in the narrow sense as has been laid down in the judgment in *Duro Felguera*, *S.A.* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] "

57. In the present case, the respondents have opposed the present petition, principally, on two grounds. First, that the disputes are not arbitrable; and second, that they are barred by limitation. Undisputedly, under the principle of *kompetenz-kompetenz*, the questions whether the disputes are barred by limitation and/or whether they are arbitrable, fall within the jurisdiction of an Arbitral Tribunal. However, the Court may examine the said aspects at a referral stage mainly for two reasons – (a) to prevent wastage of public and private resources, which may result to refer a dispute that is *ex facie* barred; and, (b) that the existence of an agreement to refer the disputes to arbitration cannot be examined as completely disjunct from the disputes.[18]

58. Having stated the above, it is also necessary to observe that the scope of such examination under Section 11 of the A&C Act is narrow and unless this Court is *ex facie* satisfied that the disputes are not arbitrable or otherwise barred by law, the Court would relegate the parties to their preferred remedy of arbitration. In ***NCC Limited v. Indian Oil Corporation Limited***[30] a Coordinate Bench of this Court had observed that *"unless it is in a manner of speech, a chalk and cheese situation or a black and white situation without shades of grey, the court concerned hearing Section 11 petition should follow the more conservative course of allowing parties to have their say before the*

[30] (2019) SCC OnLine Del 6964.

Arbitral Tribunal". This view was also approved by the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation***[18]**.**

59. Bearing the aforesaid principles in mind, the first question to be examined is whether the disputes are arbitrable. It was contended on behalf of respondent nos. 1 and 3 that the disputes raised by the petitioners related to the use of the word mark "Hero", which was registered by assignment in favour of respondent no.3. It was submitted that the registration of the trademark vested exclusive rights in favour of the registered proprietor and entitled it to seek specific relief against infringement of the trademark. Dr. Singhvi has earnestly contended that the registration of the trademark operates *in rem* and no person can assert a right contrary to the same. He also submitted that any dispute regarding the proprietary rights in the trademark must be referred to the *persona designata*, being the Registrar of the Trade Mark. He submitted that there was a specific forum for seeking rectification of registration of a trademark in favour of the registered proprietor and, as such the proceedings were *in rem* and therefore, inherently non arbitrable.

60. Mr. Nayar, learned senior counsel appearing for respondent no.3, had also amongst other submissions made submissions to the aforesaid effect.

61. It is apparent that the disputes, essentially, concern the rights of the F1 Family Group under the FSA and TMNA. Admittedly, the trademark "Hero" was registered in the name of Hero Cycles Ltd. A plain reading of the FSA clearly indicates that the four Family Groups

had agreed to separate and divide the said brand for use in relation to various businesses amongst the four Family Groups. This was an integral part of the family agreement to separate the businesses in the four packages as specified under Schedule 7 to the FSA.

62. The claim of the petitioners that the respondents cannot use the trademark “Hero” in respect of Electric Vehicles is premised on the *inter se* agreement between the four Family Groups. The petitioners are not claiming the use of the trademark “Hero” in connection with the Electric Vehicles *in rem*. Their claim is limited to what they consider their contractual right under the FSA and TMNA.

63. It is also relevant to bear in mind that it is conceded that the assignment of the trademark “Hero” – on which respondents nos.1 and 3 rely for opposing the present petition – was pursuant to the FSA and TMNA.

64. The decisions of the Supreme Court in the case of ***A. Ayyasamy v. A. Paramasivam & Ors.***[20]***; Booz Allen & Hamilton Inc. v. SBI Home Finance Limited & Ors.***[19] and ***Vidya Drolia v. Durga Trading Corporation***[18] do not further the case of the respondents in the given facts of this case.

65. In ***Booz Allen & Hamilton Inc. v. SBI Home Finance Limited & Ors.***[19], the Supreme Court had set out certain disputes, which are non-arbitrable. These included disputes that arise out of criminal offence; matrimonial matters; insolvency and winding up matters; testamentary matters; eviction or tenancy matters; and, those governed by special

statutes. However, the Supreme Court had also explained that the said cases related to actions *in rem*, which were exercisable against the world at large in contrast to rights *in personam*. The relevant extract of the said decision is set out below:

> "35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.
>
> 36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy

matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

66. The aforesaid decision was also referred to by the Supreme Court in ***A. Ayyasamy Vs. A. Paramasivam & Ors.***[20]

67. The expression "action *in rem*" is defined by R.H. Graveson[31] as under:

> "An action in rem is one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between."

68. The aforesaid definition was noted by the Supreme Court in ***Vidya Drolia v. Durga Trading Corporation***[18]. After examining the various authorities, the Supreme Court had propounded a fourfold test for determining whether the subject matter of a dispute is arbitrable. The relevant extract of the said decision is as under:

> "76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:
>
> 76.1 (1) When cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights *in personam* that arise from rights in rem.
>
> 76.2 (2) When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.
>
> 76.3 (3) When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

[31] Conflict of Laws 98, 7th Edition 1974

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

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

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

> "35...Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir v. Leeman*). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (*Soilleux*

> *v. Herbst, Wilson v. Wilson and Cahill v. Cahill*)."
>
> 77. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralized forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trademarks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to soverign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have erga omnes effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable."[18]

69. Dr. Singhvi had referred to Paragraph 76.2 of the decision in ***Vidya Drolia v. Durga Trading Corporation***[18] and submitted that the disputes, which have *erga omnes* effect, would not be arbitrable. According to him, a decision in respect of the disputes raised in the instant case would have an *erga omnes* effect. Whilst there is merit in the contention that disputes that have *erga omnes* effect may not be

arbitrable, the said contention that the dispute sought to be referred in this case is such a dispute is clearly, without merit.

70. The dispute sought to be raised by the petitioners is a dispute relating to the rights under the FSA and TMNA. The said disputes do not affect the rights of any third party. The petitioners are not seeking grant of registration of any trademark under the Trade Marks Act, 1999. They are also not seeking rectification of the Register of Trade Marks. There are separate remedies available for such reliefs. The petitioners are essentially seeking adjudication of their claim as to the interpretation of the FSA and TMNA and, the consequential relief *inter se*.

