IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF DECEMBER, 2025

BEFORE

THE HON'BLE MR. JUSTICE V. SRISHANANDA

CIVIL REVISION PETITION No.29/2019

BETWEEN

SRI ASHOK S DHARIWAL
S/O SUGANCHAND DHARIWAL,
AGED ABOUT 63 YEARS,
RESIDING AT NO.H-8/32,
BULL TEMPLE ROAD,
BASAVANGUDI,
BANGALORE-560 004.

...PETITIONER

(BY SRI P D SURANA, ADVOCATE)

AND

SRI MAHAVEER K RANKA
S/O LATE KALURAM RANKA,
RESIDING AT NO.H-7, 30TH CROSS,
5TH MAIN ROAD,
JAYANAGAR,
BANGALORE-560011
SINCE DEAD BY HIS LRS.,

1(a) SRI AJIT RANKA,
S/O LATE MAHAVEER RANKA,
AGED ABOUT 47 YEARS,

2 . SRI AKASH RANKA
S/O LATE MAHAVEER RANKA,
AGED ABOUT 39 YEARS,

3 . SMT SAPNA KOTHARI
D/O LATE MAHAVEER RANKA,
AGED ABOUT 44 YEARS,

ALL ARE RESIDING AT
NO.H-7, 30TH CROSS,
5TH MAIN ROAD, JAYANAGAR,
BANGALORE-560011.

4 . P MANJUNATH
S/O P Y SHETTY,
AGED ABOUT 52 YEARS,
RESIDING AT NO.1282,
13TH CROSS, 2ND STAGE,
INDIRANAGAR,
BANGALORE-560 038.

5 . B N SATHYANARAYANA
S/O B R NANJUNDAYYA,
AGED ABOUT 81 YEARS,
R/AT NO.107, SPM ROAD,
SHIMOGA-577401

6 . K A UMESH
S/O K S ASHOK KUMAR,
AGED ABOUT 36 YEARS,
R/AT NO.19, SANTHAPPA LANE,
CHICKPET CROSS,
BANGALORE-560002.

7 . SRI K N GIRISH
S/O K S NAGABHUSHAN,
AGED ABOUT 36 YEARS,
R/AT NO.19, SHANTHAPPA LANE,
CHICKPET CROSS
BANGALORE-560 002.

8 . SRI K R TEJAS
S/O K S RAVINDRANATH,
AGED ABOUT 31 YEARS,
R/AT NO.19, SHANTHAPPA LANE,
CHICKPET CROSS
BANGALORE-560 002.

...RESPONDENTS

(BY SRI S.SREEVATSA, SENIOR ADVOCATE FOR
SRI S.D.N.PRASAD, ADVOCATE FOR R1(A TO C);
R2 TO R6 ARE SERVED AND UNREPRESENTED)

THIS CRP IS FILED UNDER SECTION 115 OF CODE OF CIVIL PROCEDURE, AGAINST THE JUDGMENT DATED 24.11.2018 PASSED IN M.A.No.36/2015 ON THE FILE OF THE III ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BENGALURU, DISMISSING THE APPEAL FILED UNDER SECTION 37(2) OF ARBITRATION AND CONCILIATION ACT 1996.

THIS PETITION HAVING BEEN RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:-

CORAM: HON'BLE MR JUSTICE V SRISHANANDA

CAV ORDER

(PER: HON'BLE MR JUSTICE V SRISHANANDA)

The present Civil Revision Petition is a classic example of how an arbitration proceedings can be delayed even at the very inception stage in utter disregard to the laudable object of early resolution of civil dispute and Alternate Dispute Resolution System and defeating the very object

of the enactment of Arbitration and Conciliation Act, 1996. It is often said that resolution of disputes by arbitration in India is full of brakes and no engine. Present case is best example for the said saying.

2. Present Civil Revision Petition is filed by the appellant in M.A No.36 of 2015 on the file of the III Additional City Civil and Sessions Judge, Bengaluru,(CCH-25) challenging the validity of the said judgment dated 24.11.2018 dismissing the Appeal filed by him challenging the order passed by the arbitrator, whereby the arbitrator recorded a finding that the dispute between the parties is not an arbitral dispute.

3. Facts in the nutshell which are utmost necessary for disposal of the present Civil Revision Petition are as under:

It is alleged that petitioner, respondent Nos.1 to 4 along with other persons constituted a partnership firm in the name and style 'M/s Paramount Vijetha Holdings' ('firm' for short) through a deed dated 24.05.2006. The said firm was reconstituted on 15.05.2007 as the other

partners apart from respondent Nos.1 to 4 retired from the firm. Respondent Nos.1 to 4 continued as partners.

4. The partners decided to induct few more partners and therefore respondent Nos.5 and 6 were also intended to be inducted as partners with a limited interest in the firm that the share of profits of respondent No.4 would be shared by respondent Nos.5 and 6.

5. However, on account of legal issues, inducting respondent Nos.5 and 6 to the firm was not finalized.

6. Material on record would reveal that firm was engaged in Real Estate business and it ventured for development of the agricultural land measuring 3 acres 39 guntas comprised in Sy.Nos.45/2 and 45/3 of Arakere Village by entering into a Joint Development Agreement ('JDA' for short) with its owner Sri Krishna Reddy on 29.06.2006.

7. As per the terms of the JDA, M/s Sovern Developers and Infrastructure Company Limited ('construction

company' for short) was entrusted the work of construction.

8. The revision petitioner namely Ashok S. Dhariwal is the 'working partner' of the firm whereas first respondent is the 'Managing Partner'.

9. There were some differences between owner of the land i.e., Sri Krishna Reddy and the firm on account of improper handling of the development by the first respondent.

10. Therefore, Krishna Reddy filed an arbitration case in A.A No.25/2008. But, at the intervention of the petitioner, the said arbitration case ended in a compromise.

11. It is further allegation of the revision petitioner that the first respondent was immature in handling the business dealings and there are few misunderstanding between the construction company and the firm.

12. As such, the construction company also filed an arbitration case in AA No.697/2009 against the firm and

firm also filed an arbitration case against construction company in AA No.728/2009.

13. It is further alleged that, on account of pending arbitration cases, the development work got delayed and the project cost got escalated solely on account of the conduct of the first respondent. It is also alleged by the revision petitioner that first respondent sidelined the revision petitioner by misusing the blank cheques signed by the revision petitioner and transferred the amounts from account of the firm which was opened in IDBI Bank to a fresh account which was opened in HDFC bank by the first respondent alone, though in the name of the firm.

14. In addition to that, the first respondent transferred funds of the firm to his son Akash Ranka's account and collected the cheques received from the intending purchasers of the plots to the account of HDFC Bank. Thereby, revision petitioner was kept aloof from the business of the firm.

15. It is also allegation of the revision petitioner that there was a resolution passed against him in order to shield their illegal acts and improper handling of the accounts and they went to the extent of calling for books of accounts of the firm from the revision petitioner contending that those books are with the revision petitioner.

16. Under such circumstances, revision petitioner was constrained to file an arbitration case in AA No.232/2011 against respondent Nos.1 to 4 and also filed a petition in CMP No.75/2013 on the file of the High Court of Karnataka for appointment of a neutral arbitrator to resolve the dispute among them.

17. High Court at Karnataka allowed the said CMP No.75/2013 by the Order dated 06.02.2014 and appointed Justice Ajit J. Gunjal to arbitrate the matter. However, it is submitted that Justice Ajit J. Gunjal declined to arbitrate the matter. By the Order dated 10.07.2014 Justice

A.C.Kabbin was appointed as an arbitrator. From the record it is found that Justice A.C.Kabbin also did not choose to arbitrate the matter and ultimately Justice V.Jagannathan was appointed as an arbitrator.

18. Revision Petitioner has laid his claim before the arbitrator in AC No.70/2014. It is contented that learned Arbitrator after receiving the objection statement from respondent Nos.1 to 4, framed a preliminary issue regarding the arbitrability of the dispute, in the light of the averments made in the claim petition and also counter-allegations of serious nature in the objection statement filed by respondent Nos.1 to 4.

19. After hearing the parties at length, learned Arbitrator having regard to the intrinsic issues involved in the claim petition and the objection statement alleging fraud and misrepresentation, dismissed and closed the arbitration case in A.C.No.70/2014 that it is not an arbitral dispute, by Order dated 22.06.2015.

20. Being aggrieved by such a finding, an appeal in M.A.No.36/2015 came to be filed by the revision petitioner herein under Section 37(2) of the Arbitration and Conciliation Act, 1996.

21. Learned Judge in the First Appellate Court issued the notice of the appeal and after permitting the legal representatives of the first respondent to come on record, noting the death of first respondent, heard the arguments of the revision petitioner alone, as first respondent failed to file objections nor his legal representatives.

22. The learned Judge in the First Appellate Court raised the following points for consideration and by the impugned Order, dismissed the appeal.

> *(i) Whether the appellant has shown the arbitrability of the dispute raised by him?*
>
> *(ii) What Order?*

23. Being aggrieved by the same, revision petitioner has filed the present Civil Revision Petition on the following grounds.

- *The learned arbitrator erred in holding that the dispute between the parties is not arbitrable on the basis that the allegations made requires a detailed trial. The arbitrator has failed to take note of the fact that the allegations made against the respondent do not require any trial in view of the admissions made by the respondent himself. The arbitrator has referred to certain averments in the petition and on the basis of those averments he proceeds to hold that the dispute is not arbitrable. Those averments referred by the arbitrator are at para 38, 39 and 40. In para 45 the arbitrator refers to the fact of realization of the amounts from sale of the flats. The error committed by the learned arbitrator in referring those facts and to hold that the arbitration proceedings are not maintainable unsustainable in law for the following reasons.*

- *One of the statement referred to in para 38 and 39 of the order is that the 1 respondent has transferred Rs.1,07,75,000/- from the account of the firm to the account of the 1st respondent's son Akash Ranka. The said fact is not under dispute. The question of conducting a detailed enquiry to answer the said fact*

one way or the other does not arise at all. In fact, the said statement of fact is made by the Petitioner in the claim petition at para 10. The 1st respondent has filed his statement of objections to the claim petition. The 1st respondent does not dispute in his statement of objections about the transfer of the said amount from the account of the firm to the account of 1st respondent's son Akash Ranka. When there is no dispute about the transfer of the amount made by 1 respondent in favour of his son Akash Ranka the question of recording detailed evidence to find out the said fact do not arise at all. Therefore when there is no dispute about the said fact the question of referring the parties to the civil court for adjudication of the said fact does not arise at all. This aspect has not been taken note of by the learned arbitrator while passing the impugned order.

