

IN THE COURT OF MS. DEEPALI SHARMA
DISTRICT JUDGE (COMMERCIAL-03),
PATIALA HOUSE, NEW DELHI

ARB A (COMM) No.: 3/24
CNR No. DLND01-002325-2024

In the matter of:
ONE 97 COMMUNICATIONS LIMITED,
Registered Office at :
First Floor, Devika Tower,
Nehru Place, New Delhi-110019.

Corporate Office at :
One Skymark, Tower-D,
Plot No. H-10B, Sector-98,
Noida-201304.

..... Appellant

Versus

1. M/S NIGHTSTAY TRAVELS PRIVATE LIMITED,
Registered Office :
Flat No. 301, H.No. 3, Third Floor,
Ashiana Apartment,
Jogabai, Jamia Nagar, Okhla,
New Delhi-110025.

2. MR. NASR ULLAH KHAN,
3rd Floor, 158, Pocket-2,
Jasola, New Delhi-110025.

Also at :

161/3, Ashiana Apartments,
S.S.Avenue Jagabai,
Jamia Nagar, Okhla,
New Delhi-110025.

3. BLISS INNS PVT. LTD.
Registered Office :

C-34, GroundFloor,
Hauz Khas, New Delhi-110016.

Also at :
Corporate Office at
Logix Park, A-5,
Ground Floor, Sector-16,
Noida, Uttar Pradesh-201301.

.....Respondents

Date of institution of suit	:	16.03.2024
Judgment reserved on	:	19.02.2026
Date of Judgment	:	13.03.2026

JUDGMENT

1) The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act 1996 (hereinafter referred to as the 'Act') assailing the order dated 03.01.2024 passed by Id. Sole Arbitrator under Section 16 of the Act holding that the dispute in issue was 'Non-Arbitrable' and accordingly dismissed the claim of the appellant.

2) The facts in brief are that the appellant is a Private Limited Company, which owns and operates on-line market place platform on website www.paytm.com. It acts as a online platform for different entities to sell their bookings and for different buyers to assess the variety of booking services and purchase the booking offered by other entities. Respondent no. 1 is a Private Limited Company, a start-up engaged in the business of developing and operating software application/platforms for

on-line booking of hotels and other accommodations.

3) It is stated that Respondent no. 2 is the erstwhile founder of technology platform and mobile application “Nightstay App” and “Nightstay booking”. Respondent no. 2 was also the Director of respondent no. 1.

4) It is stated that on 14.12.2018 the appellants and the respondents entered into a Deed of Assignment whereby the respondents agreed to assign, convey and transfer unto the appellant the entire rights, interest, benefits etc. in and to the assigned intellectual property unconditionally.

5) In terms of Clause -5 of the Deed of Assignment, in consideration of the Deed of Assignment and transfer of the assigned intellectual property, the appellant agreed to pay to the respondents a one time fixed amount of Rs. 5,50,00,000/- exclusive of all direct and indirect applicable taxes. In pursuance thereof the respondent issued a tax invoice dated 14.12.2018 bearing no. NSD23311 for a sum of Rs. 6,49,00,000/- which included Rs. 5,50,00,000/- towards one time fixed amount alongwith applicable SGST and CGST aggregating Rs. 99,00,000/-. On 24.12.2018 the appellant made a payment of Rs. 6,49,00,000/- to the respondent towards tax invoice dated 14.12.2018.

6) It is urged that in terms of Clause 5.2 of Deed of Assignment, it was the responsibility of the respondents to pay all applicable taxes in relation to the transactions including compliance of GST Act. It is stated that at the time of GST reconciliation for the relevant period, the appellant was shocked

to notice that the respondent had not deposited the applicable GST with the appropriate authority, which the respondents were under an obligation to deposit by 31.12.2018 and to comply with GSTR-1 in order to enable the appellant to avail the benefit of input tax credit. The respondents accordingly were in breach of Clause 5.2 of the Deed of Assignment and hence, the respondents are liable to indemnify the appellant in terms of Clause 7.1 of the Deed of Assignment and thereby refund an amount of Rs. 99 Lakhs alongwith interest @ 18% per annum to the appellant. It is stated that despite issuance of Legal Notice dated 20.04.2020 the respondents failed to make the payment and meet their obligation as per the Deed of Assignment.