71. In ***Vidya Drolia v. Durga Trading Corporation***[18], the Supreme Court had clearly specified that grant and issue of patents and registration of trademarks are matters that fall within the sovereign or government functions and have *erga omnes* effect. *Prima facie*, the nature of disputes sought to be raised by the petitioners cannot be considered as actions *in rem*. The assumption that all matters relating to trademarks are outside the scope of arbitration is plainly erroneous. There may be disputes that may arise from subordinate rights such as licences granted by the proprietor of a registered trademark. Undisputedly, these disputes, although, involving the right to use trademarks, are arbitrable as they relate to rights and obligations *inter se* the parties to a licence agreement[32]. Similarly, disputes arising *inter*

[32] Eros International Media Ltd v. Telemax Links India Pvt Ltd. & Ors., 2016 SCC OnLine Bom 2179.

se the contracting parties in respect of their rights and obligations under the contract, are arbitrable and any action to enforce such contractual rights *inter se* the contracting parties, is an action *in personam*.

72. Petitioners nos. 2 and 3 had filed a suit[26] against Lectro E-Mobility Private Ltd. and Hero Cycles Ltd. seeking a permanent injunction restraining the said defendants from dealing in any manner in electrical bikes having a throttle using the trademark "Hero" or any mark deceptively similar thereto. In its plaint, petitioner no.3 claimed the exclusive right to use the trademark "Hero" in respect of Electric Vehicles, as the registered owner of certain trademarks. The defendants in that case (part of the F4 Family Group) had filed an application under Section 8 of the A&C Act seeking reference of the parties to arbitration. They (F4 Family Group) contended that the plaintiffs did not possess any trademark registration for the mark "Hero" for Electric Cycles / E-Cycles and claimed that they had the exclusive right to use the trade mark "Hero" without any prefix or suffix in relation to bicycles, which would also include E-Cycles.

73. The plaintiffs (petitioner nos. 2 and 3) resisted the application under Section 8 of the A&C Act, *inter alia,* contending that the issues in the controversy would operate *in rem* and therefore, the disputes were not arbitrable. This is precisely the contention advanced by respondent nos. 1 and 3 in this case. It is their case that respondent no. 3 is the proprietor of the trademark "Hero" and all other variants. Although the F1 Family Group can use the trademark "Hero Electric" in respect of Electric Vehicles; they cannot use any mark including the word "Hero".

74. In ***Hero Electric Vehicles Pvt. Ltd. & Anr. v. Lectro E-Mobility Pvt. Ltd,*** the Court noted the essence of the disputes as under:

> "45. I am unable to agree with Mr. Sudhir Chandra. As has been correctly pointed out by Mr. Sibal, the dispute, as raised by Mr. Sudhir Chandra's clients, is almost entirely centred around the FSA and TMNA. Though the prayer clause, in the suit, superficially read, seeks remedies against alleged infringement by the defendants, the infringement is alleged, not on the ground that the defendants are using deceptively similar trademarks, but on the ground that the right to use the trademarks, on electric cycles was conferred, by the FSA and TMNA, not on the F-4 group, but on the F-1 group. The reliance, by Mr. Sibal, on paras 19 to 25 of the plaint, is also well taken. The precise case set up by the plaintiff, in the said paras, is that the right to use the trademark "Hero" and its variants, which, prior to the execution of the FSA and the TMNA, vested in Hero Cycles, was transferred, by the FSA and the TMNA, to the F-1 group, insofar as electric cycles were concerned. In using the "Hero" trademark, on electric cycles and e-cycles, therefore, it was alleged that the F-4 group was infracting the covenants of the FSA and TMNA. Even if, in the process, the plaintiffs were to rely on any of the provisions of the Trade Marks Act, the essential infraction, as alleged to have been committed by the defendants, was not of the provisions of the Trade Marks Act, but of the provisions of the FSA and TMNA. As against this, the defendants rely on Articles 17.1 and 17.2 of the FSA and Article 3.7 of the TMNA, to dispute the claim of the plaintiffs. I am in agreement with Mr. Sibal that the dispute, as thus emerged between the plaintiffs and the defendants, required a holistic appreciation of the FSA and the TMNA, their

> various covenants, and the interplay thereof, in order to adjudicate on the rights conferred on the various family groups. Any effective adjudication of the disputes, without reference to the FSA and the TMNA would, in my view, be impossible."[26]

75. After noting the nature of disputes as above, the Court rejected the contention that the suit was an action *in rem*. The relevant extract of the said decision is as under:

> "48. *Booz Allen* and *Ayyasamy* have both been considered, comprehensively, in *Vidya Drolia*, which includes, among the categories of disputes which cannot be arbitrated upon, "grant and issue of patents and registration of trade marks", as "they are exclusive matters falling within the sovereign or government functions", having "erga omnes effect", resulting in conferment of "monopoly rights". The controversy, in the present case, does not relate to grant, or registration, of trademarks. The trademarks already stood granted, and registered, prior to the FSA and TMNA. The dispute is regarding the Family Group to which the rights to use the said trademarks, in connection with electric cycles and e-cycles has been assigned, by the FSA and TMNA. This assignment is by contractual, not statutory, fiat. It does not involve any exercise of sovereign functions (unless, of course, the patriarchs of the four Family Groups are, in a limited sense, to be regarded as "sovereigns"). In any event, no inalienable exercise of sovereign governmental functions can be said to be involved, in the assignment, to the various Family Groups, of their individual rights to use the existing trademarks, in respect of one, or the other, categories of goods. The dispute does not, therefore, fall under any of the categories of

disputes excepted, by the Supreme Court, from the arbitral umbrella.

49. Nor am I able to accept Mr. Sudhir Chandra's arguments that the dispute is in the nature of an action in rem. Mr Sibal has, in this context, sought to distinguish between actions in rem and rights in rem. Though this distinction does, to an extent, manifest the fallacy in the submission of Mr Sudhir Chandra, I do not deem it necessary to enter, for the purpose, into that intricate jurisprudential thicket. (Avoidance of the temptation to enter into such thickets is, indeed, one of the cautions that Vidya Drolia administers.) The right that the plaintiffs seek to assert, in the plaint, is clearly against the F-4 group, and the F-4 group alone, and not against the whole world. More precisely put, the plaintiffs are not seeking a declaration, of their right to use a particular trademark, against any potential infringer, anywhere in the world, as is the case with "normal" infringement suits.The dispute is clearly inter-se amongst two Family Groups, pillowed on the rights emanating from the FSA and the TMNA, and essentially alleges infraction of the terms of the FSA and TMNA, not of the provisions of the Trade Marks Act. The precise case of the plaintiff is that the defendants have, in using the "Hero" trademark in respect of electric cycles and e-cycles, infracted the covenants of the FSA and TMNA. The infraction, consequently, of the provisions of the Trade Marks Act, even if asserted, is only incidental, arising from the fact that the right to use a particular trademark is statutorily conferred by the said Act. Equally, therefore, even if it were to be assumed that the declaration, by the adjudicator, of the Family Group which would be entitled to use the "Hero" or "Hero Electric" trademark on electric cycles, or e-cycles, would result in that Family Group being the repository of the said trademark,