- *Annexure-B is the statement of objections filed by the 1st respondent. In para 17 of Annexure-B it is stated as follows:*

> *"These respondents submits that it is true that the amount of Rs.1,09,75,000/- (Rs.One Crore Nine Lakhs Seventy Five Thousand Only) was transferred from IDBI Bank to Akash Ranka's account at Karur Vysya Bank. This has to be done as an interim measure to enable the firm to pay the outstanding bills*

(which are paid on weekly basis) which were to be paid immediately and for the smooth progress of the work. The firm and the majority of the partners decided that the sum be transferred and the amount be paid thereof, this was necessitated by the fact that the Petitioner instead of spending time at the project interfered with the IDBI see that the no payments were made from the Bank to said account. The firm could withstand such obstructions for a short period but was finding it extremely difficult to operate the said account; the other partners had to exercise their implied authority, with the knowledge of the Petitioner which he has acquiesced for nearly 18 months. It was that stage the firm and the majority of the partners authorized the 1st respondent to open an account at HDFC Bank and operate the same for the exclusive benefit of the firm Paramount Vijetha Holdings. The account was necessarily opened by the 1st respondent since the Petitioner though informed refused to sign the necessary papers with the bankers, having no other alternative the respondents 2 to 4 authorized the 1st respondent to open the account in the name of " Paramount Vijetha Holdings."

- *Even in the statement of objections filed before the Arbitral Tribunal the 1st respondent in para 13 it is stated as follows:*

  > *"The allegation that the Petitioner has noticed that the cheques are abused by the 1st respondent and 1st respondent has transferred a sum of Rs.1,09,75,000/- (Rupees One Crore Nine Lakhs Seventy Five Thousand Only) to the account of the same is totally false and baseless and the Petitioner is put to strict proof of the same. It is relevant to state here that Akash Ranka had advanced the loan to the tune of around 1.2 Crore to tied over the situation of payment to the vendors who had supplied materials and the said amount was repaid to Sri.Akash Ranka by the firm and no amount was neither misused or misappropriated as alleged by the Petitioner. The allegation that the 1st respondent has committed an act of breach of trust is totally false and baseless."*

- *In para 14 of the statement of objections filed by 1st respondent before the arbitrational tribunal the 1st respondent has stated as follows:-*

  > *"(14) The allegation made in para No.11 that 1st respondent without the knowledge of the Petitioner had opened an account on behalf*

of and in the name of firm is to state here: totally false and baseless. It is relevant that initially the firm had opened an account in IDBI bank and Karur Vysya Bank and the account had to be operated jointly by 1st respondent and the Petitioner. there after the Petitioner started hostile attitude towards the 1st respondent on account of matrimonial dispute between his daughter with the son of the 1st respondent and refused to sign the cheques to make payments to the laborers, vendors who have supplied materials for the purpose of construction. To cause further trouble, he filed A.A. 232/2011 and obtained interim order there by stopping payments to be made to the vendors and laborers and exposed the firm to lot of litigation and caused financial losses to the firm. In addition to that the IDBI bank in which an amount 86 Lakhs was in Account, they freeze the account in view of the interim order granted in A.A. No.232/2011 thereby further exposes the firm to litigation and in convenience. Further the cheques issued for payment of statutory dues were also bounced and the firm had to face financial loss and reputation was also at stake. All these happened only because of the hostile attitude

of Petitioner. Hence, the Petitioner was compelled to open an account in HDFC Bank. Infantry Road to make payments to the vendors and for smooth functioning of firm operations.

- *In para 18 of the statement of objections Annexure-B the 1st respondent with regard to transfer of the amount from IDBI Bank to the account of HDFC Bank it is stated as follows:-*

  "Para 12-t is denied that the Petitioner was not aware or informed about the transfer of amount of sum of Rs.1,06,15,000/- (Rs.One Crore six Lakhs fifteen thousand only) from IDBI Bank account to HDFC account or the opening of the said account. It is because of the defiant attitude and non co-operation of the Petitioner at every stage was also necessitated respondents 1 to 4 in their capacity of partners of firm Paramount Vijetha Holdings, having no other alternative to constrained were transfer Rs.1,06,15,649/- (Rs.One Crore six Lakhs fifteen thousand six hundred forty nine only) from IDBI Bank to HDFC account and the financial management of the firm is being carried out by the said HDFC account in the best interest of the firm."

- *Thus, the fact of transfer of the amount from the account of the firm held at IDBI Bank to the new account opened by the 1st respondent at HDFC Bank is not in dispute. The question of conducting enquiry on the undisputed facts requiring the trial by a civil court is neither necessary nor the same is called for to refer the parties to civil court.*

- *In view of the fact that the transfer of amount as stated by the Petitioner to the account of Akash Ranka is not in dispute. The fact that without the consent of the Petitioner an account of the firm is opened at HDFC Bank is also admitted by the 1st respondent. The fact of transferring the amount from the account of IDBI Bank to HDFC Bank is also not in dispute. Under the circumstances, the question of recording detailed evidence for the purpose of finding the said fact is neither necessary nor the same is required. Therefore the reasoning of the learned arbitrator that detailed evidence is to be recorded on the averments made by the Petitioner and therefore the dispute is not arbitrable cannot be sustained.*

  In view of the aforesaid facts the reasoning of the learned Arbitrator that the dispute is not arbitrable would not have been upheld by the Civil Court.

- *The arbitrator mainly went by the fact that the statements which have been made in the petition*

which are referred to by the arbitrator require details. No evidence is required with regard to the statements made in the claim petition in view of the admissions made by the contesting respondents which are extracted above. Even with regard to the transfer of the amount from the IDBI Bank to HDFC Bank do not call for any trial in view of the admissions made in proceedings between the parties. Admitted fact has been ignored by the arbitration tribunal by directing the parties to approach the civil court and hence the impugned order is vitiated and the same is unsustainable in law. The Civil Court has not taken note of the said fact.

- *The reasoning of the learned Arbitrator at para 38 and 39 that the fact of transfer of amount to the account of Akash Ranka, the fact of opening of the account at HDFC Bank and the fact of transfer of the amount from IDBI Bank are presumed by the arbitrator to be of a serious nature which requires detailed investigation is the result of failure to take note of the admissions made by the respondent about the said fact. When the said facts are not in dispute, the reasoning that a trial is required to be conducted by a civil court is not sustainable and no trial is required about the admitted fact. The Civil Court ought to have noticed that having regard to the admissions made by the Respondents which are extracted above the question of the requirement of detailed trail is not at*

all involved. The Civil Court also failed to take note of these facts while passing impugned order.

- *The arbitrational Tribunal at para 43 of the order refers to the fact of realization of the amount by the sale of 145 flats. The amount realized by sale of 145 flats is to be calculated on the basis of the evidence that is placed before the tribunal. The fact that the sale deeds are registered for a lower price than the agreed price is not a ground to say that the dispute between the parties cannot be arbitrated. That the arbitrator has referred to various judgments on his own without bringing the same to the notice of the parties. Such a course adopted by the arbitrator is against to the principles of natural justice. One of the judgments relied up on by Petitioner is in the case of SWISS TIMINGS LTD., VS Organizing Committee, Common wealth Games reported in AIR 2014 SC 3723. The citing of said judgment is noted by the learned arbitrator in para 32 of the order. But unfortunately the text of the said judgment is neither extracted nor does the arbitrator state that the said judgment is not applicable to the facts of the case. In fact, the said judgment is applicable to the facts of the case. The learned arbitrator ought to have held that the dispute is arbitrable in view of the reasons recorded in the said judgment. Para 6(ii) of the said judgment is as follows:*

(II) The contract stands vitiated and is void ab-initio in view of Clauses 29, 30 and 34 of the Agreement dated 11th March, 2010. Hence, the Petitioner is not entitled to any payment whatsoever in respect of the contract and is liable to reimburse the payments already made. Therefore, there is no basis to invoke arbitration clause. The respondent points out that a combined reading of clause 29 and clause 34 would show that the Petitioner had warranted that it will never engage in corrupt, fraudulent, collusive or coercive practices in connection with the agreement. The Petitioner would be liable to identify the respondent against all losses suffered or incurred as a result of any breach of the agreement or any negligence, unlawful conduct or willful misconduct. The respondent may terminate the agreement when it determines that the Petitioner had engaged in any corrupt, fraudulent, collusive or coercive practice in connection with the agreement. The respondent seeks to establish the aforesaid non liability cause on the basis of registration of Criminal Case being CC.No.22 of 2011 under Section 120-B, read with Sections 420, 427, 488 and 477 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of

Corruption Act against Suresh Kalmadi, the then Chairman of the Organizing Committee and other officials of the respondent along with some officials of the Petitioner, namely Mr. S. Chianese, Sales and Marketing Manager, Mr. Christophe Bertaud, General Manager and Mr.J.Spiri, Multi Sports Events and Sales Manager."

- *It is further the case of the respondent in that case, that due to the pendency of the criminal proceedings in the trial court, the present petition ought not to be entertained. In case the arbitration proceedings continues simultaneously with the criminal trial, there is real danger of conflicting conclusions by the two for a, leading to unnecessary confusion. The Hon'ble Supreme Court has answered the above contentions in the said judgment at para 12 which is as follows:-*

  "12. The second preliminary objection raised by the respondent is on the ground that the contract stands vitiated and is void-ab-initio in view of Clause 29, 30 and 34 of the agreement dated 11th March, 2010. I am of the considered opinion that the aforesaid preliminary objection is without any substance. Under clause 29, both sides have given a warranty not to indulge in corrupt practices to induce execution of the agreement, Clause 34 empowers the Organizing

Committee to terminate the contract after deciding that the contract was executed in breach of the undertaking given in clause 29 of the contract. These are allegations which will have to be established in a proper forum on the basis of the oral and documentary evidence, produced by the parties, in support of their respective claims. The objection taken is to the manner in which the grant of the contract was manipulated in favour of the Petitioner. The second ground is that the rates charged by the Petitioner were exorbitant. Both these issues can be taken care of in the award. Certainly if the respondent is able to produce sufficient evidence to show that the similar services could have been procured for a lesser price, the arbitral tribunal would take the same into account whist computing the amounts payable to the Petitioner. As a pure question of law, I am unable to accept the very broad proposition that whenever a contract is said to be void-ab-initio, the Courts exercising jurisdiction under Section 8 and Section 11 of the Arbitration Act, 1996 are rendered powerless to refer the disputes to arbitration."

- *The learned arbitrator ought to have noticed the said observations of the Hon'ble Supreme Court and ought to have held that the dispute is arbitrable. Instead of*

referring to the said judgment the arbitrator refers to various judgments which are neither cited by the Petitioner nor by the respondents. If the Arbitrator desired to rely up on the judgment which are not relied up on by the parties in that event he ought to have invited the attention of the parties to have their say in the matter. When this exercise has not been followed the impugned order is unsustainable in law as the same is against to the principles of natural justice. The trail court proceed to hold that the decision cited by the learned arbitrator were not been known to the Petitioner's Advocate and therefore the if the arbitrator is better informed about the judgments of the court and the same are referred to in the orders by the arbitrator no fault can be found on the said aspect. It is submitted that the Petitioner would have offered his submissions about applicability of the judgments so cited by the arbitrator if the said judgments were brought to the notice of Petitioner which the arbitrator has relied upon. The manner in which this aspect is considered by trail court is oppose to natural justice.

