OCD –16

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/368/2024
[Old Case No. AP/678/2023]
SREI EQUIPMENT FINANCE LIMITED
VS
WHITEFIELD PAPERMILLS LTD AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 24th February, 2025.

Appearance:
*Mr. Jishnu Saha,Sr.Adv.*
*Mr. Swatarup Banerjee, Adv.*
*Mr. Shaunak Ghosh, Adv.*
*Mr. Rajib Mullick, Adv.*
*…. for the petitioner*
*Mr. Snubhav Sinha,Adv.*
*Mr.Subhasis Dey, Adv.*
*Mr. Saswat Acharya, Adv.*
*Mr. Abhijit Agarwal, Adv.*
*Ms. Shruti Shaw, Adv.*
*…for the respondents*

The Court:**1.** This is an application for appointment of an arbitrator. Clause 17 of the loan agreement dated July 1, 2019, contains an arbitration clause. Mr. Saha, learned senior advocate submits that the dispute between the parties should be referred to arbitration on the strength of the said clause. Clause 17 of the said agreement is quoted below:-

"17. LEGAL REMEDIES FOR RECOVERY OF DUES :

In the event of any dispute or differences arising under this Agreement including any dispute as to any amount outstanding, the real meaning or purport hereof ("**Dispute**"), such dispute shall be finally resolved by arbitration. Such arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 and rules framed thereunder and/or any amendment and/or re-enactment thereof from time to time, by a single named arbitrator to be appointed solely by the Lender. The venue of arbitration shall be Kolkata and the arbitration shall be conducted in English language. The Borrower and/or all the owner and/or the mortgagor of the property confirms to abide by the arbitration clause and shall always be bound and abide by the award and/or orders of the Arbitrator.

Further it is stated and mutually agreed between the Parties that in the event of any dispute and differences and/or any Event of Default arising out of this agreement and its connected documents including the mortgage of the security/property and/or other securities, Srei has the discretion and option to avail any other civil and/or criminal remedies and/or legal relief in Courts, Tribunals, statutory reliefs in accordance with law and as permitted in prevailing laws, Acts and Rules framed thereunder including Insolvency and Bankruptcy laws act and rules and/or SARFAESI Act and Rules and as amended from time to time and file any mortgage suit and/or do auction for the purpose of sale and recovery of its dues and claims and accordingly enforce the mortgage and sell the mortgaged property and/or other securities in accordance with law and appropriate the sale proceeds as recovery of dues along with interest and other charges accruing thereon."

**2.** Clause 20 of the agreement is quoted below,and the same mentions the chosen jurisdiction. The same is quoted below:-

"20. GOVERNING LAW AND JURISDICTION :

This Agreement shall be governed by and construed in all respects with the Laws in India and any matter or issues arising or any dispute hereunder shall, at the option/discretion of the Lender, with the exclusive jurisdiction of the Courts of the City of Kolkata. This shall not however limit the rights of the Lender to file/take proceedings in any other Court of Law or Tribunal of Competent

> Jurisdiction and the Lender is also fully entitled to avail any provisions of the Law and/or any amendments/govt.orders/circulars/notifications/statutory rights as and when applicable to the Lender in accordance with Law."

**3.** The mechanism prescribed under the arbitration clause is that, the lender will appoint the sole arbitrator,to arbitrate upon the dispute between the parties.In view of the change of law and the subsequent decisions of the Hon'ble Apex Court, the mechanism prescribed fails. The lender cannot appoint the learned arbitrator, unilaterally. Hence, the petitioner has approached this Court with this application when the respondents did not agree to the nomination of a learned Arbitrator by the petitioner, in the notice invoking arbitration dated July 5, 2023. The respondents denied the nature of the dispute.

**4.** Mr. Saha, learned senior Advocate for the petitioner submits that the contentions and objections raised by the respondents in the affidavit-in-opposition are triable issues.The scope of the referral court is restricted to the examination of the existence of an arbitration clause and invocation thereof. Mr. Sinha, learned advocate for the respondents has vehemently opposed this application and urges this Court to reject the application on the following grounds:-

(a) The Reserve Bank of India, in its application before the learned National Company Law Tribunal, Kolkata Bench indicated that the transaction between the petitioner and the respondents was a fraudulent one.

(b) The agreement was induced by fraud. Fraud vitiates all. It goes to the very root of the agreement.

(c) Fraud being a complicated issue involving elaborate appreciation of evidence,should be adjudicated by the Civil Court and not by an arbitrator.