> qua the said goods, against the whole world, that by itself would not convert the dispute, as raised in the plaint, as one in rem, or lend it erga omnes effect. To reiterate, in this context, the right asserted by the plaintiffs is not a right that emanates from the Trade Marks Act, but a right that emanates from the FSA and the TMNA, and is not asserted vis-à-vis the whole world, but is asserted specifically vis-à-vis the F-4 Family Group. The argument that the dispute is in rem and is, therefore, not amenable to the arbitral process, therefore, fails to impress."[26]

76. This Court is of the view that the decision in ***Hero Electric Vehicles Pvt. Ltd. & Anr. v. Lectro E-Mobility Pvt. Ltd***[26] would substantially address the contention advanced on behalf of the respondents regarding non-arbitrability of the disputes. Dr. Singhvi contended that the dispute in that case was arbitrable as it involved the question whether bicycles would include E bicycles (throttle assisted) or whether E bicycles would be Electric Vehicles. He also submitted that the certain observations made by the Court in ***Hero Electric Vehicles Pvt. Ltd. & Anr. v. Lectro E-Mobility Pvt. Ltd. & Anr.***[26] are *per incuriam*.

77. This Court is not persuaded to accept either of the aforesaid contentions. Having stated the above, it is also necessary to state that this Court is not required to express a conclusive view in respect of the rival contentions but merely form a *prima facie* view. The parties are not precluded from urging their contentions before the Arbitral Tribunal.

78. Dr Singhvi, had also referred to the decision of the Supreme

Court in ***Competition Commission of India v. Bharti Airtel Limited & Ors.***[33]. On the strength of the said decision, he submitted that it was necessary that the issue regarding registration of the trademark be decided by a '*persona designata'* which, according to him, would be the Registrar of Trade Marks or the IP Division of this Court, before reference of the disputes to arbitration.

79. The decision in ***Competition Commission of India v. Bharti Airtel Limited & Ors.***[33] is not applicable to the facts of this case. In that case, the principal issue was regarding jurisdiction of the Competition Commission of India (CCI) to investigate allegations regarding abuse of dominance and anti-competitive agreements. In the said case, Reliance Jio Infocom. Limited (RJIL) had filed information under Section 19(1) of the Competition Act, 2002 alleging that three major telecom operators (referred to as IDOs) had formed a cartel and entered into an anti-competitive agreement. RJIL had also claimed that the IDOs had refrained from augmenting the Points of Inter-connection (POIs) for the necessary access resulting in congestion and call failures in its network. Admittedly, the Telecom Regulatory Authority of India (TRAI) was vested with the statutory powers under the Telecom Regulatory Authority of India Act, 1997 (TRAI Act) to decide the issues regarding provision of services. One of the principal questions which fell for consideration before the Supreme Court was whether the CCI could examine allegations against the IDO. The Bombay High Court had quashed the notices issued by the CCI as it was of the view

[33] (2019) 2 SCC 521.

that the dispute was within the jurisdiction of TRAI.

80. The Supreme Court was of the view that until the factual jurisdictional issues were answered by TRAI, CCI would be ill equipped to proceed in the matter. The Supreme Court held that TRAI was required to examine the allegations regarding failure or delay on the part of IDOs to provide adequate POIs. The Supreme Court had set down various questions (in paragraph 72 and 102 of the judgment) and the findings regarding those questions would constitute the jurisdictional facts for any further proceedings by CCI. These jurisdictional issues were required to be determined by TRAI under the TRAI Act.

81. In the present case, the disputes raised arise predominantly in respect of the contractual rights and obligations and therefore, there is no requirement to await adjudication by another authority.

82. In any view of the matter, this Court need not dwell on the said issue in any further detail. In view of the doctrine of *kompetenz-kompetenz*, all issues including those regarding arbitrability of the disputes as well as regarding the jurisdiction of the Arbitral Tribunal, are required to be addressed by the Arbitral Tribunal in the first instance. Unless it is *ex-facie* established beyond a vestige of doubt that the Arbitral Tribunal does not have the jurisdiction to decide the dispute and the claims are deadwood, this Court is required to assist in constitution of the Arbitral Tribunal

83. This Court is not required to finally adjudicate controversies regarding arbitrability of disputes. Suffice it is to state that this is not a case where this Court can on an intense *prima facie* scrutiny, finally conclude that the disputes raised are beyond the scope of the Arbitration Agreement or that the Arbitral Tribunal would lack the jurisdiction to decide the disputes.

84. The next question to be examined is whether the disputes sought to be raised by the petitioners are barred by limitation. In this regard, it is relevant to briefly examine the rival contentions.

85. It was contended on behalf of the respondents that the disputes sought to be raised by the petitioners are stale and highly belated. The cause of action, if any, in respect of the said disputes had arisen as early as in the year 2011. It was contended that this is established by the facts as stated hereafter:-

85.1 Pursuant to the execution of the TMNA and FSA, on 10.02.2011, respondent no. 3 had applied for assignment of the trademark "Hero", which was registered as Trade Mark No. 235780 in respect of 'Scooters, Motorcycles and Parts thereof' and Trade Mark No. 659053 in respect of 'Vehicles and parts thereof, Tractors and parts thereof', from Hero Cycles Limited.

85.2 On 05.01.2012, respondent no.1 had showcased an Electric Vehicle at the Delhi Auto Expo. The same was in the knowledge of the petitioners, who had also showcased an Electric Vehicle at the same

Auto Expo, however, the petitioners did not voice any grievance at that stage.

85.3 On 29.01.2014, the respondents/F3 Family Group once again displayed an Electric Vehicle under the trademark "Hero Leap" in an Auto Expo. The respondents/F3 Family Group had also issued a press release with the heading reading as, "Leap – India's First Electric Serial Hybrid Scooter".

85.4 On 05.02.2014, the respondents/F3 Family Group issued a press release in respect of an electric motorcycle named as "Hero SimplEcity".