- *The learned arbitrator failed to take note of the fact that the transfer of the amount to the account of Akash Ranka and transfer of amount from IDBI Bank to HDFC Bank was not the subject matter of adjudication at all for the reason that the claim petition is presented before the Arbitration tribunal*

without seeking adjudication of aforesaid facts. In para 20 of the claim petition the number of flats which are sold is mentioned and the cost of construction incurred for the construction of flats is also mentioned. The miscellaneous costs are also mentioned and thereafter the net profit is worked. The calculation errors which have occurred in para 20 are explained in Re-joinder. It is based on the calculation furnished about the amount realized from the sale of flats. The profits has to be calculated after the deducting the cost of the construction of the flats. The prayer of the partition of the profits is based on the said submissions and the calculations so made. The other averments in the petition which are admitted facts are the facts which gave raise to the dispute between the parties. Under he circumstances the prayer for sale of remaining flats is sought for by appointing a receiver. Alternatively it is also prayed that 10% of the remaining unsold flats be allotted to the share of the Petitioner towards its profits which will have the result of distributing the profits which will accrue by the sale of the remaining flats. The reasoning of the arbitrator that such a prayer cannot be considered by the arbitrator is unsustainable in law. On passing of the award the execution will be filled before the competent civil court. The aspect of executing of the decree will be taken care of by the executing court and even the appointment of the

receiver can be undertaken in executing the decree. The Trail Court also has erred in holding that such a prayer cannot be granted by arbitrator. All steps available in law are permitted to be taken by the parties for implementing the award. The award is executed in the same manner as the decree is executed. The award made by arbitrator is executable by Civil Court and therefore the reasons assigned by Civil Court and arbitrator that such a prayer cannot be granted is unsustainable in law. To meet the ends of justice, a relief which a party is entitled to is to be granted unless the same is prohibited by law.

- *In the course of the submissions before the arbitrator it was made clear that no enquiry is sought for in relation to the misrepresentation, fraud and breach of trust. The simple prayer is of partition of the property. Such a prayer is not outside the purview of the arbitration proceedings.*

- *No adjudication was sought for on the criminality of the conduct of the 1st respondent. The tribunal erred in holding that the case involves adjudication of criminality of the matter.*

- *With regard to collection of taxes and payment of taxes are the matters of records which the parties have to place before the court and the quantum of tax paid can always be decided on the basis of the evidence produced by the parties.*

- *The observations of the tribunal that the sale deeds are executed on behalf of the owner of the property and also by the partnership firm and therefore detailed enquiry is necessary is again an erroneous observation made by the tribunal. It is an admitted fact that the joint development agreement is entered with the owner of the property. The flats are sold on the basis of the power of attorney executed by the owner. The price is realized by sale of flats which have fallen to the share of the firm as a developer. On the basis of the evidence placed by the parties the determination has to be made of the price realized by sale of the flats and after deducting the expenditure incurred for construction the profit has to be arrived and the same is to be distributed. The amount is received by the 1st respondent and he has to disburse the profits available in his hands. It cannot be said that such an exercise cannot be done in the arbitration proceedings. It is not out of place to mention that various construction contracts provides for arbitration and arbitration is conducted in such matters based on the evidence which the parties may produce before the tribunal. The exercise of calculating the profits does not amount to adjudication of fraud, misrepresentation or collusion. The observation of the tribunal that several questions will arise to ascertain the prayer of the claimant for allotment of 10% share in the profits of the firm is*

again an erroneous view of the arbitrator. In fact 60 agreements of sale were filed before the arbitrator. The corresponding sale deeds were also produced before arbitrator. The lower price mentioned in sale deed is ascertainable at the mere look of these documents. These aspects are not noticed by the the arbitrator and also by Civil Court.

- *The owner of the land Krishna Reddy need not be a party to the arbitration proceedings as there is no dispute which requires to be adjudicated with the said Krishna Reddy. The observations that may questions of law which are required to be considered and therefore they are out side the purview of the arbitration proceedings is again a observation made without any basis. The sale deeds are executed. The execution of the sale deeds is not in dispute. The firm of Paramount Vijetha Holdings has executed the sale deeds as a Builder. The parties to the sale deed need not be made parties to the arbitration proceedings. Sale deeds are only the piece of evidence evidencing the fact that the property is sold. No other question with regard to the sale deed does arise for consideration. The said question does not require any adjudication. Impleading of IDBI Bank in A.A. 232/ 2011 has nothing to do with the proceedings before the arbitrator.*

- *The arbitrator erred in holding that the partners have to seek the dissolution of the firm. The partnership deed provides for distribution of profits. The terms of partnership are by themselves enforceable without seeking dissolution. A partner cannot by its overacts force another partner to seek the dissolution. The erring partner has tobe disciplined to respect the rights of the other partner. The observations that the dissolution is required to be sought for are again an observation made by the tribunal without hearing the parties on the said question. There is no legal bar to maintain suit for partition of the profits amongst the partners. The said relief does not depend on as to whether the relief of dissolution is sought for or not. The reasoning of Civil Court and arbitrator on these aspects are unsustainable in law.*

- *It is submitted that the respondents 5 and 6 are parties to the partition deed. After execution of the partition deed further formalities are not carried out. There is an arbitration clause in the partnership deed. They are governed by the said provision. In view of the fact that there is an agreement for arbitration binding on them they are to be treated as proper parties to the proceedings if not necessary parties.*

- *The observation that the sale deeds are executed on behalf of Sri. Krishna Reddy in favour of each of the purchasers therefore Sri. Krishna Reddy and the*

purchasers are necessary parties is uncalled for. The sale deeds are not under challenge. No relief is sought for so far execution of sale deeds are concerned. The question that arises for consideration as to whether the sale price realized is the one mentioned in the sale deed or larger sum is realized by sale of each flats. The finding has to be recorded based on the evidence which the parties may lead with regard to realization of price. The Petitioner had produced before the learned Arbitrator number of agreements which were executed in favour of the purchasers of the flats. The perusal of these agreements shows the sale price fixed for sale of each of the flats. Under these circumstances it is not a case of unearthing a fraud, it is a case of finding out sale price realized. Merely because the sale price mentioned in the sale deed is lower than the one realized it cannot be said that the arbitration proceedings are not maintainable.

- *There is no dispute which is required to be decided by the Arbitrator which relates to any of the third parties. The dispute is only with regard to distribution of profits amongst the partners. Therefore the observation that the firm is required to be made as party is again unsustainable finding and not contemplated by law.*

- *The direction sought for to sell the available flats as per the prayer made is not a reason to say that the*

arbitration proceedings are not maintainable. The award made by Arbitrator is to be executed before Civil Court and if any sale of property is to be made the same will be made by Civil Court. Under the circumstances that the observation made by Civil Court that the arbitration proceedings is not maintainable in view of the prayer No.2 made in the claim petition is not sustainable in law.

- *That the partners are entitled to claim the share in the profits of the firm. Such a relief is not barred in law and therefore the observation that dissolution of the firm is not prayed for and therefore the arbitration proceedings is not maintainable is unsustainable in law.*

- *The Hon'ble Supreme Court in the case of SBP & Co., V/S Patel Engineering reported in 2005 8 SCC 618 it has been held that the power under Section 16 of Arbitration & Conciliation Act is available to the Arbitrator if the proceedings for arbitration has commenced without the intervention of the Court, where arbitration proceedings have commenced before Arbitrator without the intervention of Court. The power to rule its own jurisdiction under Section 16 of Arbitration & Conciliation Act is available to the Arbitrator. This possession of law has not been properly applied by the Civil Court. The various reasoning given by Civil Court to say that the law laid*

down by Supreme Court in the aforesaid judgment is not applicable to facts of the case is unsustainable in law. The principles laid down in said case ought to have been followed by Civil Court and Arbitrator. The reasons of the Civil Court to say that the said judgment is not applicable to facts of the case is not sustainable in law.

- *The judgments of Supreme Court has clarified in the case of A.Ayyawamy V/S Paramashiva and others. reported in (2016)10 SCC 386. That the arbitrator has jurisdiction to decide the facts even in cases where fraud is alleged. The manner of mentioning the price in the sale deeds than the one agreed for sale of flats is not a serious fraud which cannot be decided by arbitrator. The recording of finding on such issue does not require elaborate trail to discover the fraud. Even with regard to transfer of funds in favor of 1st Defendant son was an admitted fact. Under the circumstances the order of Civil Court is unsustainable in law and Civil Court ought to have reverse the order of learned Arbitrator.*

- *The Civil Court ought to have followed the judgment of Hon'ble Supreme Court reported in AIR 2016 SC No.4675 and judgment reported in 2005 ((8) SCC 618. The various reasoning adopted by trail court to say that the said judgments are not applicable to the facts of the case are unsustainable in law. The Civil*

Court is required to apply the principle that when arbitrator is appointed by Hon'ble High Court the arbitrator will not have jurisdiction under Section 16 to decide his own jurisdiction. The Civil Court has not noticed the said aspect properly.

- *The observation of the civil Court that the allegations made by the Petitioner manifestly shows the determining of criminal acts, falsification of accounts and siphoning of funds and therefore the allegations are of grave nature and in the absence of the version of Krishna Reddy these allegations cannot be decided is a erroneous reasoning adopted by trail court. The trail court failed to see all evidences placed by parties what was required to be ascertained is the actual price realized by sale of flats.*

- *The further observation of civil court that the observation of arbitrator about the firm being not impleaded in proceedings is questioned by Petitioner is unsustainable in law. There is no dispute between the firm and the partners. A firm is only a compendious name of all the partners. When all the partners are on record and that the dispute is inter se among the partners the requirement of impleading the firm does not arise at all. There is no prohibition in law to maintain legal proceedings seeking share of profits without seeking dissolution of firm.*

- *The amendment made to Arbitration and Conciliation Act which came into effect from 23-10-2015 is prospective in nature. The amendment will not apply to the proceedings which have arisen before amendment came into existence. The Civil Court erred in observing that the amendment is to be taken note of for disposal of appeal is erroneous.*

- *The judgment of Civil Court that the Respondents 5 and 6 were not inducted as partners and therefore the proceedings are not maintainable is also erroneous in nature. The various observations made by Civil Court that the petitioner is seeking the relief in all forums is erroneous in nature."*

24. Sri P.D.Surana, learned counsel for the revision petitioner, reiterating the grounds urged in the revision petition, contended that the approach of the arbitrator that the dispute is not capable of arbitration is incorrect as the said point was treated as a preliminary issue.

25. He further contended that the learned arbitrator failed to take note of the fact that allegation made against the respondent did not require any detailed trial in view of the admissions made by the first respondent himself. The observations recorded by the learned Arbitrator in

paragraph Nos.38, 39, 40 and 45 are *per se* erroneous. As such, the learned Judge in the First Appellate Court was required to consider the appeal on merits.

26. He would also contend that statement referred to in paragraphs 38 and 39 of the impugned order that first respondent has transferred sum of Rs.1,09,75,000/- from the account of the firm to the account of the son of the first respondent namely Akash Ranka when not disputed, question of holding a detailed enquiry to the claim made in the arbitration case was totally unnecessary and therefore closing the arbitration case that the dispute is not capable of arbitration is *per se* incorrect.

27. He would further contend that in the statement of objections filed by the first respondent there was a clear admission that a sum of Rs.1,09,75,000/- was transferred from IDBI Bank to Akash Ranka's account in Karur Vysya Bank as an interim measure to enable the firm to pay the outstanding bills for smooth functioning of the work.