7) The appellant invoked arbitration in terms of Clause 12.3 of the Deed of Assignment dated 14.12.2018 and eventually vide order dated 05.07.2022, the Hon'ble High Court appointed the Ld. Arbitrator for adjudication of the present dispute.

8) It is stated that vide the impugned order dated 03.01.2024 the ld. Arbitrator held that Clause 5.2 of the Deed did not cover GST payable under the GST Act 2017 which was contrary to the intention of the parties and thus the ld. Arbitrator has altered the *inter-se* terms agreed between the parties and hence, ld. Arbitrator could not have dismissed the claim of the appellant as the issue involved is arbitrable. It is stated that the issue involved in the instant dispute involves contractual obligation of the parties, which were incidentally connected to taxation.

9) It is argued by ld. Counsel for the appellant that no

sovereign function was foisted upon the Id. Sole Arbitrator and the dispute was arbitrable in nature. It is stated that the claim of the appellant was merely monetary as it sought the amount of Rs. 99,00,000/- alongwith interest and no direction was sought that respondent no. 1 be directed to pay GST and fill form GSTR 1 and hence, the dispute was purely contractual.

10) On the other hand, it is contended by Id. Counsel for the respondent that there is no infirmity in the impugned arbitral award. It is stated that that Ld. Sole Arbitrator has rightly held that Clause 5 did not impose any liability/obligation/covenant on the respondents as per the agreement and did not contemplate shifting of burden of tax liability on either party and as such the dispute was not a contractual breach but at best a statutory one, and therefore, *per se* non-arbitrable and also expressly barred under Section 162 of GST Act. It is urged that the claim of the appellant pertains to subject matter of taxation, which is non-arbitrable being a sovereign and public interest function of the State. Ld. Counsel for the respondent referred to the decision of the Hon'ble Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*, (2011) 5 SCC 532, in support of his contention.

11) It is further stated that input tax credit is not a contractual right but a concessional tax and its assessment solely vests in the authority under GST Act and any dispute pertaining to the same is non-arbitrable. It is further stated that there is no dispute in the proposition of law laid down by the Hon'ble Supreme Court in *Spectrum Power Generation Ltd. vs. GAIL*

India Ltd., 2022 SCC Online Del 4262 that service tax being an indirect tax can be passed on to another party by entering into a contract and if any dispute arises from such contract, the same would be a right in *personam* and therefore arbitrable and when the parties agree to contractually shift the burden to pay GST or provide for indemnification by the defaulting party to the aggrieved party for non-payment of GST to the Govt. or GST reimbursement arrangement and the like are arbitrable when such obligations are contractually set out by the parties expressly in the contract. It is urged that in the present case, the Assignment Deed does not provide for either contractually shifting the burden to pay GST on the respondents or for indemnification and hence the judgment in the Spectrum case (Supra) would not apply to the facts of the present case.

12) It is stated that in the present case, the appellant is not an aggrieved party and has only invoked arbitration to unjustly enrich itself. It is stated that the appellant is not entitled to be given the benefit of input tax credit from the department despite the failure of respondent no. 1 to deposit the same. It is accordingly prayed that there is no infirmity in the award passed by the Id. Arbitrator and same is liable to be upheld.

13) I have heard Id. Counsel for the parties and perused the record.

14) The present dispute between the parties stems from the Assignment Deed dated 14.12.2018 entered into between the appellant (assignee), respondent no. 1 (assignor) and respondent no. 2 (founder). The recital in the Assignment Deed *inter alia*

provides that the assignor was the proprietor of the intellectual property in relation to the technology platform and is engaged in the business of developing and/or operating software applications / platforms for online bookings of hotels and other accommodations and it has registered various domain names. The assignor was also the proprietor of the Trademarks mentioned in the Assignment Deed and vide the Assignment Deed the assignor had agreed to assign its rights, title and interest etc. in the abovesaid intellectual property to the assignee. The founder had agreed to facilitate the same.

15) Clause 5 of the Assignment Deed pertaining to consideration envisages as follows:

“5 CONSIDERATION :

5.1 In consideration for the assignment and transfer of the Assigned Intellectual Property, the sufficiency of which the Assignor, and the Founder hereby acknowledge, the Assignee shall pay the Assignor, a fixed one-time amount of INR 55,000,000 (Indian Rupees five crore and fifty lakhs only)(“Consideration”) exclusive of all direct and indirect applicable taxes, on the Closing Date. It is clarified that the Assignee shall not be required to make any further payments by way of royalty or otherwise, towards the said assignment of the Assigned Rights.