85.5 On 19.02.2014, the respondents/F3 Family Group sent a communication to the petitioner no.1 (F1 Family Group) asserting full rights to use the trademark "Hero" with respect to Electric Vehicles. It is contended that the same was received by the petitioner no.1 (F1 Family Group) on 26.02.2014 and thus the cause of action, if any, had arisen on that date.

85.6 On 13.08.2016, the respondents had showcased another Electric Vehicle named "Hero Duet" in the Auto Expo 2016. The petitioners had objected to respondent no.3 using the trademark "Hero" and had alleged that the same was in violation of the TMNA. However, the petitioners did not take any precipitative action for redressal of the disputes, which had clearly arisen. The F3 Family Group, in their communication dated 23.11.2016, comprehensively denied the claim of the F1 Family Group, which is now sought to be referred to arbitration.

85.7 On 27.01.2018, the petitioners filed an application under Section 9 of the A&C Act [being OMP(I)(COMM) No.49/2018], seeking certain interim reliefs. In an order passed on 30.01.2018 in that petition, the Court had recorded the respondents' contentions that the petitioners were aware of the intended use of the trademark "Hero" in respect of Electric / Environment Friendly Vehicles since 2012. The said petition was withdrawn on 15.03.2018.

86. It was contended on behalf of the respondents that there are also communications to the effect that the petitioners had waived and acquiesced the use of the trademark "Hero" by the F3 Family Group in respect of Electric Vehicles.

87. The petitioners countered the aforesaid submissions. The petitioners claim that their dispute is alive and not deadwood as claimed by the respondents since respondent no.2 has not launched any Electric Vehicle under the trademark / brand "Hero" or any variant thereof. Further, it is apparent that the respondents (F3 Family Group) now intends to proceed to commercially launch an Electric Vehicle under the brand name "Hero".

88. The petitioners also relied on certain communications, particularly an e-mail dated 11.02.2014 and a letter dated 13.08.2016. They state that in the years 2014, 2016, 2017 and 2019, they were apprehensive that the respondents may launch Electric Vehicles under the brand name "Hero" and had objected to the same. It is contended that the respondents had refrained from commercially launching any

Electric Vehicle under the brand name "Hero" in view of the opposition from the F1 Family Group. It is also contended on behalf of the petitioners that a commercial launch of an Electric Vehicle for the first time under the brand name "Hero" by respondent no.2, would give rise to a cause of action that had not arisen earlier and therefore, there is no question of the disputes being stale or barred by limitation.

89. It is also claimed that in terms of Article 22.5 of the FSA, a failure or delay on the part of any Family Group in exercising a right would not operate as a waiver. It is contended that in terms of the FSA, the petitioners could not be precluded from agitating their rights under the FSA on account of delay or laches if any.

90. The petitioners also rely on the decisions of the Supreme Court in ***Hari Shankar Singhania & Ors. v. Gaur Hari Singhania & Ors.***[22], in support of their contention that a family settlement is required to be treated differently and technicalities of limitation ought not to be permitted to obstruct the implementation of a family settlement. Attention of this Court was drawn to paragraphs 42 and 43 of the said decision, which reads as under:

> "42. Another fact that assumes importance at this stage is that, a family settlement is treated differently from any other formal commercial settlement as such settlement in the eye of the law ensures peace and goodwill among the family members. Such family settlements generally meet with approval of the courts. Such settlements are governed by a special equity principle where the terms are fair and bona fide, taking into account the well-being of a family.

> 43. The concept of "*family arrangement or settlement*" and the present one in hand, in our opinion, should be treated differently. Technicalities of limitation, etc. should not be put at risk of the implementation of a settlement *drawn by a family, which is essential for maintaining pea and harmony in a family.* Also it can be seen from decided cases of this Court that, any such arrangement would be upheld if family settlements were entered into to allay disputes existing or apprehend and even any dispute or difference apart, if *it was entered into bona fide to maintain peace or to bring about harmony in the family.* Even a semblance of a claim or some other ground, as say affection, may suffice as observed by this Court in *Ram Charan Das v. Girjanandini Devi.*"

91. The petitioners also relied on the decision of the Supreme Court in the case of ***Kale & Ors. v. Deputy Director of Consolidation & Ors.***[23], in support of their contention that the Courts should endeavour to uphold the validity of a Family Settlement.

92. It is clear that that the issue of limitation is a contentious one. In the facts of this case, it involves a mixed question of facts and law. Indisputably, issuing advertisement or showcasing a vehicle under the trademark, which includes the word mark "Hero" would amount to using the said trademark. However, *prima facie*, that may not extinguish the cause of action arising from a commercial launch of vehicles under the said trademark. This Court must refrain from adjudicating such issues as it is clearly beyond the standards of examination under Section 11 of the A&C Act.

93. In ***Bharat Sanchar Nigam Limited & Anr. v. Nortel Networks India Private Limited***[34], the Supreme Court following its earlier decision in ***Vidya Drolia v. Durga Trading Corporation***[18] had observed as under:

> "40. The issue of limitation, in essence, goes to the maintainability or admissibility of the claim, which is to be decided by the Arbitral Tribunal. For instance, a challenge that a claim is time-barred, or prohibited until some precondition is fulfilled, is a challenge to the admissibility of that claim, and not a challenge to the jurisdiction of the arbitrator to decide the claim itself.
>
> *** *** ***
>
> 44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.
>
> 45. In a recent judgment delivered by a three-Judge Bench in *Vidya Drolia* v. *Durga Trading Corpn.* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , on the scope of power under Sections 8 and 11, it has been held that the Court must undertake a primary first review to weed out "manifestly ex facie non-existent and invalid arbitration agreements, or non-arbitrable disputes". The prima facie review at the reference stage is to cut the deadwood, where dismissal is barefaced and pellucid, and when on the facts and law, the litigation must stop at the first stage. Only when the Court is certain

[34] (2021) 5 SCC 738.

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By:Dushyant Rawal
Signing Date:11.03.2022

that no valid arbitration agreement exists, or that the subject-matter is not arbitrable, that reference may be refused.

45.1. In para 144, the Court observed that the judgment in *Mayavati Trading* [*Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] had rightly held that the judgment in *Patel Engg.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] had been legislatively overruled. Para 144 reads as: (*Vidya Drolia case* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC pp. 114-15)

> "*144*. As observed earlier, *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. *Mayavati Trading (P) Ltd.* [*Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , *in our humble opinion, rightly holds thatPatel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618] *has been legislatively overruled and hence would*

not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act.Mayavati Trading (P) Ltd. [*Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] *has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the UNCITRAL Model of law of arbitration on which the Arbitration Act was drafted and enacted*."