28. Such an admission in the statement of objection would be sufficient enough to hold that there was misdeed committed by the first respondent detrimental to the interest of the firm and thus, dispute was clearly an arbitral dispute.

29. He also pointed out that in the statement of objections, at paragraph No.11, it has been mentioned that first respondent without the knowledge of the revision petitioner had opened an account on behalf and in the name of the firm is incorrect. But there is material on record that first respondent opened an account in HDFC Bank and therefore there was a clear dispute between the parties which was capable of arbitration. Therefore, the impugned order passed by the arbitrator confirmed by the First Appellate Court are bad in law.

30. It is also the contention of Sri P.D.Surana that in paragraph 43 of the impugned Order, there is a reference that fact of realization of the amount by sale of 145 plots

and amount so realised is to be calculated on the basis of the material evidence to be placed before the Tribunal.

31. Such a finding by the learned arbitrator is incorrect inasmuch as there is a fixed value in all the 145 sale deeds and it was only a question of mathematical calculation that was required to be carried out and there was no other material evidence required for required for establishing the misdeeds committed by the first respondent.

32. He further pointed out mere citing the decision in the case of ***Swiss Timings Ltd. Vs. Organising Committee, Common Wealth Games*** reported in ***AIR 2014 SC 3723***, without extracting the relevant portion and applying the *ratio decidendi* of the said decision to the facts of the case would not be sufficient to hold that the impugned order is a valid order.

33. Sri P.D.Surana, would also contend that preliminary objection raised by the respondent before the arbitrator that the contract stood vitiated and is *ab initio void* in view of clauses 29, 30 and 34 of the agreement dated

11.03.2010 is not properly addressed by the learned arbitrator in the impugned order and mechanically held that the dispute is incapable of arbitration.

34. He also pointed out that the observation made by the learned arbitrator that the sale deeds are executed for and on behalf of Krishna Reddy, the owner of the land, as well as the firm and therefore detailed enquiry is necessary and as such, the dispute is incapable of arbitration is *per se* incorrect.

35. Sri Surana would further contend that the judgment of the Hon'ble Apex Court in the case of ***A.Ayyasamy vs. A.Paramasivam and others*** reported in ***(2016)10 SCC 386***, the arbitrator did possess the jurisdiction to decide the facts even where fraud is alleged. Therefore, the impugned order holding that the dispute is incapable of arbitration when there is an allegation of fraud is misconceived and therefore sought for allowing the revision petition.

36. Lastly, Sri Surana would contend that the amendment to the Arbitration and Conciliation Act which came into effect on and from 23.10.2015 is prospective in nature. As such, the Civil Court erred in observing that the amendment is to be taken note of for disposal of the appeal in the M.A.No.36/2015 filed by the petitioner is *per se* incorrect and therefore sought for allowing the revision petition with a direction to reconsider the issue by the Appellate Court as to the validity of the order passed by the arbitrator.

37. Sri P.D.Surana, in support of his arguments placed reliance on the following judgments and invited attention of this Court to the relevant portions of the judgments which are culled out hereunder for ready reference.

SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618

> ***12.*** *Section 16 of the Act only makes explicit what is even otherwise implicit, namely, that the Arbitral Tribunal constituted under the Act has the jurisdiction to rule on its own jurisdiction, including ruling on objections with respect to the existence or validity of the arbitration agreement. Sub-section (1) also directs that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the*

other terms of the contract. It also clarifies that a decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Sub-section (2) of Section 16 enjoins that a party wanting to raise a plea that the Arbitral Tribunal does not have jurisdiction, has to raise that objection not later than the submission of the statement of defence, and that the party shall not be precluded from raising the plea of jurisdiction merely because he has appointed or participated in the appointment of an arbitrator. Sub-section (3) lays down that a plea that the Arbitral Tribunal is exceeding the scope of its authority, shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. When the Tribunal decides these two questions, namely, the question of jurisdiction and the question of exceeding the scope of authority or either of them, the same is open to immediate challenge in an appeal, when the objection is upheld and only in an appeal against the final award, when the objection is overruled. Sub-section (5) enjoins that if the Arbitral Tribunal overrules the objections under sub-section (2) or (3), it should continue with the arbitral proceedings and make an arbitral award. Sub-section (6) provides that a party aggrieved by such an arbitral award overruling the plea on lack of jurisdiction and the exceeding of the scope of authority, may make an application on these grounds for setting aside the award in accordance with Section 34 of the Act. The question, in the context of sub-section (7) of Section 11 is, what is the scope of the right conferred on the Arbitral Tribunal to rule upon its own jurisdiction and the existence of the arbitration clause, envisaged by Section 16(1), once the Chief Justice or the person designated by him had appointed an arbitrator after satisfying himself that the conditions for the exercise of power to appoint an arbitrator are

present in the case. Prima facie, it would be difficult to say that in spite of the finality conferred by sub-section (7) of Section 11 of the Act, to such a decision of the Chief Justice, the Arbitral Tribunal can still go behind that decision and rule on its own jurisdiction or on the existence of an arbitration clause. It also appears to us to be incongruous to say that after the Chief Justice had appointed an Arbitral Tribunal, the Arbitral Tribunal can turn round and say that the Chief Justice had no jurisdiction or authority to appoint the Tribunal, the very creature brought into existence by the exercise of power by its creator, the Chief Justice. The argument of the learned Senior Counsel, Mr K.K. Venugopal that Section 16 has full play only when an Arbitral Tribunal is constituted without intervention under Section 11(6) of the Act, is one way of reconciling that provision with Section 11 of the Act, especially in the context of sub-section (7) thereof. We are inclined to the view that the decision of the Chief Justice on the issue of jurisdiction and the existence of a valid arbitration agreement would be binding on the parties when the matter goes to the Arbitral Tribunal and at subsequent stages of the proceeding except in an appeal in the Supreme Court in the case of the decision being by the Chief Justice of the High Court or by a Judge of the High Court designated by him.

19. *It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act*

and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (see Fair Air Engineers (P) Ltd. v. N.K. Modi [(1996) 6 SCC 385]). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, Section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the

same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication (see R.M.A.R.A. Adaikappa Chettiar v. R. Chandrasekhara Thevar [AIR 1948 PC 12:74 IA 264]).

20. *Section 16 is said to be the recognition of the principle of Kompetenz-Kompetenz. The fact that the Arbitral Tribunal has the competence to rule on its own jurisdiction and to define the contours of its jurisdiction, only means that when such issues arise before it, the Tribunal can, and possibly, ought to decide them. This can happen when the parties have gone to the Arbitral Tribunal without recourse to Section 8 or 11 of the Act. But where the jurisdictional issues are decided under these sections, before a reference is made, Section 16 cannot be held to empower the Arbitral Tribunal to ignore the decision given by the judicial authority or the Chief Justice before the reference to it was made. The competence to decide does not enable the Arbitral Tribunal to get over the finality conferred on an order passed prior to its entering upon the reference by the very statute that creates it. That is the position arising out of Section 11(7) of the Act read with Section 16 thereof. The finality given to the order of the Chief Justice on the matters within his competence under Section 11 of the Act are incapable of being reopened before the Arbitral Tribunal. In Konkan Rly. [(2002) 2 SCC 388] what is considered is only the fact that under Section 16, the Arbitral Tribunal has the right to rule on its own jurisdiction and any objection, with respect to the existence or validity of the arbitration agreement. What is the impact of Section 11(7) of the Act on the Arbitral Tribunal constituted by an order under Section 11(6) of the Act, was not considered. Obviously, this*

was because of the view taken in that decision that the Chief Justice is not expected to decide anything while entertaining a request under Section 11(6) of the Act and is only performing an administrative function in appointing an Arbitral Tribunal. Once it is held that there is an adjudicatory function entrusted to the Chief Justice by the Act, obviously, the right of the Arbitral Tribunal to go behind the order passed by the Chief Justice would take another hue and would be controlled by Section 11(7) of the Act.

28. *The correctness of the decision in Konkan Rly. Corpn. Ltd. v. Mehul Construction Co. [(2000) 7 SCC 201] was doubted in Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. [(2000) 8 SCC 159] The reconsideration was recommended on the ground that the Act did not take away the power of the Court to decide preliminary issues notwithstanding the arbitrator's competence to decide such issues including whether particular matters were "excepted matters", or whether an arbitration agreement existed or whether there was a dispute in terms of the agreement. It was noticed that in other countries where UNCITRAL Model was being followed, the court could decide such issues judicially and need not mechanically appoint an arbitrator. There were situations where preliminary issues would have to be decided by the court rather than by the arbitrator. If the order of the Chief Justice or his nominees were to be treated as an administrative one, it could be challenged before the Single Judge of the High Court, then before a Division Bench and then the Supreme Court under Article 136 of the Constitution, a result that would cause further delay in arbitral proceedings, something sought to be prevented by the Act. An order under Section 11 of the Act did not relate to the administrative functions of the Chief Justice of the High Court or of the Chief Justice of India.*

32. *Moreover, in a case where the objection to jurisdiction or the existence of an arbitration agreement is overruled by the Arbitral Tribunal, the party has to participate in the arbitration proceedings extending over a period of time by incurring substantial expenditure and then to come to the court with an application under Section 34 of the Arbitration Act seeking the setting aside of the award on the ground that there was no arbitration agreement or that there was nothing to be arbitrated upon when the Tribunal was constituted. Though this may avoid intervention by court until the award is pronounced, it does mean considerable expenditure and time spent by the party before the Arbitral Tribunal. On the other hand, if even at the initial stage, the Chief Justice judicially pronounces that he has jurisdiction to appoint an arbitrator, that there is an arbitration agreement between the parties, that there was a live and subsisting dispute for being referred to arbitration and constitutes the Tribunal as envisaged, on being satisfied of the existence of the conditions for the exercise of his power, ensuring that the arbitrator is a qualified arbitrator, that will put an end to a host of disputes between the parties, leaving the party aggrieved with a remedy of approaching this Court under Article 136 of the Constitution. That would give this Court, an opportunity of scrutinising the decision of the Chief Justice on merits and deciding whether it calls for interference in exercise of its plenary power. Once this Court declines to interfere with the adjudication of the Chief Justice to the extent it is made, it becomes final. This reasoning is also supported by sub-section (7) of Section 11, making final, the decision of the Chief Justice on the matters decided by him while constituting the Arbitral Tribunal. This will leave the Arbitral Tribunal to decide the dispute on merits*

unhampered by preliminary and technical objections. In the long run, especially in the context of the judicial system in our country, this would be more conducive to minimising judicial intervention in matters coming under the Act. This will also avert the situation where even the order of the Chief Justice of India could be challenged before a Single Judge of the High Court invoking Article 226 of the Constitution or before an Arbitral Tribunal, consisting not necessarily of legally trained persons and their coming to a conclusion that their constitution by the Chief Justice was not warranted in the absence of an arbitration agreement or in the absence of a dispute in terms of the agreement.