5.2 The Assignee shall be entitled to deduct and withhold from the Consideration, such amounts as may be required to be deducted or withheld under any Applicable Law relating to taxes. To the extent such amounts are so deducted or withheld, such amounts shall be treated for all purposes under this Deed as having been paid to the Assignor. The Assignor and the Founder shall bear all such taxes as they are required to pay under Applicable Laws in relation to the transactions contemplated hereunder unless otherwise agreed in this Deed.”

16) Pursuant thereto in consideration of the Assignment Deed, the assignee i.e. the appellant herein, paid an amount of Rs.6,49,00,000/- vide the invoice dated 14.12.2018 to the assignor inclusive of one time amount of Rs. 5,50,00,000/- and State GST and Central GST @ 9% each totalling to Rs. 99,00,000/-.

17) It is the case of the appellant that the respondent failed to upload the GST R-1 against the aforesaid invoice and hence, the appellant has been denied input tax credit and thereby suffered a loss for which the respondents are liable to indemnify the appellant and accordingly reimburse the appellant for the losses suffered by it including Tax Loss, interest and penalty.

18) In this regard, it is contended by Id. Counsel for the respondent that there is no express/implied obligation under the agreement to submit Form GSTR-1 and that the entire agreement does not have any reference to the term GST. It is stated that the said Assignment Deed though expressly refers to the words “Income Tax” and obligations relating to it in Clause 1.1.18 and 4.15, however, there is no reference to GST, thereby making it clear that the parties never contemplated any obligation relating to submission of Form-GSTR-1. The respondent has relied upon the judgment of the Hon’ble Supreme Court in *M/s Shree Enterprise Coal Sales Pvt. Ltd. vs. Union of India (Appeal No. 6359/2022 decided on 12.09.2022)* wherein the Hon’ble Supreme Court held that disputes relating to tax concessions are non-arbitrable. It is stated that since the Assignment Deed does not contemplate GST, therefore, the same cannot be read into the

contract and obligations arising therefrom are accordingly non-arbitrable. It is further stated that a term can only be implied into the contract if it is necessary in the business sense to give efficacy to the contract. It is stated that even if any implied obligation can be read into Clause 5.2, the same is not necessary for the purpose of business efficacy of the Assignment Deed and hence, the obligation regarding GST cannot be read into the Assignment Deed. Ld. Counsel for the respondent has referred to the decision in the matter of *Nabha Power Ltd. Punjab State Power Corporation Limited (PSPCL) & Anr., (2018) 11 SCC 101*, to contend that the explicit terms of the contract are always the final word with regard to intention of the parties.

19) Perusal of the record reveals that Clause 5.1 of the Assignment Deed specifically provides that the assignee shall pay to the assignor a fixed one time amount of INR 5,50,00,000/- consideration *exclusive* of *all* direct and indirect applicable taxes. Clause 5.2 provides that the assignee shall be entitled to deduct and withhold from the consideration such amounts as may be required to be deducted or withheld under any *applicable law* relating to taxes. The amounts so deducted or withheld shall be treated as having been paid to the assignor. It is further mentioned therein that the assignor and the founder shall bear *all such taxes* as they are required to pay under the *applicable laws* in relation to the transactions contemplated hereunder unless otherwise agreed in the Assignment Deed.

20) Furthermore, Clause 1.1.2 of the Assignment Deed defines “Applicable Law” as all applicable laws, by-laws, rule,

regulations, orders, protocols, codes, guidance, policies, notices, directions and judgments or other requirements of any Govt. Authority in any relevant jurisdiction.

21) Hence, the term “applicable law” has been defined to include all applicable laws, by-laws etc. The definition of “applicable law” is not restrictive and infact is expansive. Merely because GST has not been specifically discussed in the Assignment Deed, does not lead to the conclusion that GST is not contemplated under the Deed. Infact when the term “applicable law” is so widely worded, then the exclusion of GST cannot be inferred/read into the Deed.