(emphasis supplied)

While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute. Para 148 of the judgment reads as follows : (*Vidya Drolia case* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 119)

"*148*. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and the Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. *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*. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in *Premium Nafta Products Ltd.* [*Fili Shipping Co. Ltd.* v. *Premium Nafta Products Ltd.*, 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen."

(emphasis supplied)

45.2. In para 154.4, it has been concluded that : (*Vidya Drolia case* [*Vidya Drolia* v. *Durga*

Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 121)

> "*154.4. Rarely as a demurrer the court may interfere at Sections 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable*, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. *The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood*. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. *This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism*."
>
> (emphasis supplied)

45.3. In para 244.4 it was concluded that : (*Vidya Drolia case* [*Vidya Drolia* v. *Durga*

Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] , SCC p. 162)

> "*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***"*."
>
> (emphasis supplied)

46. The upshot of the judgment in *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] is affirmation of the position of law expounded in *Duro Felguera* [*Duro Felguera, S.A.* v. *Gangavaram Port Ltd.*, (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] and *Mayavati Trading* [*Mayavati Trading (P) Ltd.* v. *Pradyuat Deb Burman*, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] , which continue to hold the field. It must be understood clearly that *Vidya Drolia* [*Vidya Drolia* v. *Durga Trading Corpn.*, (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] has not resurrected the pre-amendment position on the scope of power as held in *SBP & Co.* v. *Patel Engg. Ltd.* [*SBP & Co.* v. *Patel Engg. Ltd.*, (2005) 8 SCC 618]

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."

94. The aforesaid decision makes it amply clear that the standards of examination under Section 11 of the A&C Act are limited and as explained by the Supreme Court, it is only in cases where there is not even a vestige of doubt that the claims are barred by limitation, that the Court could decline to refer the disputes to arbitration.

95. The respondents had relied upon the decision of this Court in ***M/s KSR Brothers, through its Partner Jaswinder Singh v. IGNOU, through its Vice Chancellor***[35], in support of their contention that the present petition is liable to be dismissed as the claims are barred by limitation. The said decision is not applicable to the facts of the present case as it is apparent that the issue of limitation is a contentious one. Admittedly, the respondents have not launched an Electric Vehicle commercially. According to the respondents, respondent no.2 intends to do so shortly. The petitioners claim that the respondents cannot market and sell the same under any trademark containing the word "Hero" or any variant thereof. The question whether showcasing of an Electric Scooter at an auto exhibition extinguishes the petitioners remedy to object to commercial exploitation of the trademarks in connection with Electric Vehicles, is clearly a question that requires adjudication. As stated above, the petition can be rejected only in cases where there is even a vestige of doubt that the claims are barred by limitation.

[35] 2021 SCC OnLine Del 5018.

96. The next question to be examined is whether the arbitration agreement under the TMNA stood discharged. It was contended on behalf of respondent nos. 1 and 3 that the TMNA has been performed, as each of the Family Groups had undertaken actions to implement the material terms of the TMNA. It was stated that the F3 Family Group had applied for being recorded as a subsequent proprietor of the registered Trade Mark nos. 235780 and 659053 being the trademark "Hero" for 'scooters, motorcycles and parts thereof' and for 'vehicle in parts thereof, tractors and parts thereof', respectively.

97. It is also contended that the F1 Family Group had withdrawn their applications for registration in respect of certain marks containing the word "Hero". Respondent nos. 1 and 3 also rely on an email dated 04.06.2013 whereby the F1 Family Group had confirmed that the F1 Family Group would be entitled to use the mark "Hero Electric" for Electric Vehicles and the F3 Family Group could continue to use the mark "Hero" in any form or manner, with any prefix or suffix, other than "Hero Electric" for electric bikes scooters and/or environmental friendly vehicles. It is submitted that pursuant to the Power of Attorney executed by petitioner no. 1 and the consensus between the Family Groups, the Registrar of Trademarks had passed an order dated 31.01.2014 and directed respondent no. 3 to be the registered proprietor for the Trade Mark nos. 235780 and 659053 for the mark "Hero".

98. The petitioners dispute the above. It is their case that they had not accepted that the F3 Family Group could use the trademark "Hero" in any form in respect of Electric Vehicles. They contend that a

confirmation letter was sought but it was not signed by petitioner no.1. On the contrary, the F1 Family Group had declined to confer any other right in favour of the F3 Family Group.

99. Respondent nos. 1 and 3 also contend on the strength of the factual averments, that the F1 Family Group had acquiesced in the entitlement of the F3 Family Group to use any mark other than the mark “Hero Electric” in respect of Electric Vehicles. The petitioners have countered the aforesaid submissions. They assert to the contrary and contend that the F1 Family Group had objected to the F3 Family Group for using the trademark “Hero” or any variant thereof in respect of Electric Vehicles and, the respondents had refrained from commercially launching any Electric Vehicle under the brand name “Hero” or any variant thereof.

100. It is not apposite for this Court to adjudicate any of the aforesaid issues in these proceedings.

101. The contention that the present petition is liable to be dismissed as the other parties to the FSA and TMNA have not been joined as parties, is unmerited. The petitioners have arrayed the head of the F3 Family Group and two entities allocated to the F3 Family Group as the disputes are essentially against the F3 Family Group. The parties against which no relief is sought are not necessary parties.

102. The next question to be examined is whether petitioner no. 2 and, respondent nos. 2 and 3 can be included as parties in the arbitration proceedings. Petitioner no. 2 was incorporated by the F1 Family Group

after the Munjal Group had entered into the FSA and TMNA. However, it is not disputed that petitioner no. 2 is claiming its rights through the F1 Family Group, which is admittedly a party to the Arbitration Agreements.