36. *Going by the above test it is seen that at least in the matter of deciding his own jurisdiction and in the matter of deciding on the existence of an arbitration agreement, the Chief Justice when confronted with two points of view presented by the rival parties, is called upon to decide between them and the decision vitally affects the rights of the parties in that, either the claim for appointing an Arbitral Tribunal leading to an award is denied to a party or the claim to have an arbitration proceeding set in motion for entertaining a claim is facilitated by the Chief Justice. In this context, it is not possible to say that the Chief Justice is merely exercising an administrative function when called upon to appoint an arbitrator and that he need not even issue notice to the opposite side before appointing an arbitrator.*

38. *It is true that finality under Section 11(7) of the Act is attached only to a decision of the Chief Justice on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) of that section. Sub-section (4) deals with the existence of an appointment procedure*

and the failure of a party to appoint the arbitrator within 30 days from the receipt of a request to do so from the other party or when the two appointed arbitrators fail to agree on the presiding arbitrator within 30 days of their appointment. Sub-section (5) deals with the parties failing to agree in nominating a sole arbitrator within 30 days of the request in that behalf made by one of the parties to the arbitration agreement and sub-section (6) deals with the Chief Justice appointing an arbitrator or an Arbitral Tribunal when the party or the two arbitrators or a person including an institution entrusted with the function, fails to perform the same. The finality, at first blush, could be said to be only on the decision on these matters. But the basic requirement for exercising his power under Section 11(6), is the existence of an arbitration agreement in terms of Section 7 of the Act and the applicant before the Chief Justice being shown to be a party to such an agreement. It would also include the question of the existence of jurisdiction in him to entertain the request and an enquiry whether at least a part of the cause of action has arisen within the State concerned. Therefore, a decision on jurisdiction and on the existence of the arbitration agreement and of the person making the request being a party to that agreement and the subsistence of an arbitrable dispute require to be decided and the decision on these aspects is a prelude to the Chief Justice considering whether the requirements of sub-section (4), sub-section (5) or sub-section (6) of Section 11 are satisfied when approached with the request for appointment of an arbitrator. It is difficult to understand the finality referred to in Section 11(7) as excluding the decision on his competence and the locus standi of the party which seeks to invoke his jurisdiction to appoint an arbitrator. Viewed from that angle, the decision on all these aspects rendered by the Chief Justice would

attain finality and it is obvious that the decision on these aspects could be taken only after notice to the parties and after hearing them.

44. *Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under Section 11(6) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach the Supreme Court under Article 136 of the Constitution. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under Section 11 of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.*

ITI Ltd. v. Siemens Public Communications Network Ltd., AIR 2002 SC 2308

4. *The principal question that arises for our consideration is whether a revision petition under*

Section 115 of the Civil Procedure Code ("the Code") lies to the High Court as against an order made by a civil court in an appeal preferred under Section 37 of the Act. If so, whether on the facts and circumstances of this case, such a remedy by way of revision is an alternate and efficacious remedy or not.

8. *The question still remains as to whether when a second appeal is statutorily barred under the Act and when the Code is not specifically made applicable, can it be said that a right of revision before the High Court would still be available to an aggrieved party? As pointed out by Mr Chidambaram, this Court in the case of Nirma Ltd. [(2002) 5 SCC 520] while dismissing an SLP by a reasoned judgment has held: (SCC p. 521, para 1)*

> *"[I]n our opinion, an efficacious alternate remedy is available to the petitioner by way of filing a revision in the High Court under Section 115 of the Code of Civil Procedure. Merely because a second appeal against an appellate order is barred by the provisions of sub-section (3) of Section 37, the remedy of revision does not cease to be available to the petitioner, for the City Civil Court deciding an appeal under sub-section (2) of Section 37 remains a court subordinate to the High Court within the meaning of Section 115 CPC."*

13. *We also do not find much force in the argument of learned counsel for the appellant based on Section 5 of the Act. It is to be noted that it is under this Part, namely, Part I of the Act that Section 37(1) of the Act is found, which provides for an appeal to a civil court. The term "court" referred to in the said provision is defined under Section 2(1)(e) of the Act. From the said*

definition, it is clear that the appeal is not to any designated person but to a civil court. In such a situation, the proceedings before such court will have to be controlled by the provisions of the Code, therefore, the remedy by way of a revision under Section 115 of the Code will not amount to a judicial intervention not provided for by Part I of the Act. To put it in other words, when the Act under Section 37 provided for an appeal to the civil court and the application of the Code not having been expressly barred, the revisional jurisdiction of the High Court gets attracted. If that be so, the bar under Section 5 will not be attracted because conferment of appellate power on the civil court in Part I of the Act attracts the provisions of the Code also.

16. *For the aforesaid reasons, while holding that this Court in an appropriate case would entertain an appeal directly against the judgment in first appeal, we hold that the High Court also has the jurisdiction to entertain a revision petition, therefore, in the facts and circumstances of this case, we direct the appellant to first approach the High Court. For the said reasons, this appeal fails and the same is hereby dismissed. We, however, make it clear that should the appellant present a revision petition within 30 days from today, the same will be entertained by the High Court without going into the question of limitation, if any.*

Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1

68. *Statutes unfailingly have a public purpose or policy which is the basis and purpose behind the legislation. Application of mandatory law to the merits of the case do not imply that the right to arbitrate is taken away. Mandatory law may require a particular substantive rule to be applied, but this would not*

preclude arbitration. Implied non-arbitrability requires prohibition against waiver of jurisdiction, which happens when a statute gives special rights or obligations and creates or stipulates an exclusive forum for adjudication and enforcement. An arbitrator, like the court, is equally bound by the public policy behind the statute while examining the claim on merits. The public policy in case of non-arbitrability would relate to conferment of exclusive jurisdiction on the court or the special forum set up by law for decision making. Non-arbitrability question cannot be answered by examining whether the statute has a public policy objective which invariably every statute would have. There is a general presumption in favour of arbitrability, which is not excluded simply because the dispute is permeated by applicability of mandatory law. Violation of public policy by the arbitrator could well result in setting aside the award on the ground of failure to follow the fundamental policy of law in India, but not on the ground that the subject-matter of the dispute was non-arbitrable.

69. *However, the above discussion would not be a complete answer to N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] that if justice demands, then notwithstanding the arbitration clause, the dispute would be tried in the open court. To accept this reasoning one would have to agree that arbitration is a flawed and compromised dispute resolution mechanism that can be forgone when public interest or public policy demands the dispute should be tried and decided in the court of law. The public policy argument proceeds on the foundation and principle that arbitration is inferior to court adjudication as:*

> *(i) fact-finding process in arbitration is not equivalent to judicial fact-finding, which is far more comprehensive and in-depth;*

(ii) there is limited or lack of reasoning in awards;

(iii) arbitrators enjoy and exercise extensive and unhindered powers and therefore are prone in making arbitrary and despotic decisions;

(iv) there is no appeal process in arbitration which combined with the (iii) above and limited review of an arbitral award in post-award court proceedings, arbitration may have devastating consequences for the losing party and undermines justice;

(v) arbitration proceedings are usually private and confidential;

(vi) arbitrators are unfit to address issues arising out of the economic power disparity or social concerns; [(i) to (vi) from Prof. Stavros Brekoulakis, "On Arbitrability : Persisting Misconceptions and New Area of Concern".]

(vii) business and industry, by adopting and compulsorily applying arbitration process, leave the vulnerable and weaker sections with little or no meaningful choice but to accept arbitration. Few people realise and understand the importance of loss of their right to access the court of law or public forum, which are impartial, just and fair; [(vii) from the Preamble of the text of the Bill of 2007 Arbitration Fairness Act as was written by the sponsor and submitted to the House for consideration.] and

(viii) arbitration is expensive and costly in comparison to court adjudication. [Union of India v. Singh Builders Syndicate, (2009) 4 SCC 523 : (2009) 2 SCC (Civ) 246]

> *While it would not be correct to dispel the above grounds as mere conjectures and baseless, it would be grossly irrational and completely wrong to mistrust and treat arbitration as flawed and inferior adjudication procedure unfit to deal with the public policy aspects of a legislation.*

70. *Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law. Possibility of failure to abide by public policy consideration in a legislation, which otherwise does not expressly or by necessary implication exclude arbitration, cannot form the basis to overwrite and nullify the arbitration agreement. This would be contrary to and defeat the legislative intent reflected in the public policy objective behind the Arbitration Act. Arbitration has considerable advantages as it gives freedom to the parties to choose an arbitrator of their choice, and it is informal, flexible and quick. Simplicity, informality and expedition are hallmarks of arbitration. Arbitrators are required to be impartial and independent, adhere to natural justice, and follow a fair and just procedure. Arbitrators are normally experts in the subject and perform their tasks by referring to facts, evidence, and relevant case law.*

71. *Complexity is not sufficient to ward off arbitration. In terms of the mandate of Section 89 of the Civil Procedure Code and the object and purpose behind the Arbitration Act and the mandatory language of Sections 8 and 11, the mutually agreed arbitration clauses must be enforced. The language of Sections 8 and 11 of the Arbitration Act are peremptory in nature. The Arbitration Act has been enacted to promote arbitration as a transparent, fair,*

and just alternative to court adjudication. Public policy is to encourage and strengthen arbitration to resolve and settle economic, commercial and civil disputes. Amendments from time to time have addressed the issues and corrected the inadequacies and flaws in the arbitration procedure. It is for the stakeholders, including the arbitrators, to assure that the arbitration is as impartial, just, and fair as court adjudication. It is also the duty of the courts at the post-award stage to selectively yet effectively exercise the limited jurisdiction, within the four corners of Section 34(2)(b)(ii) read with Explanations 1 and 2 and check any conflict with the fundamental policy of the applicable law. We would subsequently refer to the "second look" [Mitsubishi Motors Corpn. v. Soler Chrysler-Plymouth Inc., 1985 SCC OnLine US SC 203 : 87 L Ed 2d 444 : 105 S Ct 3346 : 473 US 614 (1985) (US Supreme Court, 2-7-1985)] principle which is applicable in three specific situations dealing with arbitrability as per the mandate of Section 34 of the Arbitration Act.

72. *Recently, the Supreme Court of Canada in TELUS Communications Inc. v. Avraham Wellman [TELUS Communications Inc. v. Avraham Wellman, 2019 SCC OnLine Can SC 25 : 2019 SCC 19] , while conceding that arbitration as a method of dispute resolution was met with "overt hostility" for a long time on public policy grounds as it ousts jurisdiction of courts, observed that the new legislation, the Arbitration Act of 1991, marks a departure as it encourages parties to adopt arbitration in commercial and other matters. By putting party autonomy on a high pedestal, the Act mandates that the parties to a valid arbitration agreement must abide by the consensual and agreed mode of dispute resolution. The courts must show due respect to*

arbitration agreements particularly in commercial settings by staying the court proceedings, unless the legislative language is to the contrary. The principle of party autonomy goes hand in hand with the principle of limited court intervention, this being the fundamental principle underlying modern arbitration law. Party autonomy is weaker in non-negotiated "take it or leave it" contracts and, therefore, the legislature can through statutes shield the weakest and vulnerable contracting parties like consumers. This is not so in negotiated agreements or even in adhesion contracts having an arbitration clause in commercial settings. Virtues of commercial and civil arbitration have been recognised and accepted and the courts even encourage the use of arbitration.