22) Pertinently, the Assignment Deed was entered into on 14.12.2018 and the Tax Invoice was also raised by the respondents on the same date itself i.e. 14.12.2018. As per Clause 5.1 the assignee had to pay to the assignor a fixed one time amount of Rs. 5,50,00,000/- exclusive of all the *direct and indirect taxes*. GST is an indirect tax. The invoice dated 14.12.2018 was for an amount of Rs.5,50,00,000/- and also included the component of SGST @ 9% and CGST @ 9%, totaling to Rs. 99,00,000/-. In the event GST was not contemplated in the Agreement by the respondents, then there is no reason why the component of GST was included in the Tax Invoice, which was raised on the same day when the Assignment Deed was entered into. The GST component was in addition to the one time amount of Rs. 5,50,00,000/- as contemplated under the Assignment Deed. In these circumstances, it cannot be urged by the respondent that the Assignment Deed did not contemplate

Goods and Services Tax.

23) It is vehemently contended by Id. Counsel for the respondent that the appellant has claimed refund of Rs. 99,00,000/- from the respondent on the ground that it could not avail the benefit of input tax credit from the government owing to non-deposit of GST by the respondent with the concerned authority. It is urged that since the said dispute pertains to GST, therefore GST Act would be applicable, which is a self contained Code regarding levy, computation, recovery etc. of the GST and the instant dispute *per se* is not arbitrable as the GST Act provides for a special forum to adjudicate dispute relating to GST. It is stated that the jurisdiction of the Civil Court is ousted under Section 162 CGST Act and hence, the present dispute is not arbitrable. Section 162 Central Goods and Service Tax Act reads as under :

“Section 162 Bar on jurisdiction of Civil Courts: Save as provided in Sections 117 and 118, no Civil Court shall have jurisdiction to deal with or decided any question arising from or relating to anything done or purported to be done under this Act.”

24) Ld. Counsel for the respondent has also referred to the decision of the Hon’ble Supreme Court in *Booz-Allen and Hamilton INC vs. SBI Home Finance Limted, 2011 (5) SCC 532*, wherein the Hon’ble Supreme Court observed as follows :

“21. The term ‘arbitrability’ has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under : (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would

exclusively fall within the domain of public fora (courts). (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement. (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal.

22. 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 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 a 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. The well recognized 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.

23. 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, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and 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). 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.”

25) It is thus contended by Id. Counsel for the respondent that the present dispute relates to taxation, which is a right in rem and is thus incapable of private settlement by way of arbitration and ought to be decided by Public Tribunal or the concerned authority.

26) Hon’ble Supreme Court expounded the law in relation to arbitrability/non-arbitrability of the disputes in the decision of *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1, and

propounded the four fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable and held as follows :

“76. In view of the above discussion, we would like to propound a four-Fold 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.

76.1.(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.

76.1.(3) When cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

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

76.1.(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.

76.1.(6) However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures Pvt. 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 sovereign functions of the State. Further, violations of criminal law are offenses 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.”

27) Ld. Counsel for the respondent also referred to the decision of the Hon’ble Supreme Court in M/s Shree Enterprise Coal Sales Pvt. Ltd. v. UOI and Anr., Civil Appeal No. 6539 of 2022, wherein the Hon’ble Supreme Court in its judgment dated 12.09.2022 made the following observations :

“3 The appellant is a private limited company with a Head Office in Kolkata and branches in other States, including Uttar Pradesh. The branch in Uttar Pradesh is situated in the District of Bulandshahar and is registered since 18 July 2001. The appellant is involved in the trading of coal which it obtains from e-auctions conducted, inter alia, by the subsidiaries of Coal India Limited. The appellant has stated that after purchasing coal from the second respondent, Northern Coal 18:04:52 IST through the Railways of which the destination was the State of Madhya Pradesh. Initially, the second respondent charged a concessional rate of tax at two per cent. The grievance of the appellant is that the second respondent did not issue Form E-1 and did not grant the benefit of Form C while charging tax at the rate of four per cent. In this backdrop, the appellant moved a writ petition before the High Court seeking, inter alia, the following reliefs:

“(i) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondent no.2 to accept, Form C and issue Form E-1 to the petitioner for the goods distained from one State to another [i.e. from their premises to Madhya Pradesh].

(ii) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondent no.2 to grant the benefit of concessional rate of tax to the petitioner after accepting Form C on record.”

4 The High Court dismissed the writ petition on the ground that:

(i) The terms of e-auction provided that any dispute is arbitrable; and

(ii) The appellant was virtually seeking the enforcement of a contract through a writ petition for raising a claim for refund.

