2025:DHC:1636

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 11th MARCH, 2025

IN THE MATTER OF:

\+ **ARB. A. (COMM.) 55/2023 & I.A. 25113/2023, I.A. 25114/2023, I.A. 3993/2024**

BENTWOOD SEATING SYSTEM (P) LTD. .....Appellant

Through: Mr. S.D. Singh, Mr. Kamla Prasad, Mrs. Meenu Singh, Mr. Siddharth Singh, Advocates.

versus

AIRPORT AUTHORITY OF INDIA & ANR .....Respondents

Through: Mr. Digvijay Rai, Mrs. Chetna Rai, Mr. Archit Mishra & Mr. Raghib Ali Khan, Advocates with Mr. Gagan Kochar, Sr. Manager (Law), AAI.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Appeal has been filed under Section 37(2)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter 'Act of 1996') read with Section 13 of the Commercial Court Act by the Appellant against the Orders dated 14.08.2023 and 16.08.2023 passed by the Ld Arbitral Tribunal while adjudicating the disputes which have arisen between the parties i.e. the Appellant and the Respondents-herein under a Tender No.Tech 06/2017 (Tender ID 2017_AAI_150_1), dated 02.11.2017 for 'Supply and Comprehensive Annual Maintenance Contract (CAMC of 4000 Nos. passengers baggage trolleys) Stainless Style type for various airports'

wherein the Ld. Arbitral Tribunal has held that the dispute is not arbitrable on the ground of fraud played by the Appellant.

2. Shorn of unnecessary details, the facts in brief, leading to the filing of the instant appeal are as under:-

i. It is stated that the Respondents had invited bids for 'Supply and Comprehensive Annual Maintenance Contract (CAMC of 4000 Nos. Passengers Baggage Trolleys ("PBTs")) Stainless Style type for various airports'. The relevant Clauses of the Tender dated 02.11.2017, which are necessary for adjudication of instant appeal, are as under:

*"**(a) Clauses from Section A of the Tender Document**:*

***1.2** Eligibility conditions for participating in the Tender:*

***1.2.3**-Experience (For Original Item Manufacturers);*
The firm should have successfully completed similar works which should include supply of at least 400 nos passenger baggage trolleys during last 7 years ending 31st March 2017 and should be either of the following:

a) three completed works costing not less than the value of Rs.2.17 crore each

Or

b) two completed works costing not less than the value of 2.71 crore each

Or

c) one completed work costing not less than the value of 4.34 crore.

d) Multiple completed works costing not less than the value of Rs.5.42 crore in aggregate.

1.2.4-Satisfactory Performance Certificate: The Firm should submit satisfactory performance certificate from two end users for the works carried out w.e.f. 01.04.2010 to 31.03.2017 out of which at least one work should be from an airport for supply of passenger baggage trolleys.

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*"**Clause 1.2.6 (For Indian Associate -Applicable in case of a foreign bidder)**: (i) The Indian Associate (IA) should be authorized by Original Item Manufacturer (OIM). The Indian Associate should be in the business of manufacturing/fabricating of Stainless Steel goods/products/material carrying/trolleys mounted equipment/passenger baggage trolleys/maintenance of equipment/machineries for a minimum period of last 3 years (as on 31st March, 2017).*

(ii) The Original Item Manufacturer should meet the eligibility requirements i.e. Profile, Resources, Experience and Satisfactory Performance Certificate of Clause 1.2.1, 1.2.2, 1.2.3 and 1.2.4 above;

(iii) Indian Associate (IA) of OIM should have current authorization from OIM firm authorizing it as its authorized Indian Agent for the tender, shall be submitted;

(iv) Indian Associate (IA) shall submit an undertaking stating that its firm or its Partners or its Directors have not been blacklisted or any case is pending or any complaint regarding irregularities is pending in India or abroad, by any global international body like World Bank/International Monetary Fund/World Health Organization etc. or any Indian State/Central

Government Department or Public Sector undertaking of India.

(v) Only one Indian Associate (IA) shall be authorized by OIM firm for the offered product in the tender.

(b) Clauses from Section B:

***Clause 2.25.6**: Prototype of Passenger Baggage Trolley (PBT) should be produced for inspection within 15 days from the date of placement of Purchase Order.*

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***Clause 2.3**: the contractor is to deliver the stores/materials as per the T&Cs mentioned in this tender document and purchase order. If the contractor fails to complete the supply as per the delivery schedule given in this tender document, the purchaser has the right to cancel the order or get the supplies/material from an alternative source at the risk and cost of the contractor. However, in exceptional cases, the purchaser may agree to inspect the stores even beyond the agreed schedule subject to levy of LD at the rates mentioned in delivery schedule."*