(d) The referral Court, upon perusal of the application of the Reserve Bank of India and all the bank transactions which have been annexed to the affidavit-in-opposition, should refrain from referring the disputes to arbitration. The petitioner must be relegated to a civil suit.

(e) The notice invoking arbitration is defective as an incorrect clause has been mentioned.

(f) The arbitration agreement is not properly certified.

**5.** Reliance has been placed on the decisions of ***Rashid Raza vs. Sadaf Akhtar*** reported in ***(2019) 8 SCC 710*** and ***A. Ayyasamy vs. A. Paramasivam and Ors.*** reported in ***(2016) 10 SCC 386***.

**6.** According to Mr. Sinha, if the referral court upon, prima facie, appreciation of the documents arrives at a conclusion that the allegation of fraud is serious and issues are triable under the criminal laws,the prayer for reference should be rejected. According to Mr. Sinha, fraud vitiates all, including the agreement. Moreover, not only were the transactions between the parties fraudulent, but the execution of the document was also an act of fraud. The respondents' signature was induced by fraud and misrepresentation. Accordingly, the decision in ***A. Ayyasamy (supra)*** is relied upon by Mr. Sinha in support of his further contention that, when there are allegations of fraud, the referral court while adjudicating the application under Section 11, should conduct the twin tests, i.e., (a) whether the plea of fraud permeates the entire contract (b) whether the allegation of fraud touches upon the internal affairs of the parties inter se, having no implication in the public domain. Mr. Sinha submits that, the very fact that the Reserve Bank of India approached the NCLT, Kolkata Bench with the allegations that fraudulent activities were being indulged in by the petitioner, which also involved the transactions with the respondents, was indicative of the adverse effect on the public exchequer. The respondents has also filed a supplementary affidavit to bring on record that, a notice of invocation of pledged shares had been issued by the petitioner, which indicated that the dispute and difference, arose out of a loan agreement of 2017 and not the subject agreement dated July 1, 2019. It is submitted that the impugned loan was utilized to round trip an amount of INR 66 crores to the respondents, to enable the petitioner to repay an existing loan of SEFL andultimately, the amount was ultimately received by SEFL.Further, mortgage of properties which were situatedwithin the Special Economic Zone could not have been created. Moreover,allocation of those properties were also cancelled by the Andhra Pradesh Government which proved that the transactions were completely fraudulent and illegal. The disbursements were made to the respondents with an ulterior motive.

**7.** Heard the parties. This is a referral Court. The jurisdiction of the referral Court is restricted to the satisfaction of existence of an arbitration agreement and whether the arbitration clause had been invoked or not.The existence of the arbitration agreement is not in dispute. Mr. Sinha has addressed the Court today, on the issue that the same was induced by fraud. However, in the first paragraph of the reply to the notice invoking arbitration, the learned advocate for the respondents has stated thus:-

> "It is imperative to note that we have entered into a loan agreement with SREI Equipment Finance Ltd. (hereinafter referred to as "SPFL") in good faith, with the intention of fulfilling all the terms and conditions as set forth in the agreement. However, it can be seen through the notice that various issues have been raised by you relating to the said Loan Agreement No. 179878 dated 01.07.2019 and because of which you have served upon us a notice u/s. 21 of the Arbitration & Conciliation Act, 1996 for commencement of Arbitration proceedings with respect to the alleged disputes as mentioned aforesaid."

**8.** In the last paragraph of the letter, it has been stated as follows:-

> "However we would like to emphasize that in order to address the concerns raised by you in your notice we are willing to cooperate in resolving the same, if any, and hope to reach a fair and equitable resolution that is acceptable to the parties involved. We believe that an open and honest communication can lead to finding a solution that suits and benefits mutually. Therefore, in light of the above kindly consider this response as an invitation to your client to engage with us in a constructive dialogue to address this issue amicably and explore the possibilities of settlement of the alleged dispute, if any, without resorting to legal recourses.
> In any event, we hereby reserve all our rights and remedies as available under law and our bona fide invitation towards an amicable settlement shall not be construed as admission to any of your allegations. Accordingly, we kindly request you to acknowledge the receipt of this letter and provide us with your response towards our suggestion and nay proposed alternatives within 15 days from the date of this letter."

**9.** The execution of the agreement in good faith and with an intention to fulfill the terms and conditions is accepted. The receipt of the notice of invocation is also accepted. Now, whether the agreement was induced by fraud or misrepresentation etc. will require a detailed enquiry and consideration of the evidence to be led by the parties. These issues cannot be decided by the referral Court. Srei Infrastructure Private Limited and Srei Equipment Finance Limited had undergonea Corporate Insolvency Resolution Process. However, the company has come out of the resolution process. The petitioner company is now managed by a different entity. The change of management is the outcome of a successful insolvency resolution.