5 On both these aspects, we are of the view that the High Court was in error. The appellant is not asserting a contractual claim in pursuance of the e-auction. Undoubtedly, a contractual dispute would be amenable to be resolved by arbitration. However, in the present case, as the reliefs which have been extracted above indicate, the dispute was not of that nature. Hence, we are inclined to set aside the impugned judgment and order dated 15 March 2018

and remand the proceedings back to the High Court for consideration on merits. The appeal is allowed. The impugned judgment and order dated 15 March 2018 is set aside. Writ Tax No 850 of 2016 is restored to the file of the High Court for consideration afresh.”

28) It is thus contended by Id. Counsel for the respondent that the appellant in the present case is not asserting a contractual claim and is infact seeking refund of the amount owing to the fact that the benefit of input tax credit was not given to it. It is urged that since the present case pertains to taxation under CGST Act, therefore, it is a right *in rem* and not a right in *personum* and thus is not arbitrable.

29) Ld. Counsel for the respondent has also referred to the decision of the Hon’ble Supreme Court in *Spectrum Power Generation Ltd. v. GAIL (India) Ltd.*, 2022 SCC OnLine Del 4262,. It is urged that in that case the petitioner came to realize that he had been incorrectly foisted with the liability towards GST in contravention of the agreement between the parties and in those circumstances, the Hon’ble Supreme Court held that the dispute was arbitrable.

30) Perusal of the aforesaid judgment *Spectrum Power Generation Ltd. (Supra)* reveals that in the said case also the contention was raised that the dispute essentially relates to whether the burden of GST/VAT, which may have been born by GAIL and of which reimbursement was claimed by the petitioner was liable to be refunded and thus was a dispute relating to taxation and thus non-arbitrable in the light of the principles enunciated in *Vidya Drolia*.

31) In these circumstances, the Hon'ble Supreme Court in *Spectrum Power Generation Ltd. (Supra)* made the following observations :

“14. From the enunciation of the legal principles which would govern, the principal issue which arises is whether the objection taken by the respondent merits the reference being denied or in the alternative the matter being referred to the Arbitral Tribunal and the question being kept open for its consideration.

15. It would be pertinent to recall that Vidya Drolia while expounding upon what questions would fall in the category of non- arbitrable disputes had included those which related to the sovereign functions of the State. It was explained that sovereign functions would extend to the exercise of an executive power in different fields including that of commerce, economic, legislation in all forms, taxation, eminent domain and police powers. Vidya Drolia thus is an authority for the proposition that the powers and decisions that the State may take in exercise of its sovereign functions, and which would necessarily include its taxing power, cannot form subject matter of an arbitration.

16. However, it is relevant to bear in mind that the petitioner here does not assail, question or dispute a tax that may have been imposed upon it by the State in exercise of its sovereign or statutory powers. The issue which is essentially raised is whether the GST/VAT liability which came to be placed upon GAIL could be passed onto the petitioner or it be held liable to reimburse GAIL to the aforesaid extent under the agreement. The challenge is raised solely on the anvil of Article 10.6. The petitioner asserts that it was only liable to bear such taxes as may have been shouldered by GAIL while purchasing gas from any supplier or any tax that may have been levied or stood attracted at the time when natural gas was sold to the petitioner. Viewed in the aforesaid light, it is manifest that the issue does not relate to the taxing power of the State or any action taken or an order made in exercise thereof.” (emphasis supplied)

32) Accordingly, in the aforesaid case, the issue was regarding as to whether the GST liability which was placed upon GAIL could be passed on the petitioner or it was to be held liable to reimburse GAIL under the Agreement, was held to be arbitrable and the Hon'ble Supreme Court negated the contention that the dispute raised was non-arbitrable, in the facts of that case.

33) In *M/s Shree Enterprise Coal Sales (Supra)*, a writ petition was filed seeking Mandamus directing respondent no. 2 i.e. State to accept Form-C and issue Form-E1 to the petitioner for the goods destined from one State to another and further seeking a direction that respondent no. 2 to grant benefit of concessional rate of tax to the petitioner after accepting Form-C on record. In that case the Hon'ble Allahabad High Court observed that the petitioner was seeking enforcement of a contract through a Writ Petition and was raising a claim for refund of money and therefore the Writ Petition was held not maintainable. The petitioner filed a Civil Appeal bearing no. 6539 of 2022 before the Hon'ble Supreme Court and in the backdrop of the nature of relief sought by the petitioner that the respondent did not issue Form-E1 and did not grant benefit of Form-C while charging tax from the petitioner, the Hon'ble Supreme Court held that the reliefs which have been sought are not in the nature of contractual dispute. Hence, in *M/s Shree Enterprise Coal Sales (Supra)*, considering the nature of relief sought, the Writ Petition was held maintainable.