(emphasis supplied)

ii. It is stated that the Appellant had submitted its bid claiming itself to be the Indian Associate of the Foreign Original Item Manufacturer i.e. Suzhou Jinta Metal Working Co. Ltd, Cheluba Industry Zone, Shanghu Town, Changshu City, Jiangsu Province, China ("SJM"). It is stated that the Appellant who claimed itself to be the Indian Associate of the Foreign Original Item Manufacturer was permitted to bid as being eligible under Clause 1.2.6. In compliance to Clause 1.2.4, the Appellant submitted the

Satisfactory Performance Certificate ("SPCs") as having been issued by Heathrow Airport, United Kingdom and Noi-Bai International Airport, Vietnam to SJM. It is stated that the said SPCs had been purportedly issued by the two Airports to SJM. The Appellant had also furnished a purported authorisation letter dated 04.05.2017. It is stated that the said letter was issued to the Appellant by SJM and stated that the Appellant was an authorized distributor of SJM from 04.05.2017 to 03.05.2017. Apart from producing the SPCs, the Appellant had submitted different rates for basic price, excise duty, VAT/Sales Tax, average inland basis freight and average basic insurance, inland etc. On 30.06.2017, the Respondents issued its Letter of Intent to the Appellant for supply of 4000 PBTs and placed the Purchase Order dated 13.07.2017.

iii. Needless to state the Purchase Order contains an Arbitration Clause being Clause 14 which is not being reproduced as no dispute arises on the applicability of arbitration between the parties. It is stated that consequent to the Letter of Intent, an Agreement has been entered into between the Appellant and the Respondents on 20.08.2017. The Bank Guarantees for a sum of Rs.17,30,124.31 as required under the Agreement was furnished by the Appellant.

iv. Material on record indicates that a complaint was received by the Airport Authority of India from one M/s GILCO Exports India on 31.10.2017 stating that the Tender has been procured by the Appellant by producing forged and fabricated documents. The complaint specifically stated that the Heathrow Airport has not

issued any SPC to SJM. Material on record further indicates that certain other issues had also cropped up between the Appellant and the Respondents regarding delay in delivery of the PBTs to various airports which are not relevant for the controversy in dispute in the instant Appeal.

v. It is pertinent to mention that the disputes regarding delay and the satisfactory working of the PBTs escalated, resulting in issuance of a Show Cause Notice issued by the Airport Authority of India as to why the Appellant should not be blacklisted. It is stated that a Blacklisting Order was passed on 20.02.2018 and the Contract was terminated. It is also pertinent to mention that though the Respondents has started investigating on the issue as to whether the Appellant had given valid SPCs and whether the SPCs submitted by the Appellant purported to have been supplied to SJM of which the Appellant claimed to be the Indian Associate. It is stated that the blacklisting and the disputes that initially arose were not on these grounds.

vi. It is stated that the Appellant herein had filed a petition under Section 9 of the Act of 1996 being OMP (I) COMM No.102/2018 apprehending encashment of the bank guarantee on account of the Blacklisting Order. This Court *vide* Order dated 06.03.2018 granted interim relief with respect to the blacklisting of the Appellant by the Respondents and the consequential encashment of the bank guarantee.

vii. In the interregnum, the Respondents received an e-mail from the Heathrow Airport on 28.03.2018 stating that it did not recognise

the SJM, any product supplied by the SJM or any person named in "Segun Jones" who was named as the contact person at the Heathrow Airport in the SPC purchased by the Appellant to the Airport Authority of India for complying with the conditions of SPC as required by Clause 1.2.6 of the tender condition.

viii. It is stated that the Arbitration was invoked by the Appellant in terms of Clause 2.3.1 of the General Information and Guidelines under the tender conditions and Clause 14 of the Terms and Conditions enclosed with the Purchase Order dated 13.07.2017.

ix. It is also pertinent to mention that the Airport Authority of India was continuing with the investigation regarding the validity of the SPC purchased by the Appellant. In pursuance to the said investigation, the Respondents also requested the Consulate General of India at Birmingham to find out the authentication and credentials from SJM the purported original foreign manufacturer of the PBTs of which the Appellant purported to be the Indian Associate.

x. It is stated that on receiving the contact details of the original foreign manufacturer i.e. SJM the Respondents contacted SJM to verify as to whether the Appellant was in fact the Indian Associate of SJM as claimed by it or not. *Vide* an e-mail dated 29.06.2018, SJM told the Respondents to the queries raised by the Respondents by stating as under;-

Dear Sirs,

This is Susan from JINTA factory. ***We are leading manufacturer in China for more than 15 years. Ambassador Mr. Yuan called me to investigate our***

> ***company due to a program in last year. I followed the program, however we cannot accept your target price so you didn't place order to us. I am confused about the investigation now****. Pls kindly explain what's going on here so that I can cooperate better. Many thanks!*
>
> *(emphasis supplied)*

xi. It is stated that the Consulate General of India at Shanghai has also sent an e-mail to the Respondents, which reads as under;-