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.*

> ***78.*** *In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] inter alia observing that allegations of fraud can (sic cannot) be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable.*

<u>A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386</u>

> ***5.*** *Seminal facts in the context in which the issue falls for determination have already been taken note of above. However, few more facts need to be added to the aforesaid chronology, particularly, the nature of plea of fraud taken in the suit filed by the respondents.*

6. *The respondents are four in number who are brothers of the appellant. These five brothers are the partners. Their father, A. Arunagiri was also a partner along with them who died on 28-4-2009. These six partners had 1/6th share each in the partnership business. Disputes arose between the brothers after the demise of their father. It is the allegation of the respondents, as contained in the plaint, that the subject-matter of the suit "Hotel Arunagiri" was managed and administered by their father in a disciplined manner till his death. After his death, the appellant being the eldest brother wanted to take the administration of "Hotel Arunagiri" with the assurance that he will be following the footprints of his father. The respondents had no other alternative except to accept the said proposal in good faith. It was at that time resolved by all the brothers that the daily collection of money from "Hotel Arunagiri" should be deposited on the very next day into the hotel's Current Account No. 23 maintained with Indian Overseas Bank, Tirunelveli Junction. It was agreed that about rupees ten to fifteen thousand may be kept as cash for urgent expenses. The respondents reposed confidence with the appellant and believed that his administration would never be detrimental to the smooth running of the business. On the aforesaid understanding, administration of the hotel was taken over by the appellant. But he did not adhere to the said understanding and failed to deposit day-to-day collection into the bank account as promised.*

7. *It is also urged that the appellant, fraudulently, signed and issued a cheque for Rs 10,00,050 dated 17-6-2010 from the bank account in the name of "Hotel Arunagiri" in favour of his son without the knowledge and consent of the other partners and in this manner, the money was siphoned off and misappropriated from the common fund. It is further alleged that the*

appellant kept the hotel account books with him and did not show it to the respondents for their examination. The respondents sent legal notices but it did not deter the appellant to continue to act in the same manner by not depositing the day-to-day collections in the account.

8. *It is also alleged that the appellant's wife's younger brother one Dhanapalraj was a member of the Bar Council of Tamil Nadu and was also a Vice-Chairman of All-India Bar Council, New Delhi. In Chennai, the Central Bureau of Investigation (CBI) raided the houses of the said Dhanapalraj and his co-brother Chandrasekaran and seized Rs 45,00,000 cash from them. As Dhanapalraj was aware of the disputes between the appellant and the respondents in respect of "Hotel Arunagiri", a false statement has been given by him before CBI to the effect that the seized money of Rs 45 lakhs belonged to "Hotel Arunagiri". It is reliably learned that the appellant had also, on receipt of summons, appeared before CBI in New Delhi and given a false statement as if the said seized money of Rs 45 lakhs belonged to "Hotel Arunagiri" which was taken to Chennai to purchase a property. This led to the issuance of another notice dated 22-1-2011 by the third respondent to the appellant stating that the money seized by CBI belonged only to Dhanapalraj and not "Hotel Arunagiri".*

9. *On the basis of the aforesaid allegations, which are relevant and material for the purposes of this appeal, the following reliefs are sought in the suit filed by the respondents:*

> *"(a) for a declaration that the respondents as partners of the deed of partnership dated 1-4-1994 are entitled to participate in the*

> *administration of Hotel Arunagiri mentioned in the schedule and for consequential permanent injunction restraining the appellant from interfering with the same;*
> *(b) for cost of this suit; and*
> *(c) for such other reliefs this Hon'ble Court may deem fit and proper in the circumstances of this case."*

***25**. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and*

the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.

26. *When we apply the aforesaid principles to the facts of this case, we find that the only allegation of fraud that is levelled is that the appellant had signed and issued a cheque of Rs 10,00,050 dated 17-6-2010 of "Hotel Arunagiri" in favour of his son without the knowledge and consent of the other partners i.e. the*

respondents. It is a mere matter of accounts which can be looked into and found out even by the arbitrator. It does not involve any complex issue. If such a cheque is issued from the hotel account by the appellant in favour of his son, it is easy to prove the same and then the onus is upon the appellant to show as to what was the reason for giving that amount from the partnership firm to his son and he will have to account for the same. Likewise, the allegation of the respondents that daily collections are not deposited in the bank accounts is to be proved by the respondents which is again a matter of accounts.

28. *We, therefore, are of the opinion that the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator. The courts below, therefore, fell in error in rejecting the application of the appellant under Section 8 of the Act. Reversing these judgments, we allow these appeals and as a consequence, application filed by the appellant under Section 8 in the suit is allowed thereby relegating the parties to the arbitration.*

35. *Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , this Court held that (at SCC p. 546, para 35) adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain*

other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as : (SCC pp. 546-47, para 36)

> *(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 and child custody;*
>
> *(iii) matters of guardianship;*
>
> *(iv) insolvency and winding up;*
>
> *(v) testamentary matters, such as the grant of probate, letters of administration and succession certificates; and*
>
> *(vi) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.*
>
> *This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishor Shah v. Jayesh Dinesh Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC*

> *788 : (2016) 4 SCC (Civ) 303] , this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.*

45. *The position that emerges both before and after the decision in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject-matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud:*

45.1. *First and foremost, it is necessary to emphasise that the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. More often than not, a bogey of fraud is set forth if only to plead*

that the dispute cannot be arbitrated upon. To allow such a plea would be a plain misreading of the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] . As I have noted earlier, that was a case where the appellant who had filed an application under Section 8 faced with a suit on a dispute in partnership had raised serious issues of criminal wrongdoing, misappropriation of funds and malpractice on the part of the respondent. It was in this background that this Court accepted the submission of the respondent that the arbitrator would not be competent to deal with matters "which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation". Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] may come into existence.

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.

***

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.

47. *The judgment of the Court of Appeal [Fiona Trust and Holding Corpn. v. Privalov, (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)] was affirmed by the House of Lords in Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] The House of Lords held that claims of fraudulent inducement of the underlying contract (i.e. alleged bribery of one party's officer to accept uncommercial terms) did not impeach the arbitration clause contained within that contract. The Law Lords reasoned that : (Bus LR pp. 1725 H-1725 A, para 18)*

"18. … if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement."

They went on to conclude that : (Bus LR p. 1725 F-G, para 17)

"17. The principle of separability … means that the invalidity or rescission of the main contract does not necessarily entail the

> *invalidity or rescission of the arbitration agreement. The arbitration must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement."*

Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713

> ***34.*** *In a recent judgment reported as Rashid Raza [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , this Court referred to Sikri, J.'s judgment in Ayyasamy [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] and then held : (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."*
>
> ***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.

Rameswarlal Bagla v. Bezonji Barjorji Nadodwalla, AIR 1950 CALCUTTA 236

***19**. Here, the suit had been properly constituted at the date of its institution, because all the necessary parties had been impleaded. Really, the addition of the plaintiff firm was not necessary, as all the members of that firm were on the record either as plaintiffs or as defendant.*

***26**. It was contended by Mr. Sen that the judgment of Jenkins, C.J. in the Bombay case is no longer good law in view of O. XXX, r. 9 in the Civil Procedure Code of 1908. That rule reads as follows:—*
This Order shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common: but no execution shall be issued in such suits except by leave of the court and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

***28**. One of the original plaintiffs, Radhakissen Bagla, is dead and it is conceded that his son,*

Rameshwarlal, who has been substituted in his place, is not entitled to his share of the decretal amount except on the production of a Succession Certificate. The appeal is allowed and the decree of Clough, J. is set aside. There will be a decree for Rs. 2,291-6-4½ in favour of Ramnivas Bagla. There will be a further decree for the said sum in favour of Rameshwar Lal Bagla, but he must produce a Succession Certificate before the decree is finally completed. The defendant Nadodwalla will be entitled to credit for the sum of Rs. 4,045-8-6 in the partnership accounts of Behar Mining Co.

Suresh Kumar Sanghi v. Amrit Kumar Sanghi, AIR 1982 DELHI 131

26. *That being the position, the question would arise as to whether the plaintiff is entitled to injunct the defendants from interfering with the management and conduct of the business by him or creating hurdles and obstacles in his way to the detriment of partnership business as alleged. The learned counsel for the defendants 1 to 4 has canvassed with considerable fervour that the plaintiff cannot as a matter of right saddle the defendants with personal liability under the bank guarantee against their will, more so when the bank guarantee has not been given by them pursuant to any term or condition of the partnership agreement and the have done so of their own accord in order to facilitate and promote the smooth functioning of the partnership business. He has further urged that an injunction cannot I granted to prevent the breach of contract, the performance of which will not be specifically enforced (S. 41, Cl.(e) of Specific Relief Act). So, according to him, a contract, which will not be affirmatively enforced by a decree for specific performance, will not be negatively enforced by the*

grant of an injunction. However, this argument no longer holds good, for there is abundant authority for the proposition that the Court will restrain a partner from violating the terms of his partnership contract of acting inconsistently with his duties as a partner during the subsistence of the partnership irrespective of the fact whether dissolution is also sought or not. It may be that where an agreement of partnership has not at all been acted upon the Court may, in a proper case refuse to decree specific performance thereof because it may not be considered just o equitable to force partnership on an unwilling partner. However, the position in a case like the present where a partnership agreement has been acted upon for several years and the partnership is still subsisting would be altogether different. Certainly after the commencement and during the continuation of a partnership it will be equitable for the Court in many a case to interpose to decree specific performance of articles/terms of the partnership. The necessity for such an action arises when the conduct of a partner virtually imperils the success of partnership enterprise and jurisdiction to enjoin a partner from doing that which seriously interferes with the business or which is a breach of the express terms of the partnership agreement is now well established, even if the suit does not seek a dissolution of the partnership. Thus, jurisdiction to grant preventive relief may primarily rest upon contractual obligations between the partners, the violation of which will be prevented to avoid irreparable injury and vexatious or interminable litigation. Lord Lindley has stated the legal position in his book on Law of Partnership (13th Edn.), at page 545 as follows:

> *"In order to prevent a partner from acting contrary lo the agreement into which he may have entered with his co-partners, or contrary to the good faith which,*

> *independently of any agreement, is to be observed by one partner towards his co-partner, it is sometimes necessary for a Court to interfere either by granting an injunction against the partner complained of, or by taking the affairs of the partnership out of the hands of all the partners, and entrusting them to a receiver or receiver and manager of its own appointment."*
> *The learned author proceeds to state:—*
> *"Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution of partnership is sought."*

38. *Per contra*, Sri S.Sreevatsa, learned Senior Advocate for respondent Nos.1(a to c) opposes the grounds of revision by contending that the pleadings between the parties would make it clear that subject matter of dispute is a complicated question of law and facts which are to be decided in the *lis.* Therefore, learned arbitrator was justified in holding that the dispute is not arbitrable.

39. He would contend that when the revision petitioner himself has made allegations of fraud and misrepresentation which would involve complex factual dispute requiring placing of detailed evidence, such

disputes are to be termed as non-arbitrable disputes. Therefore, the finding of the learned arbitrator is just and proper.