103. Respondent nos. 2 and 3 are non-signatories to the FSA and the TMNA. However, it is not disputed that respondent no. 3 had executed a Deed of Adherence in terms of Article VIII of the FSA. Article VIII of the FSA is set out below:

> "Article VIII
>
> Deed of Adherence
>
> *8.1 Each of the Patriarchs states and confirms that the Family Settlement recorded herein has been arrived at after full discussions with and consent, and approval and authorisation of Munjal Family Members comprised in his Family Group and agrees and undertakes to cause each member of his Family Group to enter into a Deed of Adherence substantially in form and content as at Schedule 8A hereto in token reiteration thereof.*
>
> *8.2 The Parties agree that they shall cause each Munjal Group Entity to agree to and be bound by the Family Settlement recorded herein and shall accordingly cause each Munjal Group Entity to execute and enter into a Deed of Adherence substantially in form and content as at Schedule 8B hereto."*

104. Clauses 1 and 2 of the format of the Deed of Adherence annexed as Schedule 8B reads as under:-

"**NOW THEREFORE THE [F1] FAMILY MEMBER DECLARES AND THIS DEED OF ADHERENCE WITNESSETH AS FOLLOWS:**

1. The [F1] Family Member hereby declares and confirms that the Patriarch of [F1] Family Group has entered into the Family Settlement Agreement with the consent and approval of all [F1] Family Group members including the [F1] Family member and after satisfactory discussions of the proposals with the [F1] Family Group members including the [F1] Family Member.

2. The [F1] Family Member hereby acknowledges that he/she has received a copy of the Family Settlement Agreement and Shri………………………., the husband/father/son of the [F1] Family Member has read and explained to the [F1] Family Member fully and in detail the Family Settlement Agreement and he/she has understood fully the contents and implications of the Family Settlement Agreement and agrees and confirms that the Family Settlement Agreement is in the best interests of the [F1] Family Member and he/she shall be bound by the provisions of the Family Settlement Agreement as of the date thereof as if he/she were an original Party thereto and the Family Settlement Agreement shall have full force and effect on him/her and the same shall be read and constituted to be binding on him/her and enforceable against him/her in accordance with the terms of the Family Settlement Agreement."[36]

105. Thus, undeniably, respondent no.3 had agreed to be bound by the provisions of the FSA as if it was an original party thereto.

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[36] Clauses 1 and 2 of Schedule 8B annexed to the FSA.

106. It is also claimed that Hero Cycles Limited had assigned the trademark “Hero” in favour of respondent no.3 in furtherance of the FSA and TMNA. Respondent no.3 is thus, also the beneficiary of the FSA and TMNA. Admittedly, it is also a Munjal Group Entity. *Prima facie*, respondent no.3 would also be bound by the Arbitration Agreement under the FSA and TMNA.

107. Respondent no.2 claims that it is neither a signatory nor has it executed a Deed of Adherence as required under Article VIII of the FSA. This is stoutly disputed by the petitioners. The petitioners point out that in proceedings[37] under Section 9 of the A&C Act that were instituted by the petitioners, respondent no.2 had admitted that it had also executed a Deed of Adherence and therefore, it is now not open for respondent no.2 to contend to the contrary.

108. This Court had pointedly asked Dr Singhvi, learned senior counsel who appeared on behalf of respondent no.1, as to the respondent no.1’s stand whether respondent no.2 is bound by the FSA or TMNA. He had initially avoided answering the question and finally stated that he had no instructions to answer the same. Clearly, the intention being to sit on the fence. Undisputedly, it was respondent no.1’s obligation to ensure that respondent no.2 files the Deed of Adherence and its failure to ensure the same would give justifiable grounds to allege that respondent no.1 breached the terms of the FSA. In this context, the stand of respondent no.1 to not squarely answer the questions put from the

[37] OMP (I) (COMM) 49/2018 (Delhi High Court).

Court is, *prima facie*, reflective of a less than honest intent.

109. Be that as it may, it is not disputed that respondent no.2 is a part of the Munjal Group Entities that was allocated to the share of the F3 Family Group under the FSA. It is also not disputed that the members of the F3 Family Group control respondent no.2 in their capacity of substantial shareholders. Additionally, certain members of the F3 Family Group including respondent no.1 are principal officers of respondent no.2.

110. Respondent no.2 is also an indirect beneficiary of the FSA and now claims that it is entitled to use the trademark "Hero" through respondent no.3.

111. It is clearly not open for the F3 Family Group to claim that it is entitled to control respondent no.2 company to the exclusion of the other Family Groups pursuant to the FSA and, at the same time contend that respondent no.2 is not bound by the terms of the FSA.

112. It is also relevant to refer to Section 7(4)(c) of the A&C Act, which expressly provides that assertion of an arbitration agreement in a Statement of Claims, which is not denied would constitute an arbitration agreement. In the present case, it is not disputed that respondent no.2 had admitted that it had executed a Deed of Adherence which, as stated above, required the Munjal Group Entities to assert that it should be bound by the FSA as if it was a party to it. Thus, on an analogy of Section 7(4) of the A&C Act, it may not be possible for respondent no.2 to deny the existence of an arbitration agreement.

113. In addition, there are various principles on the basis of which a non-signatory may be compelled to arbitrate. These include cases where a non-signatory is an alter ego signatory[38]; the non-signatory is found to be a party by lifting the corporate veil[39]; the non-signatory is a part of the same group of companies[40]; the non-signatory is a party to a composite transaction[41]; the non-signatory's consent is implied[42]; the non-signatory is estopped from avoiding arbitration where it knowingly received benefits under the agreement.[43]

114. Undeniably, the F3 Family Group intends to carry on the business of manufacturing Electric Vehicles through respondent no.2 which is allocated in their package under Schedule 7 of the FSA.

115. The decision in ***Atul Singh***[12] and ***Vimal Kishor Shah***[13] are not applicable in the facts of this case. In Atul Singh's case heirs of one Rajendara Prasd Singh (R) had challenged a partnership deed dated 17.2.1992 as illegal and void. R was neither a signatory nor a partner under the 17.02.1992 partnership deed. In this context the court found

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[38] Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 [hereafter 'Chloro Control']; Barcelona Traction, Light and Power Company Ltd.: (1970) ICJ Rep. 3 [hereafter 'Barcelona Traction'].

[39] Ibid [Barcelona Traction]; Builders Federal (Hong Kong) v. Turner Const.: 655 F. Supp. 1400, 1406 (S.D.N.Y. 1987); Wm. Passalacqua Builders, Inc. v. Resnick Developers South, Inc.: 933 F.2d 131, 32, 32 Fed. R. Evid. Serv. 1218 (2d Cir. 1991); Thomson-CSF, S.A. v. American Arbitration Association: 64 F.3d 773 (2d Cir. 1995).