> *"Dear Mr. Paul Manickam,*
>
> *The company M/s. Suzhou Jinta Metal Working Company limited has sent an email that there was a difference in target price between what was quoted by their company and what Air India had agreed and hence the proposal was not followed further and the business was discontinued. The same email was marked a copy to you also.*
>
> *If you want to us to proceed further we can continue to check their credentials.*
>
> *Regards*
> *Aparna Ganesan*
> *Consul (Comm)*
> *Consulate General of India*
> *Shanghai."*

3. The arbitration proceedings commenced and the Appellant filed a petition under Section 11(6) being Arbitration Petition No.490/2018 for appointment of an Arbitrator. The matter was referred to the Delhi International Arbitration Centre (DIAC). It is stated that a Sole Arbitrator was appointed. Before the Ld. Sole Arbitrator, the allegations of fraud were pointed out. However, the Ld. Sole Arbitrator *vide* Award dated 13.03.2019

had set aside the Termination Order dated 20.02.2018 by which the Appellant was blacklisted and the Contract was terminated. It is stated that the said Order was challenged by the Respondents by filing a petition under Section 34 of the Arbitration and Conciliation Act, 1996 being OMP (COMM) No.262/2019.

4. Pending the challenge under Section 34 of the Act of 1996, an e-mail dated 04.09.2020 was received by the Embassy of India, Vietnam from the Noi-Bai International Airport, Vietnam. The e-mail sent from Noi Bai International Airport (NIA) to Embassy of India reads as under:-

> *"To Embassy of India,*
>
> *Warm Greeting from Noi Bai International Airport (NIA)*
>
> *Regarding the Document No NV/478/CO.M/2020 dated 31/8/2020 of the Embassy asking NIA to check the genuineness of "Satisfactory Performance Certificate", NIA would like to respond as follows:*
>
> *NIA has checked thoroughly and confirm that the "Satisfactory Performance Certificate" dated 3 May 2017 had not been issued by NIA; The stamp on the Document is not the official stamp of NIA; The Person named "Mr. Nguyen Phuc Ninh" mentioned in the Document is not belong to NIA,*
>
> *Therefore the "Satisfactory Performance Certificate" is not genuine. NIA will take no responsibility of the fake Document.*
>
> *Thanks & Regards*
> *For and on behalf of NIA*
> *Administration Office*
> *Executive Official*
> *Phan Thi Nim Ha"*

The Embassy of India forwarded the said e-mail to the Airport Authority of India which reads as under:-

> *"Dear Sir,*
>
> *This has reference to your email of 26 August 2020 addressed to CG, Ho Chi Minh City.*
>
> *Please find below trailing mail received from Noi Bai International Airport (NIA) in Hanoi mentioning that the name of the person, stamp and Certificate do not belong to Noi Bai International Airport, Hanoi, Vietnam. Therefore, the 'Satisfactory Performance Certificate" is not genui.e You may like to take further necessary action in this regard.*
>
> *With regards,*
> *(Aman Bansal)*
> *Second Secretary (Eco & Com)*
> *Embassy of India,*
> *Hanoi, Vietnam"*

5. Information was also received from the Ministry of External Affairs that they had reached out to SJM and that they were verbally informed that some kind of authorization letter has been issued by the SJM to the Appellant. However, the SJM refused to come for any meeting with the officials of Indian Consulate to corroborate the same.

6. In view of the information received, the Respondents filed a Criminal Complaint dated 26.10.2021 to the SHO, P.S. Lodhi Colony, against the Directors of the Appellant, informing the police authorities about the act of forgery of documents by the Appellant. However, no further information was received from P.S. Lodhi Colony pursuant to the Respondents' complaint.

7. This Court in OMP (COMM) No.262/2019 set aside the Award dated 13.03.2019 *vide* Order dated 27.05.2021 primarily on the ground that the Ld. Sole Arbitrator, despite noting the plea of fraud taken by the Airport Authority of India had not adjudicated on the dispute. The Coordinate Bench of this Court was of the opinion that the plea of fraud would have a vital bearing on the final Award and since the said aspect had not been adjudicated upon by the Arbitrator, the Award cannot be sustained. The Order dated 27.05.2021 was challenged by the Appellant herein before the Division Bench of this Court by filing an appeal being FAO (OS) (COMM) No.97/2021. The Division Bench *vide* Order dated 11.08.2021 upheld the Order of the learned Single Judge by observing as under:-

> "***14****. We have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same. From a reading of paragraphs 24 and 24 of the Award, it is clear that the learned Arbitrator apart from giving a declaration that he has considered the submissions advanced by the respondent, has not given any finding as far as the plea of the fraud urged by the respondent is concerned. In fact, a perusal of the A ward would show that all other contentions of the respondent have been elaborately dealt with by the learned Arbitrator. It is apparent that the plea of fraud urged by the respondent has escaped the attention of the learned Arbitrator altogether. This submission has a vital bearing on the prayer of grant of specific performance of the Purchase Order made by the appellant before the Arbitrator and granted by the Arbitrator in the Arbitral Award.*
>
> ***
>
> ***17****. We are in agreement with the observations made by the learned Single Judge. The plea of grant of specific performance of the contract was dependent on the outcome of the defence raised by the respondent that*