40. He also pointed out that the very claim petition itself was not maintainable before the arbitrator and not capable of arbitration in view of non-joinder of necessary parties, inasmuch as, very partnership firm itself was not impleaded as a party to proceedings before the arbitrator.

41. He would also contend that learned arbitrator and learned Judge in the First Appellate Court rightly appreciated these two aspects of the matter and thus the order passed by the learned arbitrator confirmed by the First Appellate Court needs no interference.

42. He would further contend that respondent Nos.5 and 6 to the claim petition were never inducted as the partners of the firm and therefore *per se* they are not necessary parties before the arbitrator and as such, the claim petition before the arbitrator was bad for mis-joinder of parties.

43. It is also contention of Sri Sreevatsa that the revision petitioner was a partner with only 10% of profit sharing method and had no role either in the construction, marketing, financial management or day to day affairs of the project and did not possess any supervisory rights in respect of the affairs of the firm. As such, the arbitrator holding that the dispute as is raised by the revision petitioner alleging fraud and misrepresentation is not capable of arbitration is just and proper and thus sought for dismissal of the revision petition.

44. Sri Sreevatsa, would further contend that the allegations made against the first respondent that there is misappropriation of the funds and there is breach of trust, financial irregularities and such complicated questions cannot be subject matter of arbitration and it requires a detailed full-fledged trial before the competent Court and as such the impugned order is just and proper.

45. He further argued that Bank accounts were duly operated by proper authorization including the account at

HDFC Bank and the claim made by the revision petitioner that there are huge profits are *per se* incorrect.

46. Sri Sreevatsa would further emphasize that because of the interim order obtained by the revision petitioner, constructions were delayed and there was freezing of bank accounts resulting in cascading effect with regard to the payment of money to the service providers, construction workers, statutory authorities resulting in huge loss to the firm. Payment made to the land owner and settlement made in the wake of the aforesaid developments is thus with *bonafide* and pragmatic decision in order to avoid an intended prolonged litigation and to protect the firm from the losses and its reputation.

47. On behalf of respondents, it is also contended that the termination of the earlier contractor was utmost necessary on account of poor workmanship and complaints already received and it was in the interest of the firm and not ill-motivated which is again the subject matter of a

full-fledged trial and therefore the dispute is not arbitrable one and thus sought for dismissal of Revision Petition.

48. It is also emphasized on behalf of the respondents that all decisions taken for and on behalf of the firm are through the participation of majority of the partners and through valid resolutions.

49. He also contended that despite notice, petitioner continued his non co-operation in attending the meetings. Therefore, such decisions cannot be the subject matter of arbitration which has been rightly concluded by the learned arbitrator in the impugned order which was properly re-appreciated by the learned Judge in the First Appellate Court.

50. It is also contention of the respondent that having regard to the scope of the revisional jurisdiction, this Court cannot revisit into those aspects of the matter and sought for dismissal of the revision petition.

51. In the light of the arguments put forth on behalf of the parties and keeping in background the principles of law enunciated on behalf of the revision petitioner as referred to supra in *extenso*, this Court perused the material on record meticulously.

52. On such perusal of the material on record, it is not in dispute about the formation of the partnership firm comprising of the revision petitioner and four partners and two others at the first instance. It is to be noted that even though respondent Nos.5 and 6 are sought to be inducted as additional partners, the said process did not materialise and therefore respondent Nos.5 and 6 were not inducted as partners of the firm. There was reconstitution of the firm, wherein, petitioner and respondent Nos.1 to 4 alone continued as partners.

53. There is no material on record like declaration made before the Registrar of Firms etc., to establish that respondent Nos.5 and 6 are also included as additional partners in the firm.

54. Reconstitution of the firm is not in dispute. The Joint Development Agreement entered into by the firm with owner namely Sri Krishna Reddy is not in dispute. As per the Joint Development Agreement, the construction was commenced by appointing M/s Sovern Developers and Infrastructure Company Limited as contractor for the project.

55. However there is dispute between the revision petitioner and the firm with regard to the termination of the M/s Sovern Developers and Infrastructure Company Limited to complete the project.

56. When serious disputes arose with regard to the development project commenced, there were proceedings in approaching the Civil Court in A.A. No.697/2009, A.A. No.728/2009 and A.A. No.232/2011.

57. Ultimately, to resolve the dispute between the petitioner and the other partners, a petition came to be filed under Section 11 of the Arbitration and Conciliation

Act before the High Court of Karnataka in CMP No.75/2013.

58. Learned Judge, at the first instance, appointed Mr.Justice Ajit J.Gunjal as arbitrator. However, he declined to accept the appointment and therefore on an application, Justice A.C.Kabbin was appointed as arbitrator. Material on record also shows that he also declined to arbitrate the dispute between the parties. What were the reasons for two of the arbitrators to decline their appointment as arbitrator is not pleaded or not forthcoming on record.

59. Be it what it may. Finally, the High Court appointed Justice V.Jagannathan as the arbitrator. Parties went into arbitration before him. On behalf of the respondent, preliminary objection was raised stating that the dispute as is referred to in the claim petition made by the revision petitioner is incapable of arbitration.

60. Necessary reasons were pleaded in the objection statement to substantiate that the dispute is not capable of arbitration.

61. Learned arbitrator after hearing the petitioner as well as the respondent noted the flaw in the claim petition and the complicated questions raised therein as well as the objection statement, especially with regard to fraud, misrepresentation, siphoning of the funds of the firm, improper opening of the bank account etc ., passed the impugned order as referred to supra, *inter alia* holding in paragraph Nos.55 to 70 as under:

> ***"55**. That the claimant's case is not a simple one is also clear from very stand taken by the claimant both in the claim petition and in the rejoinder to which I have already made reference. At the cost of repetition, it has to be mentioned that it is the specific case of the claimant that the sale price shown in the registered sale deeds is lower than the sale price mentioned in the agreements. The claimant has filed list of documents containing 11 volumes and in each volume the claimant has produced agreement for construction, agreement for sale and certified copy of the registered sale deeds. Just to make a reference to one such sale, it is the claimant's case that in respect of sale of flat No.204, the price agreed as per the agreements is Rs.40,05,173/-. Whereas, the actual sale deed which is registered in respect of the very same flat is*

Rs.27,06,250/- and thus there is a huge difference of Rs. 12,98,923/-. Like this, in respect of all the sale deeds, certified copy of which are produced in Vol. 1 to 11 the price shown in the registered sale deed is far lower than the price mentioned in the agreements.

***56**. Secondly, it is the claimant's contention in the rejoinder that the 1st respondent has collected taxes from each of the purchasers to be paid to the concerned Departments and likewise, he has collected taxes in respect of 98 flats being the owners share and the first respondent has not paid the tax collected from the owners to the Department. The 1st respondent has paid service tax and VAT only on the amount reflected in the sale deed. Added to this, from the registered sale deeds produced by the claimant in Vol. 1 to 11, a cursory look, reveals that both Sri Krishna Reddy and M/s. Paramount Vijetha Holdings have been referred to as the vendors and again M/s. Paramount Vijetha Holdings has been referred to as the builder / promoter and the register sale deeds mentions that the vendors acknowledge having received the full sale consideration.*

***57**. Thus, the registered sale deeds produced by the claimant himself give an indication that the owner of the land as well as the partnership firm in question have been referred to as the vendors. Therefore, the matter requires a detailed examination of various documents, accounts, Income-Tax returns and other related investigation to ascertain as to which of the two vendors have received how much of the sale consideration mentioned in the registered sale deeds. Even in the agreement to sell, both Sri Krishna Reddy and the partnership M/s Paramount Vijetha holdings*

have been shown as the owner and the firm has also been shown as promoter.

***58**. Also, several questions of law will arise if the claimant's prayer for 10% share in the profits of the firm is to be ascertained. The owner of the land viz., Krishna Reddy is not a party to the arbitration proceedings. Likewise, even by the admission made by the claimant himself in the claim petition, R5 and R6 are yet to be inducted as partners. Although it is contended by the learned counsel for the claimant that the partnership firm is not legal entity and it is sufficient to make all the partners, parties to the proceedings, yet considering the stand taken in the claim petition as well as in the rejoinder both as regards great variation in the price between the sale price and the price mentioned in the agreement to sell many questions of law, which are outside the purview of the arbitration clause are likely to arise, since the claimant is seeking 10% of the share out of actual sale price realised by the 1st respondent which according to the claimant is more than ₹100 crores, Hence, a more convenient course in the interest of Justice and equity would be, to try the whole action in a court, which alone can do the justice to the parties.*

***59**. In this connection it may be useful to draw support from the decision of the Apex Court in the case of Tanna and Modi vs. CIT, Mumbai and others (2007) 7 SCC 434: The Hon'ble Supreme Court, dealing with a case of fraud committed by assesse partnership firm while making disclosure under Voluntary Disclosure of Income 1997, has observed thus at Para 15, 16, 19 and 21 thus:*

> *"15; There cannot be any doubt that under the Income Tax Act, a firm whether registered or*

not under the provisions of the Partnership Act, is treated as a separate assessee. An order of assessment is passed on the basis of income derived by a person. His total income may consist of his share of profit out of the income of the firm.

16: It may be true that in view of the matter, assessment of a firm and assessment of a partner would stand on different footing.

19: It is however also well settled that fraud vitiates all solemn acts. Fraudulent actions shall render the act a nullity. It would be non est in the eye of the law. Acts of a firm vis-à-vis its partners, however, as is understood in common parlance or in terms of the provisions of the Partnership Act, 1932.... undr the Partnership Act, a partner represents a firm. He has implied authority in terms of Sec. 19 thereof, and thus any action taken by a partner of a firm vis-à-vis the firm, unless otherwise specified, bind the firm itself. It is one thing to say that for the purpose of invoking the provisions of Income Tax Act and other Taxation laws of a firm, a firm and its partners are treated to be separate entities.....