**10.** In the entire affidavit-in-opposition, the only averment of fraud is that, the Reserve Bank of India had pointed out to the NCLT, Kolkata that the transaction between the petitioner and the respondents was fraudulent. The reasons have also been mentioned in the annexures. However, Mr. Saha submits that the application under Section 66 of the Insolvency and Bankruptcy Code was not filed by the Reserve Bank of India, but by the resolution professional. The same is still pending. In my view, whether the loan was utilized to round-trip an amount of INR 66 crores through Whitefield or whether the money was disbursed to Whitefield for ulterior motive and for Srei Equipment Finance Limited to pay off its existing loan,which was detrimental to public interest, are again matters of evidence which are required to be gone into by the learned Arbitrator.

**11.** In the decision of ***A. Ayyasamy (supra)***, the Hon'ble Apex Court held that an application under Section 8 of the Arbitration and Conciliation Act can be rejected only when the allegation of forgery and fabrication of documents in support of the plea of fraud permeated through the entire contract, including the arbitration agreement, thereby raising a serious question with regard to the validity of the contract itself.Such issues required elaborate evidence to be adduced by the parties and the civil court should reject such application and proceed with the suit.

**12.** However, the reverse position was also discussed in the said decision which stated that where there were simple allegations of fraud touching upon the internal affairs of the parties,*inter se* and it had no implication in the public domain, the arbitration clause need not be avoided and the parties should be relegated to arbitration.

**13.** In the case in hand, the issue with regard to the proceeding initiated by the Reserve Bank of India and the impact of the said loan agreement, are matters of evidence.The loan agreement before this Court, does not indicate, prima facie, that the same was a product of fraud.The respondents, in its reply to the notice invoking arbitration, has accepted that the said agreement had been entered into in good faith and the respondents intended to comply with the terms and conditions of the same. For the referral Court to probe deeper into such issue, will be contrary to the principle of competence competence.

**14.** Reference is made to the decision of ***SBI General Insurance Co. Ltd. vs Krish Spinning*** reported in ***2024 SCC Online SC 1754,*** the relevant paragraphs are quoted below:-

> **"91.** The justification given in NTPC v. SPML (supra) for allowing the scrutiny of arbitrability at the stage of Section 11 petition was that the referral court is under a duty to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable, and any interference by the referral court preventing such ex-facie meritless arbitration could be termed as legitimate. It was observed thus:
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> "28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Further, as noted in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], if this duty within the limited compass

is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22, 26]"

**92.** The position that emerges from the aforesaid discussion of law on the subject as undertaken by us can be summarised as follows:—

i. There were two conflicting views which occupied the field under the Arbitration Act, 1940. While the decisions in Damodar Valley (supra) and Amar Nath (supra) took the view that the disputes pertaining to "accord and satisfaction" should be left to the arbitrator to decide, the view taken in P.K. Ramaiah (supra) and Nathani Steels (supra) was that once a "full and final settlement" is entered into between the parties, no arbitrable disputes subsist and therefore reference to arbitration must not be allowed.

ii. Under the Act, 1996, the power under Section 11 was characterised as an administrative one as acknowledged in the decision in Konkan Railway (supra) and this continued till the decision of a seven-Judge Bench in SBP & Co. (supra) overruled it and significantly expanded the scope of judicial interference under Sections 8 and 11 respectively of the Act, 1996. The decision in Jayesh Engineering (supra) adopted this approach in the context of "accord and satisfaction" cases and held that the issue whether the contract had been fully worked out and whether payments had been made in full and final settlement of the claims are issues which should be left for the arbitrator to adjudicate upon.

iii. The decision in SBP & Co. (supra) was applied in Boghara Polyfab (supra) and it was held by this Court that the Chief Justice or his designate, in exercise of the powers available to them under Section 11 of the Act, 1996, can either look into the question of "accord and satisfaction" or leave it for the decision of the arbitrator. However, it also specified that in cases where the Chief Justice was satisfied that there was indeed "accord and satisfaction", he could reject the application for appointment of arbitrator. The prima facie standard of scrutiny was also expounded, stating that the party seeking arbitration would have to prima facie establish that there was fraud or coercion involved in the signing of the discharge certificate. The position elaborated in Boghara Polyfab (supra) was adopted in a number of subsequent decisions, wherein it was held that a mere bald plea of fraud or coercion was not sufficient for a party to seek reference to arbitration and prima facie evidence for the same was required to be provided, even at the stage of the Section 11 petition.