> *the Purchase Order/contract itself was vitiated by fraud. This defence has clearly not been adjudicated upon by the learned Arbitrator. It is not the case of merely not recording reasons for his finding, but one where there is no finding by the learned Arbitrator on this issue. It cannot also be termed as a deficiency in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take measures which can eliminate the ground for setting aside the Arbitral Award, which was stipulated as one of the conditions for exercise of power under Section 34(4) of the Act in* ***Kinnari Mullick*** *(supra). A finding on this issue may in fact, bring about a total change in the Award*."

8. Being aggrieved by the judgment dated 11.08.2021 passed by the Division Bench, the Appellant had preferred a Special Leave Petition bearing SLP (C) 12657/2021 before the Apex Court, which came to be dismissed *vide* order dated 26.08.2021. On the other hand, the Respondents, being aggrieved by the order dated 27.05.2021 also preferred an appeal bearing FAO (OS) (COMM) No. 123 of 2021 before a Division Bench of this Court, which was disposed of *vide* order dated 28.09.2022 by way of which Justice Rajiv Sahai Endlaw, a former Judge of this Court was appointed as the Sole Arbitrator to adjudicate the disputes between the parties afresh.

9. It is stated that fresh arbitration proceedings commenced between the parties and the Ld. Sole Arbitrator *vide* proceedings dated 28.03.2023 framed the following issues:-

> *"**A**. Whether on the basis of pleadings and documents on record, the disputes between the parties are non-arbitrable? OPR*
>
> ***B**. Whether the plea of non-arbitrability of the disputes*

cannot be adjudicated without recording evidence? OPPr.

***C**. Whether the principles of res judicata, on the basis of the judgment dated 27.05.2021 in OMP (COMM) No. 262 of 2019 and the order dated 11.08.2021 in FAO (OS) (COMM) No. 97 of 2021 of the High Court of Delhi and order dated 26.08.2021 of the Supreme Court, apply, and if so to what extent? OPCI*

***D**. Whether the claimant procured the contract/purchase order from the claimant, by playing fraud on the respondents and if so to what effect? OPR.*

***E**. Whether the respondents were entitled to terminate the contract and if so to what effect? OPPr.*

***F**. Whether the respondents were estopped from terminating the contract and/or whether the respondents had waived the right to terminate the agreement and if so to what effect? OPCI.*

***G**. If Issues no. E and F are decided in favour of the claimant, to what amount has the claimant is entitled from the respondents? OPCI.*

***H**. Whether the respondents have suffered any loss or damage owing to the actions of the claimant and was entitled to invoke the Bank Guarantees? OPR.*

***I**. If any monies are found due from either party to the other, whether such party is also entitled to interest thereon and if so at what rate and for what period? OPPr.*

***J**. Relief. "*

10. Issues No. A, B & C were dealt as preliminary issues as the Arbitrator wanted to first consider as to whether disputes which have arisen in the

arbitration were arbitrable at all or not before permitting the parties to lead evidence. The Ld. Sole Arbitrator by way of the Impugned Award held that the Appellant had played a fraud on the Respondents in getting the Tender and the extent of fraud is such, that it would be difficult for the Ld. Sole Arbitrator, which is not a Court, to summon witnesses from various governmental authorities and foreign companies. The Arbitrator held that the fraud in the present case cannot be confined to the internal matters/affairs of the parties herein. The allegations of fraud of the documents which pertains to fabrication of documents of foreign companies and governmental authorities cannot be adjudicated upon or examined by the Arbitral Tribunal which does not have the wherewithal of a Court. The Ld. Sole Arbitrator placed reliance on the judgments passed by the Apex Court in Vidya Drolia and Others v. Durga Trading Corporation, **(2021) 2 SCC 1**, Avitel Post Studioz Limited and Others v. HSBC PI Holdings (Mauritius) Limited, **(2021) 4 SCC 713** and A. Ayyasamy v. A. Paramasivam & Ors., **(2016) 10 SCC 386**.

11. Since the Ld. Sole Arbitrator had held that the dispute is not arbitrable and the Impugned Award therefore falls within the realm of Section 16 of the Act of 1996, the Appellant has now approached this Court by filing the instant appeal under Section 37(2)(a) of the Act of 1996 for setting aside the Impugned Award and also referring the parties to another Arbitrator.

