C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

THURSDAY, THE 15TH DAY OF SEPTEMBER 2022 / 24TH BHADRA, 1944

AR NO. 46 OF 2021

APPLICANT:

M/S SVS MARKETING SANITARY PVT. LTD.,
717,POURNAMI,NELLIMUKAL,THUVAYOOR SOUTH.P.O, KADAMBANADU VILLAGE,ADOOR TALUK,REPRESENTED BY ITS MANAGING DIRECTOR SHIBU.M,AGED 29 YEARS, S/O MOHANAN,CHITHRALAYAM,THUVAYOOR SOUTH,KADAMBANADU VILLAGE,ADOOR TALUK,PATHANAMTHITTA DISTRICT.

BY ADVS.
K.SHAJ
RENJIT GEORGE
C.IJLAL
ARUN CHAND
VINAYAK G MENON
BHARAT VIJAY P.
MAJID MUHAMMED K.

RESPONDENT:

M/S BATHTOUCH METALS PVT. LTD.,
PLOT NO.G/1611,F-ROAD,G.I.D.C.METODA,KALAWAD ROAD,RAJKOT,GUJARAT,PIN-360035,REPRESENTED BY ITS MANAGING DIRECTOR,GIRDHARBAI DONGA.

BY ADVS.
B.BINDU
RAYMOND GEORGE DIAS
HARSHIT S TOLIA

THIS ARBITRATION REQUEST HAVING COME UP FOR ORDERS ON 15.09.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C. R.

SATHISH NINAN, J.

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Arbitration Request No.46 of 2021

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Dated this the 15th day of September, 2022

O R D E R

The applicant has approached this Court seeking the appointment of an Arbitrator in terms of Section 11(5) of the Arbitration and Conciliation Act, 1996 (herein after referred to as "the Act") for resolution of the disputes that have arisen between the applicant and the respondent, out of a business transaction.

2. The applicant is a Private Limited Company engaged in manufacturing, distribution and sale of sanitary wares. The respondent is also a Private Limited Company engaged in the business of manufacturing sanitary wares.

3. According to the applicant, Annexure-A4 agreement dated 17.10.2018 was entered into between the parties with regard to the manufacture and supply of sanitary wares for the applicant company. The applicant

alleges that the goods supplied were defective or of inferior quality. There has arisen disputes between the parties. Though the applicant, as per Annexure-A10 notice, required the respondent to co-operate for appointment of an Arbitrator for resolution of the disputes, the respondent has not acted in pursuance thereof. The applicant claims to have been thus constrained to approach this Court by way of this Arbitration Request.

4. The respondent, through its Managing Director, filed a counter affidavit opposing the prayer. The respondent denied Annexure-A4 agreement. It is contended that the respondent has not signed Annexure-A4 agreement. The alleged signature of the Managing Director of the respondent, as seen in Annexure-A4 agreement, is claimed to be forged one. In the counter affidavit, there is an outright denial of all the averments in the Arbitration Request, paragraph-wise.

5. Heard Sri.K.Shaj, learned counsel for the applicant and Sri.Harshit S. Tolia, the learned counsel for the respondent.

6. The counter affidavit by the respondent does not admit that there were any business transactions between the parties. However, the argument of the learned counsel for the respondent and from Annexure-R2 document produced therewith makes it evident that, the respondent admits that there were business transactions between the parties but, it was without entering into any formal agreement. There being no agreement between the parties and there being no agreement for arbitration, the present Arbitration Request is liable to be dismissed, is the substance of the contention.

7. That Annexure-A4 agreement stipulates for resolution of disputes between the parties through arbitration, is not in dispute. However, the genuineness of the very document is under challenge. The respondent denies the purported signature of its Managing Director

as is seen therein. The contention is that, it is forged. To substantiate the contention that the signature seen in Annexure-A4 is not that of the Managing Director of the respondent Company, the respondent has produced Annexure-R1, the opinion of a handwriting expert. In Annexure-R1 report, the expert has opined that the signature seen in Anneuxure-A4 agreement is not that of the Managing Director of the respondent Company. In Annexure-A4, just below the signature of the respondent is affixed a round seal of the Company. The respondent alleges that the said stamp is also a fabricated one. Alleging fabrication and forgery the respondent has filed a complaint before the police. A true copy of the complaint dated 29.08.2021 is produced along with the counter affidavit as Annexure-R2. An agreement created by forgery, fabrication and fraud cannot be the basis for initiation of an arbitration proceeding, is the contention. The plea of fraud cannot be made the subject matter of an

arbitration proceeding, it is urged. The learned counsel for the respondent would rely on the decisions of the Apex Court in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others (2011) 5 SCC 532, A.Ayyasamy v. Paramasivam (2016) 10 SCC 386, and Rashid Raza v. Sadaf Akhtar (2019) 8 SCC 710*** to canvass the said contention.