iv. The view taken by SBP & Co. (supra) and Boghara Polyfab (supra) was seen by the legislature as causing delays in the disposal of Section 11 petitions, and with a view to overcome the same, Section 11(6-A) was introduced in the Act, 1996 to limit the scope of enquiry under Section 11 only to the extent of determining the "existence" of an arbitration agreement. This intention was acknowledged and given effect to by this Court in the decision in Duro Felguera (supra) wherein it was held that the enquiry under Section 11 only entailed an examination whether an arbitration agreement existed between the parties or not and "nothing more or nothing less".

v. Despite the introduction of Section 11(6-A) and the decision in Duro Felguera (supra), there have been diverging views of this Court on whether the scope of referral court under Section 11 of the Act, 1996 includes the power to go into the question of "accord and satisfaction". In Antique Art (supra) it was held that unless some prima facie proof of duress or coercion is adduced by the claimant, there could not be a referral of the disputes to arbitration. This view, however, was overruled in Mayavati Trading (supra) which reiterated the view taken in Duro Felguera (supra) and held that post the 2015 amendment to the Act, 1996, it was no more open to the Court while exercising its power under Section 11 of the Act, 1996 to go into the question of whether "accord and satisfaction" had taken place.

vi. The decision in Vidya Drolia (supra) although adopted the view taken in Mayawati Trading (supra) yet it provided that in exceptional cases, where it was manifest that the claims were exfacie time barred and deadwood, the Court could interfere and refuse reference to arbitration. Recently, this view in the context of "accord and satisfaction" was adopted in NTPC v. SPML (supra) wherein the "eye of the needle" test was elaborated. It permits the referral court to reject arbitration in such exceptional cases where the plea of fraud or coercion appears to be ex-facie frivolous and devoid of merit.

**93.** Thus, the position after the decisions in Mayavati Trading (supra) and Vidya Drolia (supra) is that ordinarily, the Court while acting in exercise of its powers under Section 11 of the Act, 1996, will only look into the existence of the arbitration agreement and would refuse arbitration only as a demurrer when the claims are ex-facie frivolous and non-arbitrable.

iii. What is the effect of the decision of this Court in In Re : Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1966 and the Indian Stamp Act 1899 on the scope of powers of the referral court under Section 11 of the Act, 1996?

**94.** A seven-Judge Bench of this Court, in In Re : Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act, 1966 and the Indian Stamp Act, 1899 reported in 2023 INSC 1066, speaking eruditely through one of us, Dr Dhananjaya Y. Chandrachud, Chief Justice of India, undertook a comprehensive analysis of Sections 8 and 11 respectively of the Act, 1996 and, inter alia, made poignant observations about the nature of the power vested in the Courts insofar as the aspect of appointment of arbitrator is concerned. Some of the relevant observations made by this Court in In Re : Interplay (supra) are extracted hereinbelow:

"179. […] However, the effect of the principle of competence-competence is that the arbitral tribunal is vested with the power and authority to determine its enforceability. The question of enforceability survives, pending the curing of the defect which renders the instrument inadmissible. By appointing a tribunal or its members, this Court (or the High Courts, as the case may be) is merely giving effect to the principle enshrined in Section 16. The appointment of an arbitral tribunal does not necessarily mean that the agreement in which the arbitration clause is contained as well as the arbitration agreement itself are enforceable. The arbitral tribunal will answer precisely these questions.

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185. The corollary of the doctrine of competence-competence is that courts may only examine whether an arbitration agreement exists on the basis of the prima facie standard of review. The nature of objections to the jurisdiction of an arbitral tribunal on the basis that stamp-duty has not been paid or is inadequate is such as cannot be decided on a prima facie basis. Objections of this kind will require a detailed consideration of evidence and submissions and a finding as to the law as well as the facts. Obligating the court to decide issues of stamping at the Section 8 or Section 11 stage will defeat the legislative intent underlying the Arbitration Act.

186. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain the domain of the arbitral tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). The exercise of the jurisdiction of the courts of the country over the substantive dispute between the parties is only possible at two stages:

a. If an application for interim measures is filed under Section 9 of the Arbitration Act; or

b. If the award is challenged under Section 34.

Issues which concern the payment of stamp-duty fall within the remit of the arbitral tribunal. The discussion in the preceding segments also make it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9."