12. Learned Counsel for the Appellant submits as under:-

a) That the Ld. Sole Arbitrator has exceeded the jurisdiction as conferred u/s 16 of the Act of 1996, when the Respondent had not even filed an application under the provision and only filed its objections under the Statement of Defence. It was further

submitted that the Section 16(2) requires the plea of non-arbitrability to be raised before filing of the Statement of Defence and thus no occasion arose for the Ld. Sole Arbitrator to exercise its jurisdiction under Section 16 of the Act of 1996.

b) That the biasness of the Ld. Sole Arbitrator was apparent insofar as on one hand it was held that the disputes *inter se* the parties were non-arbitrable and on the other hand, an observation on the issue of *res judicata* was made. It was submitted that when the Ld. Sole Arbitrator had already found that the disputes were not arbitrable, then he was denuded from any authority and jurisdiction to record findings on the issue of res judicata or any other points. It was further submitted that the Ld. Sole Arbitrator conducted a mini-trial.

c) That the Ld. Sole Arbitrator took a cursory view by observing that the plea of fraud would be complex and complicated as witnesses from various governmental authorities and foreign companies would have to be examined and assistance of the Ministry of External Affairs would have to be sought.

d) That the Ld. Sole Arbitrator went beyond the pleadings of the Respondent, as the Respondent never pleaded that it would be cumbersome for them to obtain cooperation from the Ministry of External Affairs.

e) That the Ld. Sole Arbitrator failed to appreciate that the contentions of arbitrability of the disputes cannot be considered by the arbitral tribunal, when the same has been constituted by the Hon'ble High Court while exercising its power under Section

11(6) of the Act of 1996.

f) That the Ld. Sole Arbitrator is not justified in denying the return of fees to the Appellant as the Ld. Sole Arbitrator was not entitled to be paid the entire fees as only findings on the arbitrability had been rendered. It is submitted that according to thr DIAC Rules, Ld. Sole Arbitrator was only entitled to get 20% of the fees and the excess amount had to be refunded to the Appellant.

g) That this Court may be pleased to allow the present Appeal and substitute the arbitrator for adjudication of disputes between the parties in accordance with law including the plea of fraud raised by the Respondents.

13. *Per contra,* learned Counsel for the Respondents submitted as under:-

a) That the Respondents had taken a categorical plea *qua* the fraud played by the Appellant in submitting forged and fabricated documents to qualify the condition laid down under Clause 1.2.4 of the Tender Document. It was further submitted that the fraud became abundantly clear when the Heathrow Airport, UK and Noi-Bai International Airport at Vietnam had communicated that no such documents were ever issued.

b) That the ld. Sole Arbitrator took note of the email dated 23.03.2018 received from Heathrow Airport, email dated 03.07.2018 received from Consulate General of India at Shanghai, email dated 29.06.2018 from SJM, email dated 26.06.2018 from Consulate General of India at Shanghai and rightly concluded that the said correspondences are sufficient to satisfy that the plea of

the Respondents of the fraud committed by the Appellant was a serious one.

c) That the Ld. Sole Arbitrator applied the settled principle of law, i.e., "fraud vitiates all solemn act," which is applicable not only to the primary proceedings but also to all collateral proceedings that arise out of the same facts and circumstances.

d) That the Ld. Sole Arbitrator had rightly held that the plea of *res judicata* would not come in the way of the Respondents to plead that the Respondent had committed fraud.

e) That the Ld. Sole Arbitrator had rightly noted the Appellant's failure to deal or controvert the material pleadings of the Respondents regarding the purported eligibility it gained as an associate of SJM as well as the genuineness of the SPCs. It is submitted that the Ld. Sole Arbitrator even posed such query to the Appellant, however the Appellant has failed to controvert to the same.

f) That while taking cognizance of the relevant conditions of the Tender Documents, the Ld. Sole Arbitrator had rightly arrived at the conclusion that the Respondents had entered into the contract with the Appellant solely on the basis of the representations made by the Appellant. It was submitted that the said fact remained unchallenged during the entire arbitration proceedings. It was accordingly further submitted that the Ld. Sole Arbitrator had correctly held that the plea of the Respondents of the fraud practiced by the Appellant to procure the contract was a serious one which permeates the entire contract.

g) That the Ld. Sole Arbitrator took a plausible and correct view that the allegations of fraud in the present case could not be said to be confined to the internal matters/affairs of the parties and such allegations, if proved, nullify the contract itself.

h) That the findings of the Ld. Sole Arbitrator do not suffer from illegality which would warrant interference by this Hon'ble Court.

14. Heard learned Counsel for the parties and perused the material on record.

15. The issue that arises for consideration in the instant Appeal is as to whether the Ld. Sole Arbitrator ought to have permitted the parties to lead evidence and adjudicate the issue of fraud, or is the decision taken by the Ld. Sole Arbitrator that the issue which arises for consideration in this case is non-arbitrable, looking at the nature of fraud that has been played by the Appellant herein, valid.