34) In the present case, however, no relief has been sought

from the State by the appellant. No relief has been sought by the appellant that the respondent be directed to deposit GST with State. State has not even been arrayed as a party to the claim petition nor any relief has been claimed qua the State. The relief claimed is restricted to recovery of money from the respondent, which had been taken by the respondent from the appellant towards GST component and thereafter retained by it.

35) In the present case, it is not the case of the respondent that the respondent has deposited the GST with the government. Admittedly, the amount towards GST amounting to Rs. 99,00,000/- was given by the appellant to the respondent on 24.12.2018 alongwith one time fixed amount of Rs. 5,50,00,000/-. In *Aastha Enterprises vs. State of Bihar, 2023 (117) GSTR 364*, passed by Hon'ble Mr. Justice K.Vinod Chandaran, the then Chief Justice of the Patna High Court, it was held as under:

“11. It is true that Input Tax Credit is a concept introduced in the tax regime, all over the country for the purpose of avoiding the cascading effect of taxes. The benefit of such credit being availed by a purchasing dealer who sells or manufactures goods, using raw materials on which tax has been paid is a benefit or concession conferred under the statute as has Patna High Court CWJC No.10395 of 2023 dt.18-08-2023 been held in ALD. Automobile Private Limited. Necessarily, the conditions for such availment of credit has to be scrupulously followed failing which there can be no benefit conferred on the assessee. The benefit is one conferred by the statute and if the conditions prescribed in the statute are not complied; no benefit flows to the claimant.

12. The contention of double taxation does not impress us especially since the claim is denied only when the supplier who collected tax from the purchaser fails to pay it to the Government. Taxation

as has been held is a compulsory extraction made for the purpose of public good, by the welfare State and without the levy being paid to the Government; there can be no claim raised of the liability to tax having been satisfied and hence there is no question of double taxation.

13. The further contention raised by the assessee is also one of the statute having provided measures to recover the collected tax, which the selling dealer fails to pay to the Government. The mere fact that there is a mode of recovery provided under the statute would not absolve the liability of the tax payer to satisfy the entire liability to the Government. The purchasing dealer being the person who claims Input Tax Credit could only claim the Input Tax benefit if the supplier who Patna High Court CWJC No.10395 of 2023 dt.18-08-2023 collected the tax from the purchaser has paid it to the Government and not otherwise. The Government definitely could use its machinery to recover the amounts from the selling dealer and if such amounts are recovered at a later point of time, the purchasing dealer who paid the tax to its supplier could possibly seek for refund. However, as long as the tax paid by the purchaser to the supplier, is not paid up to the Government by the supplier; the purchaser cannot raise a claim of Input Tax Credit under the statute. We have to notice that the word 'Input Tax Credit' itself postulates a situation where the purchasing dealer has a credit in the ledger account maintained by it with the Government. The said credit can only arise when the supplier pays up the tax collected from the purchaser. The mere production of a tax invoice, establishment of the movement of goods and receipt of the same and the consideration having been paid through bank accounts would not enable the Input Tax Credit; unless the credit is available in the ledger account of the purchasing dealer who is an assessee.

14. The seller and purchaser have an independent contract without the junction of the Government. The statute provides for a levy of tax on goods and services or both, supplied by one to the other which can be collected but the Patna High Court CWJC No.10395 of 2023 dt.18-08-2023 dealer who collects it has also the obligation to pay it up to the State. The statutory levy and the further benefit of Input

Tax Credit conferred on the purchasing dealer depends not only upon the collection by the seller but also the due payment by the seller to the Government. When the supplier fails to comply with the statutory requirement, the purchasing dealer cannot, without credit in his account claim Input Tax Credit and the remedy available to the purchasing dealer is only to proceed for recovery against the seller. Even if such recovery from the supplier is effected by the purchasing dealer, the State would be able to recover the tax amount collected and not paid to the exchequer, from the selling dealer since the rigor of the provisions for recovery on failure to pay up, after collecting tax, enables the Government so to do.”