[40] Ibid [Chloro Controls]; Mahanagr Telephone Nigam Ltd. v. Canara Bank, (2020) 12 SCC 767 [hereafter 'Canara Bank']; Dow Chemical v. Isover-Saint-Gobain (1984) Rev Arb 137); GE Energy Powe Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC: 140 S.Ct. 1637, 1640 (2020).

[41] Ibid [Canara Bank].

[42] Gvozdenovic v. United Air Lines, Inc.,: 933 F.2d 1100, 1105 (2d. Cir. 1991).

[43] Life Techs Corp.v. AB Sciex Prop. Ltd: 803 F.Supp.2d 270, 273-74 (S.D.N.Y. 2011); Deloitte Noraudit v. Deloitte Haskins Sells: 9 F.3d 1060 (2d Cir. 1993); Avila Group Inc. v. Norma J. of California: 426 F. Supp. 537 (S.D.N.Y. 1977).

that an arbitration agreement did not exist between R (or heirs of R and the other parties). In addition, the application under section 8 of the A&C Act was not accompanied by a certified copy of the arbitration agreement. In *Vimal Kishor Shah's case* the principal question was whether a arbitration clause in a trust deed constituted an agreements between the trustees. The court held that the trust deed was a declaration by the settlor and did not amount to an agreement *inter se* the trustees.

116. The reliance placed by respondent no.2 to the decision of the Supreme Court in ***Reliance Natural Resources Limited v Reliance Industries Limited***[17] is not apposite. Whilst the observations that the doctrine of identification may be applicable only in respect of small undertakings and personalities of large public companies cannot be considered as the personalities of the persons involved[44] are relevant; the present case does not rest on the premise that respondent no.2 is an alter ego of respondent no.1 or the F3 Family Group. It is also material to note that Supreme Court held that "suitable arrangement" as required to be made under the family MOU in that case was made. The other issues involved were materially different from the ones in this case.

117. In view of the aforesaid, this Court is of the view that *prima facie,* respondent nos. 2 and 3 are required to be joined in the arbitral proceedings as parties, even though, they may not be signatories to the FSA or TMNA.

118. Having stated the above, it is also necessary for this Court to

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[44] Paragraph 56

clarify that the view expressed by this Court regarding existence of an arbitration agreement insofar as petitioner no.2, respondent nos. 2 and 3 are concerned, is a *prima facie* view and, the parties are not precluded from raising their respective contentions in respect of the existence of the arbitration agreement before the Arbitral Tribunal.

119. In ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.***[45] B.N. Krishna, J. had, observed as under:-

> "74. …Even if the court takes the view that the arbitral agreement is not vitiated or that it is not invalid, inoperative or unenforceable, based upon purely a prima facie view, nothing prevents the arbitrator from trying the issue fully and rendering a final decision thereupon.
>
> 75….. Even after the court takes a prima facie view that the arbitration agreement is not vitiated on account factors enumerated in Section 45, and the arbitrator upon a full trial holds that there is no vitiating factor in the arbitration agreement and makes an award, such an award can be challenged under Section 48(1)(a). The award will be set aside if the party against whom it is invoked satisfies the court inter alia that the agreement was not valid under the law to which the parties had subjected it or under the law of the country where the award was made. The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on a prima facie view. "

120. The Law Commission of India in its 246th Report had

[45] (2005) 7 SCC 234.

recommended as under:-

> "32. In relation to the nature of intervention, the exposition of the law is to be found in the decision of the Supreme Court in *Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.* [*Shin-Etsu Chemical Co. Ltd.* v. *Aksh Optifibre Ltd.*, (2005) 7 SCC 234] , (in the context of Section 45 of the Act), where the Supreme Court has ruled in favour of looking at the issues/controversy only prima facie.
>
> 33. It is in this context, the Commission has recommended amendments to sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the Court/Judicial Authority finds that the arbitration agreement does not exist or is null and void. In so far as the nature of intervention is concerned, it is recommended that in the event the Court/Judicial Authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void. In the event that the judicial authority refers the dispute to arbitration and/or appoints an arbitrator, under sections 8 and 11 respectively, such a decision will be final and non-appealable. An appeal can be maintained under section 37

only in the event of refusal to refer parties to arbitration, or refusal to appoint an arbitrator."[46]

121. In a recent decision of the Supreme Court in ***InterContinental Hotels Group (India) Pvt. Ltd. & Anr. v. Waterline Hotels Pvt. Ltd***[47], the Supreme Court observed as under:

> "18. At the outset, we need to state that this Court's jurisdiction to adjudicate issues at the pre-appointment stage has been the subject matter of numerous cases before this Court as well as High Courts. The initial interpretation provided by this Court to examine issues extensively, was recognized as being against the pro-arbitration stance envisaged by the 1996 Act. Case by case, Courts restricted themselves in occupying the space provided for the arbitrators, in line with party autonomy that has been reiterated by this Court in Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, which clearly expounds that Courts had very limited jurisdiction under Section 11(6) of the Act. Courts are to take a 'prima facie' view, as explained therein, on issues relating to existence of the arbitration agreement. Usually, issues of arbitrability/validity are matters to be adjudicated upon by arbitrators. The only narrow exception carved out was that Courts could adjudicate to 'cut the deadwood'. Ultimately the Court held that the watch word for the Courts is 'when in doubt, do refer'."

122. In ***Mohammed Masroor Shaikh v. Bharat Bhushan Gupta & Ors.***[48] while referring to the decision in ***Vidya Drolia v. Durga Trading Corporation***[18], the Supreme Court held that "*the Court by default would*

[46] Law Commission of India Report No. 246, dated 05.08.2015 at paragraphs 32 and 33.
[47] Arbitration Petition (Civil) No. 12 of 2019, decided on 25.01.2022 (Supreme Court of India).
[48] Civil Appeal No. 874 of 2022, decided on 02.02.2022 (Supreme Court of India).

refer the matter when contentions relating to non-arbitrability are plainly arguable."

123. This Court is refraining from examining other issues regarding the merits of the dispute in view of the principles as set out above.

124. The last remaining question to be addressed is whether the petition is liable to be dismissed as the petitioner's request for arbitration is not in terms of the Arbitration Agreement. It is contended that it was necessary for the petitioners to have entered into a mediation process before the Facilitator prior to the invocation of the Arbitration Clauses under the FSA and the TMNA. It is further submitted that the arbitration was required to be conducted by an Arbitral Tribunal comprising of a Facilitator and two other members to be jointly appointed by the four patriarchs of the Munjal Family Group. It is stated that in variance with the said procedure, the petitioners had nominated an arbitrator and had called upon the respondents to nominate its arbitrator. This was not the agreed procedure under the Arbitration Agreements.