16. Section 17 of the Indian Contract Act, 1872 defines "Fraud", which reads as under:-

> *"**17. "Fraud" defined**.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent, or to induce him to enter into the contract:—*
> *(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
>
> *(2) the active concealment of a fact by one having knowledge or belief of the fact;*
>
> *(3) a promise made without any intention of performing it;*
>
> *(4) any other act fitted to deceive;*

> *(5) any such act or omission as the law specially declares to be fraudulent.*
>
> *Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.*
>
> *(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.*
>
> *(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.*
>
> *(c) B says to A—"If you do not deny it, I shall assume that the horse is sound." A says nothing. Here, A's silence is equivalent to speech.*
>
> *(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B' willingness to proceed with the contract. A is not bound to inform B."*

17. The allegation against the Appellant is that the Appellant has submitted the two SPCs to depict that the end users of the PBTs manufactured by the Foreign Original Manufacturer namely SJM were Heathrow Airport, United Kingdom and Noi-Bai International Airport, Vietnam. It is also stated that the Appellant has submitted an Authorisation Letter purportedly given by SJM to represent the itself as the Indian Associate of the Foreign Original Manufacturer to make it eligible to participate in the Tender. It is the creation of the two SPCs and the

Authorisation Letter which is to be examined as to whether they are a product of forgery or are the originals. These documents are therefore the heart of the matter and if these documents are proved to be forged/fabricated then the Appellant has committed a fraud on the Respondents as defined under Section 17 of the Indian Contract Act, 1872. The Civil and Criminal Courts have to adjudicate the issue. Undoubtedly, both the proceedings can go on simultaneously and one is not necessarily dependent on the other. But in both the civil and criminal proceedings, these documents will have to be tested. It is in this light, this Court has to consider as to whether the finding of the Ld. Sole Arbitrator holding the disputes as non-arbitrable warrant interference or not.

18. The parameters which have to be kept in mind while deciding as to whether allegations regarding fraud are arbitrable or not is now well established. The Apex Court in A. Ayyasamy v. A. Paramasivam & Ors **(2016) 10 SCC 386,** has observed as under:-

> *"**12**. In this behalf, we have to begin our discussion with the pertinent observation that insofar as the Arbitration and Conciliation Act, 1996 is concerned, it does not make any specific provision excluding any category of disputes terming them to be non-arbitrable:*
>
> *12.1. A number of pronouncements have been rendered laying down the scope of judicial intervention, in cases where there is an arbitration clause, with clear and unambiguous message that in such an event judicial intervention would be very limited and minimal. However, the Act contains provisions for challenging the arbitral awards. These provisions are Section 34 and Section 48 of the Act. Section 34(2)(b) and Section 48(2) of the Act, inter alia, provide that an arbitral award may be set aside if the Court finds that the*

"subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force". Even when such a provision is interpreted, what is to be shown is that there is a law which makes subject-matter of a dispute incapable of settlement by arbitration. The aforesaid position in law has been culled out from the combined readings of Sections 5, 16 and 34 of the Act.

12.2. When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the court in proceedings under Section 34 of the Act while challenging the arbitral award.

12.3. The aforesaid scheme of the Act is succinctly brought out in the following discussion by this Court in Kvaerner Cementation India Ltd. v. Bajranglal Agarwal [Kvaerner Cementation India Ltd. v.

Bajranglal Agarwal, (2012) 5 SCC 214] : (SCC p. 214, paras 3-5)

> *"3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.*
>
> *4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.*
>
> *5. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings."*

12.4. Aforesaid is the position when the Arbitral Tribunal is constituted at the instance of one of the parties and the other party takes up the position that such proceedings are not valid in law.

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***14**. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable [See O.P. Malhotra on 'The Law and Practice of Arbitration and Conciliation', 3rd Edn., authored by Indu Malhotra. See also note 10 ibid.] :*

(i) patent, trade marks and copyright;

(ii) anti-trust/competition laws;

(iii) insolvency/winding up;

(iv) bribery/corruption;

(v) fraud;

(vi) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

15. *"Fraud" is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines "fraud" as a concealment or false representation through a statement or conduct that injures another who relies on it [See Ramesh Kumar v. Furu Ram, (2011) 8 SCC 613 : (2011) 4 SCC (Civ) 303 (a decision rendered under the Arbitration Act, 1940).] . However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject-matter of dispute from arbitration and decision thereof necessary by the civil court.*

16*. In Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406] , serious allegations of fraud were held by the Court to be a sufficient ground for not making a reference to arbitration. Reliance in that regard was placed by the Court on a decision of the Chancery Division in Russell v. Russell [Russell v. Russell, (1880) LR 14 Ch D 471]. That was a case where a notice for the dissolution of a partnership was issued by one of the partners, upon which the other partner brought an action alleging various charges of fraud, and sought a declaration that the notice of dissolution was void. The partner who was charged with fraud sought reference of the disputes to arbitration. The Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. But where the*

objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved.