8. The learned counsel for the applicant would on the other hand, referring to the e-mail communications, produced as Annexures, argue that the e-mails make it abundantly clear that the respondent had duly signed Annexure-A4 agreement. He would refer to Annexure-A2(1) e-mail communication to the respondent forwarding a draft agreement, and Annexure-A3 e-mail communication which is sent subsequently on 17.10.2018, forwarding the final agreement. Referring to the title of the e-mail communication – "AGREEMENT COPY – FINALISED", the learned counsel would contend that, evidently there had been discussions between the parties and the agreement was finalised as is revealed from the e-mail

communication. According to the applicant, the agreement was duly executed and handed over by respondent to the applicant at the time of delivery of goods. The applicant would further rely on Annexures-A6 to A9 communications dated 16.03.2020, 18.04.2020, 09.06.2020, 11.01.2021 respectively, and Annexure-A10 notice under Section 21 of the Act dated 28.04.2021, all of which refer to the agreement in question-Annexure-A4. The said communications were not replied to by the respondent. The silence on the part of the respondent Company to the said communications itself would prove the genuineness of Annexure-A4 agreement, it is contended.

9. When a plea of fraud is urged, is the dispute arbitrable; which is the forum to decide on the issue of arbitrability/non-arbitrability; these are the two questions that crop up for consideration.

10. On the issues whether a plea of fraud is arbitrable and as to the forum to adjudicate on the same, there has been a progressive development of law

favouring the jurisdiction of Arbitral Tribunals. In ***Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24*** it was held that, allegations of fraud, fabrication, forgery etc. are not matters which are considered suitable for the Alternate Disputes Resolution process. The said view was reiterated in ***Booz Allen's*** case cited supra. Therein it was held that disputes relating to rights and liabilities which give rise to or arise out of criminal offences are non-arbitrable. In ***N.Radhakrishnan v. Maestro Engineers (2010) 1 SCC 72,*** it was held that allegations of fraud and commission of criminal offences are not matters to be tried and decided by the Arbitrator but should be tried in a Court of law which would be more competent to decide on the complicated issues. Subsequently, in ***A. Ayyasamy v. Paramasivam (2016) 10 SCC 386,*** the Apex Court drew a distinction based on, the potency of the allegation of fraud, namely, serious allegations of fraud and

allegations simplicitor for resisting a reference to arbitration. The Apex Court observed thus:-

> *"18. ..... Otherwise it may become a convenient mode of avoiding the process of arbitration by simply using the devise of making allegations of fraud and plead that issue of fraud needs to be decided by the civil court."*

The Apex Court drew a distinction between cases where there are serious allegations of forgery/fabrication of document in support of the plea of fraud or where the fraud alleged is of such a nature that permeates the entire contract including the agreement to arbitrate, and a plea of fraud touching upon the internal affairs of the parties. The above distinction between "simple allegations" and "serious allegations" was reiterated by the Apex Court in ***Rashid Raza's case cited supra***. Therein, referring to the judgment in ***Ayyasamy's case (supra)***, the Apex Court laid down twin tests for considering the issue of non-arbitrability namely; (i) whether the plea permeates the entire contract and the very agreement of

arbitration rendering it void, (ii) whether the allegations of fraud relate to the internal affairs of the parties inter se, having no implication in the public domain. The above principle was reiterated by the Apex Court in ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. (2021) 4 SCC 713***. It would be apposite to refer to paragraph 35 of the judgment which reads thus:-

> *"35. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions*

arising from the contract itself or breach thereof, but questions arising in the public law domain."