**15.**With regard to the jurisdiction of the referral court to decide on the issue of fraud, in the matter of ***A. Ayyasamy v. A. Paramasivam,*** reported in***(2016) 10 SCC 386***, the Hon'ble Apex Court held as follows:-

**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 uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

**46.** The position as it obtains in other jurisdictions which value arbitration as an effective form of alternate dispute resolution is no different. In the UK, Section 24(2) of the Arbitration Act, 1950 provided that the court could revoke the authority of a tribunal to deal with claims involving issues of fraud and determine those claims itself. The English Act of 1979 provided for a stay of proceedings involving allegations of fraud. However, under the English Arbitration Act, 1996, there is no such restriction and the Arbitral Tribunal has jurisdiction to consider and rule on issues of fraud. In Fiona Trust and Holding Corpn. v. Privalov [Fiona Trust and Holding Corpn. v. Privalov, (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)] , the Court of Appeal emphasised the need to make a fresh start in imparting business efficacy to arbitral agreements. The Court of Appeal held that : (Bus LR pp. 695 H-696 B & F, paras 17 & 19)

“17. … For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

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19. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction."

Arbitration must provide a one-stop forum for resolution of disputes. The Court of Appeal held that if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract is procured by bribery, just as much as they can decide whether a contract has been vitiated by misrepresentation or non-disclosure.

**50.** Lord Hoffmann held that if this is the purpose underlying an agreement to arbitrate, it would be inconceivable that parties would have intended that some, amongst their disputes should first be resolved by a court before they proceed to arbitration : (Premium Nafta Products case [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , Bus LR pp. 1723 D-E, para 7)

"7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."

**51.** While affirming the judgment of the Court of Appeal, the House of Lords held : (Premium Nafta Products case [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , Bus LR p. 1725 A-B & D-E, paras 13 & 15)

"13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore, L.J. remarked, at para 17:

'if any businessmen did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

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15. If one adopts this approach, the language of Clause 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute."

This principle should guide the approach when a defence of fraud is raised before a judicial authority to oppose a reference to arbitration. The arbitration agreement between the parties stands distinct from the contract in which it is contained, as a matter of law and consequence. Even the invalidity of the main agreement does not ipso jure result in the invalidity of the arbitration agreement. The parties having agreed to refer disputes to arbitration, the plain meaning and effect of Section 8 must ensue.

**55.** Similarly, Redfern and Hunter on International Arbitration [ 6th Edn., para 2.154] contains the following statement of legal position in relation to arbitrability of matters involving fraud:

"(vi) Fraud

Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the Arbitral Tribunal to decline jurisdiction. Indeed, in the heat of battle, such allegations are frequently made, although much less frequently proven."

**16.**In the matter of ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.,*** reported in ***(2021) 4 SCC 713***, the Hon'ble Apex Court held as follows:-

"**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."

**17.**The Arbitration and Conciliation Act imposes an affirmative obligation that, every judiciary must follow to uphold and make operative the agreement.Unless it is, prima facie, available from the record, that the agreement is null and void and/or inoperative or incapable of being performed on account of fraud, the referral Court should not indulge into a roving investigation, which is within the domain of the learned arbitrator. With regard to the notice invoking arbitration, this Court finds that the jurisdiction clause has been mentioned instead of the arbitration clause, but the notice communicates the intention to arbitrate and the disputes have been enumerated. The respondents responded to the same. A strict and technical interpretation of that notice is not required. It is also not the respondents' case that the notice was not received. The respondents replied to the same.

**18.**With regard to non-filing of a certified copy of the original agreement, this Court finds that the application is authenticated by a notary. A notarized document is considered to be a document with higher degree of authenticity, in which a notary public has verified the identity of the signatories and witnessed their signatures, essentially creating a presumption that the document is genuine and executed by the individuals named on it. Reference is made to the decision of the Hon'ble Apex Court in***Jugraj Singh v. Jaswant Singh*** reported in***AIR 1971 SC 761.*** The petitioner shall file a certified copy when the occasion demands.

The issues raised by Mr. Sinha shall be available before the learned Arbitrator. This Court has not expressed any opinion on the merits. The observations made hereinabove are tentative, and for the purpose of disposal of this application.

**19.** Under such circumstances, the application is allowed by referring the matter to arbitration by appointing Hon'ble Justice Girish Chandra Gupta, former Chief Justice of this Court, as the sole arbitrator, to arbitrate upon the disputes. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the schedule of Arbitration and Conciliation Act, 1996.

(SHAMPA SARKAR, J.)

TR/