***17**. The aforesaid judgment was followed by this Court in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] while considering the matter under the present Act. In that case, the respondent had instituted a suit against the appellant, upon which the appellant filed an application under Section 8 of the Act. The applicant made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator, and ought to be settled by the Court, through detailed evidence led by both parties.*

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***19**. As noted above, in Swiss Timing Ltd. case [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] , the Single Judge of this Court while dealing with the same issue in an application under Section 11 of the Act treated the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] as per incuriam by referring to the other judgments in P. Anand Gajapathi Raju v. P.V.G. Raju [P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539] and Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums [Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503] . Two reasons were given in support which can be found in para 20 of the judgment which makes the following reading : (Swiss Timing case [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] , SCC pp. 689-90)*

"20. This judgment in P. Anand Gajapathi case [P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539] was not even brought to the notice of the Court in N. Radhakrishnan case [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] . In my opinion, the judgment in N. Radhakrishnan case [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] is per incuriam on two grounds : firstly, the judgment in Hindustan Petroleum Corpn. Ltd. [Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503] , though referred to has not been distinguished but at the same time is not followed also. The judgment in P. Anand Gajapathi Raju [P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539] was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provisions contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] does not lay down the correct law and cannot be relied upon."

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21. *As we are concerned with the first facet of the arbitrability of dispute, on this aspect the Court pointed out that in those cases where the subject-matter falls exclusively within the domain of public fora viz. the courts, such disputes would be non-arbitrable and cannot be decided by the Arbitral Tribunal but by the courts alone. The justification and rationale given for adjudicating such disputes through the process of courts i.e. public fora and not by Arbitral Tribunals, which is a private forum, is given by the Court in the following manner : (Booz Allen*

case [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , SCC pp. 546-47, paras 35-38)

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

protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

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

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

22. *The Law Commission has taken note of the fact that there is divergence of views between the different High Courts where two views have been expressed, one is in favour of the civil court having jurisdiction in cases of serious fraud and the other view encompasses that even in cases of serious fraud, the Arbitral Tribunal*

will rule on its own jurisdiction. It may be pertinent here to reproduce the observations of the Law Commission as contained in Paras 50 and 51 of the 246th Law Commission Report, which are as under:

> *"50. The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra [Bharat Rasiklal Ashra v. Gautam Rasiklal Ashra, (2012) 2 SCC 144 : (2012) 1 SCC (Civ) 556] that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable. In this context, a two-Judge Bench of the Supreme Court, while adjudicating on an application under Section 8 of the Act, in N. Radhakrishnan v. Maestro Engineers [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] held that an issue of fraud is not arbitrable. This decision was ostensibly based on the decision of the three-Judge Bench of the Supreme Court in Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406] . However, the said three-Judge Bench decision (which was based on the finding in Russell v. Russell [Russell v. Russell, (1880) LR 14 Ch D 471]) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] , it appears that issues of fraud are not arbitrable.*

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable *[see Ivory Properties and Hotels (P) Ltd. v. Nusli Neville Wadia [Ivory Properties and Hotels (P) Ltd. v. Nusli Neville Wadia, (2011) 2 Arb LR 479 : 2011 SCC OnLine Bom 22] ; C.S. Ravishankar v. C.K. Ravishankar [C.S. Ravishankar v. C.K. Ravishankar, (2011) 6 Kant LJ 417 : 2011 SCC OnLine Kar 4128]]. The Supreme Court in Meguin GmbH v. Nandan Petrochem Ltd. [Meguin GmbH v. Nandan Petrochem Ltd., (2016) 10 SCC 422] in the context of an application filed under Section 11 has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] , in a similar case of exercising jurisdiction under Section 11, held that the judgment in Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] is per incuriam and, therefore, not good law."*

23. A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognised that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud and fraud simpliciter. It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simpliciter and such allegations are merely alleged, we are of the opinion that it may not be necessary to nullify the effect of the arbitration agreement between the parties

> ***as such issues can be determined by the Arbitral Tribunal."***
>
> (emphasis supplied)

19. The Apex Court was of the opinion that cases where serious frauds are involved that has to be treated as non-arbitrable and it is only the Civil Court which take such matters. However, where the allegations of fraud simplicitor and such frauds are merely alleged then it is not necessary to nullify the affect of the Arbitration Agreement of the parties and such issues can be determined by the Tribunal.