The above principle was referred to by the Apex Court in the judgment in ***Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1.*** In Vidya Drolia's case the ratio in ***N.Radhakrishnan's case (supra)*** was expressly overruled. In the subsequent judgment in ***N.N.Global Mercantile Private Limited v. Indo Unique Flame Limited and Others (2021) 4 SCC 379,*** the Apex Court, after re-visiting the earlier case laws held that, the civil aspect of fraud is arbitrable unless the very arbitration agreement itself is vitiated by fraud, and that the criminal aspect of fraud, forgery or fabrication could be adjudicated only by a court of law. The Apex Court held that, the view that allegations of fraud are not arbitrable is a wholly archaic view which has become obsolete and deserves to be discarded.

11. Having noted the distinction drawn by the Apex Court regarding the circumstances under which a plea of fraud becomes non-arbitrable, I proceed to consider the

second issue regarding the forum to determine on the plea of non-arbitrability. Section 16(1) of the Act empowers the Arbitral Tribunal to decide on the challenge on the very existence or validity of arbitration agreement. Section 16(1) reads thus:-

> *"**16. Competence of arbitral tribunal to rule on its jurisdiction**.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—*
>
> *(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and*
>
> *(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."*

The Apex Court has in ***Vidya Drolia's case*** held that the Arbitral Tribunal is to be the first preferred authority

to determine and decide all questions of non-arbitrability and that the court is conferred with the power of a second look. The relevant portion of the Apex Court judgment (paragraph 154.3) reads thus:-

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

The Apex Court further proceeded to hold that rarely as a demurrer the court may interfere at the Section 8 or Section 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent or the disputes are non-arbitrable. However, it has been

cautioned that Section 8 or Section 11 is not the stage for the Court to enter into a mini trial and usurp the jurisdiction of the Arbitral Tribunal. As was noted during the course of discussion on the previous issue regarding arbitrability, it was the view that allegations of fraud are not matters to be tried and decided by the Arbitrator but should be tried in a Court of law which would be more competent to decide complicated issues. However, in Ayyasamy's case referred to supra, the Apex Court held that, the Arbitral Tribunal is competent enough to adjudicate on a plea of fraud. It would be relevant to refer to the observations of the Apex Court at paragraph 45.2 of the judgment which reads thus:-

> *"45.2. Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes.* ***If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the***

> ***ambit and purview of a claim in arbitration.*** *The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainly the institutional efficacy of arbitration. Such a consequence must be eschewed."*

12. The same view was expressed by the Apex Court in ***N.N.Global's case (supra)***. Paragraph 50 of the judgment reads thus:-

> *"50. The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, Arbitral Tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become*

obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law."

13. In ***Vidya Drolia's case (supra),*** the Apex Court held that, at the referral stage under Section 8 or at the stage of appointment of Arbitrator under Section 11, all that the Courts are required to do is a prima facie examination regarding, the existence of an arbitration agreement and the arbitrability of the dispute. Unless it is ex facie evident that there is no valid arbitration agreement or an arbitrable dispute, the court is bound to refer the parties to arbitration. The court is not expected to conduct a "mini trial" at that stage. It would be appropriate to refer to the observations of the Apex Court in paragraph 134 of the judgment in ***Vidya Drolia's*** case which reads thus:-

> *"Prima facie examination is not full review but a primary first review to weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim off the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreement exists or the disputes/subject-matter are not arbitrable, the application under Section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial."*

14. The Apex Court proceeded to hold that, if the validity of an agreement or the question of arbitrability, cannot be determined on a prima facie basis, the proper course is to refer the parties to arbitration. Certain conclusions drawn by the Apex Court are as hereunder:-

*"**244.2.** Usually, subject-matter arbitrability cannot be decided at the stage of Section 8 or 11 of the Act, unless it is a clear case of deadwood.*

***244.3**. The court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be, unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.*

***244.4.** The court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above i.e. "when in doubt, do refer".*

The same view was followed by Apex Court in ***Intercontinental Hotels Group (India) Pvt. Ltd. v. Waterline Hotels Pvt. Ltd. [(2022) 7 SCC 662]*** wherein it was held,

*"**19**. 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, (2020 (6) KLT OnLine 1025 (SC)= (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'."

15. The case of ***Pravin Electricals Pvt. Ltd. v. Galaxy Infra Engineering Pvt. Ltd. 2021 (5) SCC 671*** was one in which the genuineness of the signatures on the agreement in question was in issue (as is in the present case).