125. Mr Satish Bansal, the named Facilitator and the Arbitrator is stated to be ineligible to be appointed as an arbitrator under Section 12 (5) of the A&C Act. It is not disputed that Mr Satish Bansal has accepted remunerative assignments from the Munjal Family Groups. He had also provided evidence to the F4 Family Group in an arbitration proceeding between the F1 and F4 Family Groups. It is not seriously disputed that Mr Satish Bansal is ineligible to act as an arbitrator, as circumstances

as set out in the Seventh Schedule to the A&C Act exist.

126. The other two members of the Arbitral Tribunal were required to be jointly appointed by the four patriarchs of the Munjal Family Groups. However, the petitioners claim that it is not possible for the four patriarchs to jointly agree on the names of the other two members of the Arbitral Tribunal as there are already disputes between the F1 Family Group and two of the other Family Groups. In addition, it is stated that the business of one of the Family Groups is now aligned with the business of the F3 Family Group.

127. The contention that Mr Bansal was known to all the Family Groups and therefore, the four patriarchs must be bound by the agreement to refer the disputes to an Arbitral Tribunal presided by him, is unmerited. The FSA and TMNA were entered into prior to the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. After the said Act came into force, a person is ineligible to be appointed as an arbitrator if circumstances as set out in the Seventh Schedule exist. Unless, the parties waive their objections, in writing in terms of the proviso to Section 12 (5) of the A&C Act after the disputes have arisen, there is no question of a person who is ineligible to be so appointed as an arbitrator.[49]

128. This Court is also of the view that if one of the persons, who is required to act jointly with other persons to appoint arbitrators, states that it is jointly impossible for him to jointly concur with the other

[49] See: Bharat Broadband Network Limited v. United Telecoms Limited: (2019) 5 SCC 755.

persons for appointment of an arbitrator, it would clearly be an exercise in futility to relegate the party to undertake that exercise. Petitioner no.1 has clearly stated that it would not be possible for him to concur on any names of any arbitrator with the other three patriarchs and therefore, it must be accepted that the mechanism for appointing two members of the Arbitral Tribunal jointly by the four patriarchs fails.

129. Although, the parties had contemplated that they would endeavor to resolve the disputes for mediation in the first instance, it is necessary to bear in mind that mediation is a voluntary process. The parties must engage voluntarily. If circumstances exists where mediation is perceived to be not feasible – as is asserted by the petitioners in this case – the precondition to attempt resolution through mediation cannot obstruct or impede reference of disputes to arbitration. In the present case, there is material to indicate that a mediation before the Facilitator is not feasible. The named Facilitator may have enjoyed the confidence of the four Family Groups at the material time, however, he does not do so now. It is not in dispute that he has rendered assistance to one of the Family Groups in arbitration proceedings where the F1 Family Group is involved. It is also not disputed that he has accepted remunerative assignments.

130. The reference to the decision in the case of ***Iron and Steel Company Limited v. Tiwari Road Lines***[16] by the respondents is not apposite. In that case, the parties had agreed to resolve the disputes in accordance with the Rules of Arbitration of the Indian Council of Arbitration and therefore, the Court held that provisions of Sub-sections

(3), (4) and (5) of Section 11 of the A&C Act had no application. There was ground to justify that the procedure as agreed was not feasible or had failed.

131. In the present case, there is no agreement between the parties accepting that the arbitration must be conducted under the rules of any arbitration institution or specialized body. The parties had agreed that in terms of Clause 5.6 of the TMNA and Clause 19.5 of the FSA, the Facilitator would act as a mediator and on failure of the mediation process, the Family Groups would submit to arbitration. The arbitration would be conducted by Mr Satish Bansal (the named Facilitator) as the Presiding Arbitrator and two other arbitrators to be appointed by the four patriarchs.

132. As stated above, conciliation is a voluntary process. The conciliation proceedings can be determined by any party declaring the same to be terminated.[50]

133. It is also relevant to mention that under Section 80(b) of the A&C Act, a Conciliator cannot be presented by the parties as a witness in any arbitral or judicial proceedings. In this case, it is stated that the Facilitator has already filed statements, which have been used in evidence in another arbitral proceedings. The provisions of Section 80(b) of the A&C Act may not apply *stricto sensu* but the underlying principles certainly do. The requirement of independence and impartiality of Mediators and Arbitrators, is sacrosanct and must be

[50] Section 76(d) of the Arbitration and Conciliation Act, 1996.

met.

134. It is conceded that the disputes between the parties have been festering for some time. However, it is clear that they have been unable to resolve the disputes. It is also the case of the petitioners that it is not possible to resolve the disputes through mediation. In this view, it would not be apposite to relegate the parties to mediation. The process of referring disputes to arbitration cannot be turned into an obstacle course.

135. During the course of the proceedings, this Court had elicited a response from the respondents, whether a sole arbitrator could be appointed. However, the learned counsel appearing for the respondent nos. 1 and 3 had stated that the said respondents would insist on an Arbitral Tribunal of three members and in terms of the Arbitration Clause.

136. In view of the above, this Court considers it apposite to allow the petition and appoint an Arbitral Tribunal of three members to adjudicate the disputes between the parties. Accordingly, Justice (Retired) Dipak Misra, former Chief Justice of India; Justice (Retired) Indermeet Kaur, a former Judge of this Court; and Justice (Retired) Indu Malhotra, former Judge of the Supreme Court are appointed as the Arbitrators to constitute the Arbitral Tribunal to adjudicate the disputes in terms of the Arbitration Agreements under the FSA and TMNA. This is subject to the members of the Arbitral Tribunal making the necessary disclosure as required under Section 12 (1) of the A&C Act and not being

ineligible under Section 12(5) of the A&C Act.

137. The parties are at liberty to approach the learned Members of the Arbitral Tribunal for further proceedings.

138. It is clarified that all contentions of the parties are reserved. The observations made by this Court are solely for the purposes of this petition and the Arbitral Tribunal shall decide all disputes uninfluenced by any observations made in this order.

139. The petition is disposed of in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

FEBRUARY 17, 2022
GSR/PKV/RK/v

** Note: Corrected by the order dated 09.03.2022 passed in IA No. 3819/2022.*