20. The Apex Court in Rashid Raza v. Sadaf Akhtar, **(2019) 8 SCC 710**, after considering A. Ayyasamy (*supra*) has observed as under:-

> ***"4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."***
>
> (emphasis supplied)

21. The Judgments passed by the Apex Court in A. Ayyasamy (*supra*) and Rashid Raza (*supra*) had again come up for consideration before the Hon'ble Apex Court in Avitel Post Studioz Limited and Others v. HSBC PI Holdings (Mauritius) Limited, **(2021) 4 SCC 713**. The Apex Court, while upholding and reaffirming the said two judgments had observed as under:-

> *"**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."*

22. Since there were difference of opinion regarding which are the issues which are arbitrable or not, the issue was referred to the Bench of three-Judges and the reference was answered by the Apex Court in Vidya Drolia and Others v. Durga Trading Corporation, **(2021) 2 SCC 1**. The Apex Court considered the issue as to in which cases the issue of fraud would become non-arbitrable. The Apex Court held that the Arbitrators' Courts are bound to resolve and decide the disputes. However, while considering the issue of fraud, the Bench of three-Judge has observed as under:-

> *"**73**. A recent judgment of this Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] has examined the law on invocation of "fraud exception" in great detail and holds that N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in para 34 of the judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC*

OnLine SC 656] , which quotes observations in Rashid Raza v. Sadaf Akhtar [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] : (Rashid Raza case [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , SCC p. 712, para 4)

> *"4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."*
>
> *to observe in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] : (SCC para 35)*
>
> ***"35. … 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."***

> ***74***. *The judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post-contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void."*
>
> (emphasis supplied)

23. The Bench of three-Judges therefore held that serious allegations of fraud ought not to be adjudicated in arbitral proceedings and are best left to the Courts. The Arbitral Tribunal, after applying the law laid down by the Apex Court in A. Ayyasamy (*supra*), Rashid Raza (*supra*), Avitel Post Studioz (*supra)* and Vidya Drolia (*supra*), came to the conclusion that the facts of the present case are complex in nature. The Arbitral Tribunal would have to examine witnesses who are officers from governmental authorities and/or those outside the country, and therefore, it is difficult to summon those witnesses before the Ld. Sole Arbitrator. The Ld. Sole Arbitrator would also have to take the assistance of the Ministry of External Affairs to summon those witnesses which can be more expediently handed over by the Civil Courts than by the Arbitral Tribunal. The allegations of fraud are not of forgery but fabrication of documents of foreign companies/authorities and therefore this could be more conveniently adjudicated by the Civil Courts than by the Arbitral Tribunal.

24. The facts of the present case reveal that it took substantial amount of time by the Respondents to unearth the fraud of the Appellant. The

Respondents had to send repeated e-mails to the Heathrow Airport, United Kingdom and Noi-Bai International Airport, Vietnam, take the assistance of the Ministry of External Affairs and contact the Indian Consulates. The Indian Consulates had to take steps to contact the SJM, whose e-mails reveal that SJM was reluctant even to come to the Indian Consulate for a meeting. Though the Arbitral Tribunal has been conferred with powers under Section 27 of the Act of 1996 to call for witnesses, this Court is of the opinion that the view taken by the Ld. Sole Arbitrator that it would be more easy for the civil court to summon witnesses, that is, officials at the Heathrow Airport, United Kingdom and Noi-Bai International Airport, Vietnam and officials of the SJM to give evidence for unearthing the core issue which is as to whether the SPCs which has been produced by the Appellant is fabricated or not. If the documents are fabricated then the Appellant has taken the benefit by the forged and fabricated documents and the Appellant cannot be permitted to get a premium on fraud which is alleged to have been committed by them and Courts cannot be mute spectator to such fraud which is alleged to have been committed.

25. The conclusion of the Ld. Sole Arbitrator that a Court is better equipped to adjudicate these issues therefore, does not call for any interference. It cannot be said that the Ld. Sole Arbitrator has taken a cursory view regarding fraud. The issues that arise are complicated and complex in nature involving production of witnesses outside the country and also documents from outside the country. It has to be adjudicated whether the documents are a product of fabrication or not and whether SJM was a party to the said fabrication and as to how SJM permitted the Appellant, if they have given any such letter to the Appellant, to use it for getting the

contract with the Respondents and more particularly when the Heathrow Airport, United Kingdom and Noi-Bai International Airport, Vietnam have stated that the SJM did not participate in any supply of the PBTs. The finding of the Ld. Sole Arbitrator that the issue is not an internal matter of the Appellant and the Respondents is, therefore, correct. The documents and witnesses outside the country are necessary to be examined to unearth the issues.

26. This Court is therefore of the opinion that the present case is not on the ground of fraud simplicitor. The facts of the case are extremely serious and they do make out a case for criminal offence. The plea of fraud is of such a nature that it permits the entire contract including the agreement to arbitrate as the issue goes to the validity of the entire contract which contains the Arbitration Clause itself.

27. Considering the entire gamut of facts and the law laid down by the Apex Court, this Court is of the opinion that the present Appeal is of such a nature that it would make the entire dispute non-arbitrable, as laid down by the Apex Court in A. Ayyasamy (*supra*), Rashid Raza (*supra*), Avitel Post Studioz (*supra)* and Vidya Drolia (*supra*).

28. Accordingly, the instant Appeal stands dismissed along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

MARCH 11, 2025
RJ / AP