36) In the above case, a Writ Petition was filed by the purchaser claiming input tax credit from the State, when the purchaser being a registered dealer had satisfied the tax liability to the seller and the seller did not pay the said tax to the government after collecting it from the purchaser.

37) The aforesaid judgment accordingly deals with the situation at hand, wherein the supplier i.e. the respondent herein failed to comply with the statutory requirement and the purchaser i.e. the appellant herein could not claim the input tax credit and in these circumstances, it was held that the remedy available to the purchaser would be to proceed for recovery against the seller.

38) It may further be noted that in the case of *Vidya Drolia (Supra)*, the Hon’ble Supreme Court has also observed that merely because a matter verges on a prohibited territory, it should not by itself stop the Arbitrator from deciding the matter.

39) Ld. Counsel for the appellant has also referred to the decision of the Hon’ble Supreme Court in *Motilal Oswal Financial Services Ltd. vs. Santosh Cordeiro and Anr., 2026 SCC*

OnLine SC-6, wherein the Hon'ble Supreme Court referred to the decision in *Vidya Drolia (Supra)*, and made the following observations :

“78. What is crucial to notice is that this court clearly emphasized that creation of a specific forum as a substitute for a Civil Court or specifying the Civil Court may not be enough to accept the inference of implicit non-arbitrability. Conferment of jurisdiction on a specific Court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred.”

40) Hence, merely because a specific forum has been provided under the CGST Act is not enough to arrive at the conclusion of non-arbitrability.

41) It has further been argued by Id. Counsel for the appellant that the respondent has unjustly enriched itself by keeping with itself the amount given by the appellant to the respondent, that was liable to be paid to the government. Reliance has been placed upon the decision of the Hon'ble Supreme Court in the matter of *Ramesh Kumar Jain vs. Bharat Aluminum Company Ltd. (BALCO)*, 2025 SCC OnLine SC 2857, to contend that it is the obligation of the Arbitrator to decide the dispute in terms of the contract, however, it does not mean that every award which gives a benefit not expressly mentioned in the contract is in violation. It is urged that Section 70 of the Contract Act is an intrinsic part of the Contract Act providing for unjust enrichment remedy and compensation thereunder can be awarded by the Arbitral Tribunal. It is urged that in the present case the respondent by retaining the money

given towards GST has unjustly enriched itself and accordingly the petitioner is liable to be compensated by the Arbitral Tribunal.

42) Following observations of the Hon'ble Supreme Court in *Ramesh Kumar Jain vs. Bharat Aluminum Company Ltd. (BALCO)*(Supra) would be relevant in this regard:

“36. in our view, that is the very purpose why section 70 of the Contract Act, 1872, has been an intrinsic part of our Contract Act. The said provision creates a statutory right independent of contract, often termed quantum meruit or unjust enrichment remedy. For ready reference the said provision has been extracted hereinbelow:

“70. Obligation of person enjoying benefit of non-gratuitous act. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

37. The close scrutiny of the aforesaid provision reveals that it comes into play when one party confers a benefit on another in circumstances not governed by a contract, without intent to act gratuitously. Hence in such situation, the party taking the benefit is bound to pay compensation to the party who had gratuitously taken the benefits and the courts including arbitral tribunals, can award compensation under Section 70 if the conditions are met.”

43) It may be noted that in the present case the appellant does not assail, question or dispute a tax liability under GST. The issue involved in the present case is as to whether the amount which was given to the respondent by the petitioner and retained by the respondent and not deposited with the authorities is liable to be refunded by the respondent to the petitioner. The

issue does not relate to taxing power of the State or any action taken or an order made in exercise thereof. The claim of refund by the appellant from the respondent would be an action in *personum* and does not involve any instrumentality of the State. As to whether the compensation is liable to be paid to the appellant by the petitioner or whether the appellant is liable to be indemnified under Clause 7 of the Assignment Deed or otherwise, would fall within the domain of arbitration.

44) In view of the aforesaid discussion, the dispute in issue is held to be arbitrable in nature. The instant petition is accordingly allowed. The parties are directed to appear before the Ld. Arbitrator as and when notified.

File be consigned to Record Room.

**Pronounced in the open Court
on this 13th March, 2026**

**(Deepali Sharma)
District Judge (Commercial-03)
Patiala House Court, New Delhi**