Therein the Apex Court, after applying the "prima facie review test" laid down in Vidya Drolia's case held that, on the facts of that case a deeper consideration regarding the existence of the arbitration agreement is necessary, and the question was left to the Arbitrator to decide on evidence. The Arbitrator was required to decide on the issue of existence of the arbitration agreement as a preliminary issue and to proceed with the merits of the claims only if it is found that such an agreement exists.

16. Coming to the case at hand, at this stage materials are insufficient for the court to enter a finding on the plea of fraud and on the existence or otherwise of an arbitration agreement between the parties. Applying the principles of *"prima facie test"* and *"when in doubt refer"*, laid down by the Apex Court, the power conferred on the Arbitral Tribunal under Section 16 of the Act, and taking cue from the judgment of the Apex Court in ***Praveen Electricals case (supra)*** I deem it

appropriate that, the Arbitrator be directed to consider the issue of existence of the Arbitration agreement as a preliminary issue and to proceed with the merits only if it is found in favour.

17. On the above discussions, the arbitration request is ordered as hereunder :-

(a) Retired Justice K. Balakrishnan Nair, “Karthika”, Smrithi Lane, Chembakassery Temple Road, Aluva-683101, is nominated provisionally as the Sole Arbitrator to adjudicate upon the disputes between the parties.

(b) The learned Arbitrator shall raise a preliminary issue regarding the existence of the arbitration agreement and decide upon the same.

(c) The learned Arbitrator shall proceed to adjudicate upon the merits of the claims only if the existence of arbitration agreement is found in favour.

(d) A copy of this order shall be communicated to the learned Sole Arbitrator by the Advocate of the

applicant within a period of one week from today. A copy of the order shall also be forwarded to the learned Sole Arbitrator by the Registry.

(e) The Arbitrator is requested to forward the statement of disclosure under Section 11(8) r/w Section 12(1) of the Arbitration and Conciliation Act, 1996.

(f) The registry shall place the disclosure statement before this Court, for confirmation of the appointment of the Arbitrator.

(g) The Arbitrator's fees shall be payable as per IVth Schedule to the Arbitration and Conciliation Act, 1996.

(h) The arbitration costs and fees shall be shared equally.

Sd/-
SATHISH NINAN
JUDGE

kns/-

//True Copy//

P.S. to Judge

APPENDIX OF AR 46/2021

PETITIONER ANNEXURES

Annexure A1	TRUE COPY OF PRINTED OUT OF THE EMAIL DATED 29/8/2018 SENT BY THE RESPONDENT COMPANY TO THE APPLICANT COMPANY
Annexure A2	TRUE COPY OF PRINTED OUT OF THE EMAIL DATED 27/8/2018 SENT BY THE RESPONDENT COMPANY TO THE APPLICANT COMPANY
Annexure A3	TRUE COPY OF PRINTED OUT OF THE EMAIL DATED 17/10/2018 SENT BY THE RESPONDENT COMPANY TO THE APPLICANT COMPANY
Annexure A4	TRUE COPY OF THE AGREEMENT DATED 17/10/2018 ENTERED BETWEEN THE APPLICANT COMPANY AND THE RESPONDENT COMPANY
Annexure A5	TRUE COPY OF NOTICE DATED 16/03/2020,ISSUED BY THE APPLICANT COMPANY TO THE RESOPNDENT COMPANY
Annexure A6	TRUE COPY OF PRINTED COPY OF THE NOTICE SENT EMAIL DATED 16/03/2020 SENT BY THE APPLICANT COMPANY TO THE RESPONDENT COMPANY
Annexure A7	TRUE COPY OF THE LETTER DATED 18/04/2020 ISSUED BY THE APPLICANT COMPANY TO THE RESPONDENT.
Annexure A8	TRUE COPY OF LETTER DATED 09/062020 ISSUED BY THE APPLICANT COMPANY TO THE RESPONDENT.
Annexure A9	TRUE COPY OF PRINTED COPY OF THE EMAIL DATED 11/01/2021 SENT BY THE APPLICANT COMPANY TO THE RESPONDENT
AnnexureA10	TRUE COPY OF THE NOTICE DATED 28/04/2021 ISSUED BY THE APPLICANT COMPANY TO THE RESPONDENT.