21: ……. But in a case of this nature where fraud is alleged, we cannot be oblivious of the fact that each firm acts through its partner. A firm is a conglomeration of its partners and is not a juristic person. ……. As the income of a firm vis-à-vis its partners have a direct correlation, in our opinion, while construing a statute granting

> *immunity, it should not be construed in such a manner so as to frustrate its object.".*

***60**. I have referred to the above said decisions of the Hon'ble Supreme Court to indicate that in the facts and circumstances of the case before us, having regard to the nature of allegations made both in the claim petition and in the rejoinder, serious questions of law will arise which are required to be dealt by the other competent judicial/statutory authorities.*

***61**. Even with regard to the relief of appointment of receiver/partition sought for by the claimant, this Tribunal is of the view that having regard to the limited scope of this Tribunal, the matters relating to appointment of receiver can only be dealt by the competent civil court. In this connection, a reference may be made to the comments by the learned author P.C. Markanda in his commentary on the Law of Partnership. It has been observed at page 515 by the learned author that appointment of a receiver being an equitable reliefs, it can be granted only on equitable grounds. At page 228 under the heading - Partners not rendering accounts - the learned author has observed thus:*

> *"The partners are joint owners of the partnership assets and each is only entitled to such part of the profits as on the account would show as due to him. One partner cannot sue another for his share of the profits. If he desires to claim what he alleges is due to him from the other partners he must file a partnership suit, claim a dissolution of partnership and an account and payment to him of what is found due to taking the accounts. The only sum due from one partner*

> *to another is what is shown to be due to him after taking account of all the partnership transactions"*

***62**. Therefore, several complex issues and questions of law are also involved and having regard to the nature of the prayer sought by the claimant and considering the serious allegations made against the 1st respondent in the claim petition as well as in the rejoinder and respondents 5 and 6 being not inducted as partners, the firm viz., Paramount Vijetha Holdings also being shown as one of the vendors in the registered sale deeds and there being great difference in the sale price mentioned in the sale deed and the price mentioned in the agreement, and since a detailed investigation and examination of voluminous evidence are required, to go into allegations made in the claim petition and as the claimant has also made IDBI Bank as one of the parties in AA 232 of 2011, for all these aforesaid reasons, this Tribunal is of the view that the disputes in question are not arbitrable in nature and it is only the competent civil court which can effectively go in detail, into all these aspects of the matter.*

***63**. As regards the relief of appointment of receiver or direction to R1 to execute partition deed is concerned, in view of the non-arbitrable nature of the dispute between the parties, not only this tribunal does not have jurisdiction to adjudicate upon the matter but also cannot issue the directions which would go beyond the arbitration agreement. In this connection the following paragraphs at page 800 of the book The Law & Practice Of Arbitration And Conciliation (3rd Edition 2014) by the learned author O.P.Malhotra requires to be taken note of:*

"In MD, Army Welfare Housing Organization vs Sumangal Services Pvt.Ltd, a three-judge bench of the Supreme Court started that under Section 17 of the 1996 Act, the power of the arbitrator is a limited one. It cannot issue any direction which could go beyond the reference or the arbitration agreement. Under Section 17 an interim order must relate to the protection of the subject matter of the dispute; and, the order may be addressed only to a party to the arbitration, it cannot be addressed to other parties. Section 17 does not confer any power on the arbitral tribunal to enforce its order, nor does provide it for judicial enforcement thereof.

....The arbitrator/s does not have any power to attach any properties or bank accounts of the parties. The arbitrator/s does not have any power to appoint a Court receiver which in many cases is essential for preservation of the subject matter of the dispute, and for the purpose of valuation of movable and immovable properties.

In Sundaram Finance Ltd vs NEPC India Ltd, the Supreme Court observed that orders passed by arbitral tribunal under Section 17 cannot be enforced as orders of a court. It is for this reason that Section 9 confers the Court with the power to pass interim order during the arbitration proceedings."

***64**. As far as the decisions referred to by the learned counsel for the claimant are concerned, though reliance is placed on the decision in Swiss Timing Limited (Commonwealth Games Case) to contend that even cases involving allegations of fraud can be gone into by*

the Arbitrator and it was further pointed out that the decision of the Apex court in Radhakrishnan's case was also taken note of to submit that the judgment in Radhakrishnan's case does not lay down the correct law, it is to be noted that Commonwealth Games case, the learned single Judge, his Lordship Hon'ble Justice Surinder Singh Nijjar of the Hon'ble Supreme Court, taking note of the fact situation before the court, found that the objection taken by the respondent in the said case was that the contract stood vitiated and it void initio in view of the clause 29, 30 and 34 of the agreement dated 11.3.2010. The Apex Court therefore, held that the objection taken is to the manner in which grant of the contract was manipulated in favour of the petitioner and as far as the second Ground was concerned it was introspect of the rates charged by the petitioner and these two issues can be taken care of in the award.

***65**. However in the case on hand, the facts and circumstances are entirely different and I have already referred to the claim petition allegations as well as allegations made in the rejoinder and the other issues and the questions of law involved in the aforementioned paragraphs and therefore, the decision - in Commonwealth Games case is entirely on different set of facts. This Tribunal has also considered the Apex Court decision of Booz Allen and Hamilton case rendered by a Bench of two judges of the Hon'ble Supreme Court wherein it has been held that where there are allegations of fraud made, the dispute will be non arbitrable.*

***66**. As regards the other decisions referred to by the learned counsel for the claimant are concerned, (1999) 5 SCC 651 was referred to submit that the dispute or differences must consists of a justiciable issue triable*

civily and a fair test of this is whether the difference can be compromised lawfully by way of accord and in satisfaction.

***67**. In so far as the decision in AIR 1972 Mysore 209 is concerned, reference to Order XXX, Rule 1 of CPC is made by the learned counsel for the claimant to submit that a suit by or in the name of a firm is thus a really a suit by or in the name of all its partners. I have already referred to the decision of the Apex Court Tanna and Modi wherein the Hon'ble Supreme Court has held that a firm is a conglomeration of its partners.*

***68**. As regards the contention put forward by the learned counsel for the claimant that the respondents have sought for interim measure during the pendency of the arbitration proceedings, as such the respondents deemed to have waived their objections is concerned, in the case on hand the respondents have taken plea in the objections that the matter requires to be dealt by the civil court and as such when a plea is taken in the objections itself, the question of waiver does not arise. It is also settled law that if an order is nullity for want of jurisdiction, the same can be challenged at any stage.*

***69**. It is also settled law that inherent lack of jurisdiction or want of jurisdiction renders the ultimate decision a nullity so that it can be challenged at any subsequent stage or even in collateral proceedings. Such defects cannot be cured by waiver or acquiescence of the party entitled to raise objection. Therefore, the said ground urged by the learned counsel for the claimant also cannot be accepted in law.*

***70**. For all the aforesaid reasons, the decisions referred to by the learned counsel for the claimant cannot be of*

> *any assistance to the claimant with regard to the question of the jurisdiction of this Tribunal to adjudicate the dispute between the parties, which disputes for the reasons mentioned above, are "non arbitrable" in nature."*

62. Learned Judge in the First Appellate Court upholding the Order of the learned arbitrator has discussed in detail the validity of the order of the arbitrator in paragraphs 18 to 26, as under:

> ***"18.*** *While arriving any finding on the submission of the appellant one should take note of the distinction between the reference made by a court by invoking Section 8 of the Arbitration Act and the reference made by the Chief Justice Designate under Section 11(6) of the Act. As I said earlier when a reference is made or Tribunal is constituted by recourse to Section 11(6) of the Act, except considering the existence of arbitration agreement, the existence of live dispute and whether the party who has moved such application is party to the arbitration agreement there will be no other scope to examine the nature of dispute and prayers to be made by him/them by that court, therefore certainly it is open to the Arbitrator to decide on his jurisdiction by recourse to Section 16 of the Act. However when a dispute is referred under Section 8 of the Act as already the nature and*

substance of the said dispute will be very much available to the court, including the reliefs prayed therein, in the form of plaint, so if a civil court finds that the said dispute is covered under the Arbitration Agreement and that can be decided by a private fora, certainly the jurisdiction of the Arbitrator to rule on his jurisdiction under such circumstances would be limited. This is what that has been explained in the Booz Allen and Hamilton Inc.'s case.

***19**. No doubt in N.Radhakrishnan's case, Hon'ble Court held that allegation of fraud would automatically oust the jurisdiction of the Tribunal, but in A.Ayyasamy's case making a slight departure from the said observation Hon'ble Court held that unless serious allegations of fraud and breach of trust are leveled, the jurisdiction of the Tribunal will not get ousted. In Rajesh Verma's case modifying the order of Hon'ble High Court of Delhi, wherein thorough observation was made by that court regarding the arbitrability of the dispute, the Hon'ble Supreme Court held that it was not open to the referral Judge to make such thorough observation on the arbitrability of the dispute. This reiterated its earlier view. Then at para-10 of that Judgment Hon'ble Court held that the jurisdiction of the court under Section 11 of the Act is limited and confined to examine as to whether there is an arbitration agreement between the contracting*

parties and, if so, whether any dispute has been arisen between them out of such agreement, which may call for appointment of Arbitrator to decide such disputes. Once it is held that dispute has been arisen between the parties in relation to the agreement, which contained an arbitration clause for resolving such disputes, the court should have made reference to the Arbitrator, leaving the parties to approach the Arbitrator with their claim and counter-claim, to enable the Arbitrator to decide on all such disputes on the basis of case set up by the parties before him.

***20**. Therefore I hold that there is no any ambiguity in understanding the ratio laid down in SBP & Co.'s case on which the appellant places heavy reliance. While reading and understanding a decision and ratio laid down there, one has to see the intent behind such Judgment. It would be a travesty of justice in the event the entire focus is thrust on only one observation by totally neglecting the core subject involved and other surrounding circumstances.*

***21**. It is also important to note that the impugned order was passed by the Tribunal on 22.06.2015 and this appeal was filed on 29.09.2015. Whereas amendment was effected to Section 11 of the principal Act by Amendment Act of 2015, which came into effect from 23.10.2015. Through that amendment*

Section (6A), (6B) were inserted in the principal Act. As per Section (6A), notwithstanding any Judgment, Decree or order of any court the Supreme Court or High Court have to confine to the examination of existence of arbitration agreement when application is filed under Section 6(4) or under Section 6(5) of the Act. Though the said amendment was made to the Act subsequent to the filing of this appeal, one has to take note of the said further development which clarifies all the ambiguities and sets rest the possible questions that may crop up in the mind of a disturbed person. Therefore the contention of appellant in para-26 of her appeal memo that nonetheless in the course of submission before the Tribunal he clarified that no enquiry is needed in respect of misrepresentation, fraud and breach of trust which he alleged, it was not taken note by the Tribunal and it proceeded to pass the impugned order etc leading to causing of injustice to him cannot be accepted. When a written submission is made by the appellant not only in the claim petition, even in his rejoinder as well as in AA No. 232/2011 and when he proceeded to take action against respondent No.1 to 4 for violating the interim order passed by the court, certainly those things could not have been overlooked by the Tribunal altogether and decide the claim petition. Invariably the said issues will overlap when a full fledged trial is undertaken and the said things cannot be decided in discrete.

***22**. The grounds urged by the appellant manifestly show the features of alleged commission of criminal acts of falsification of accounts, documents and siphoning of the unaccounted amount by the respondents. When such grave allegations are made, in the absence of the version of C.Krishna Reddy, there could not have been any effective finding. The contention of appellant in para-28 and 29 of the appeal memo that it was a simple case of mathematical calculation and to share the remainder amount amongst the partners is far from truth. It is curious that even while making such submission he keeps aside the firm and urges that since the firm is not a juridical person, its impleadment is unnecessary and even he gone to the extent of questioning the observation of the Tribunal that he ought to have sought for dissolution of partnership.*

***23**. During his argument Sri PDS Advocate contended that there was no necessity for the appellant to seek for dissolution of the firm and the observation to that effect by the Tribunal is erroneous. I am really surprised by the said submission. It appears that the appellant has no intention to set rest the lingering dispute between him and the other parties of the firm. Unmindful of the resolution of such inchoate dispute no Tribunal or court can proceed to pass orders and*

they cannot become a platform for recurring causes of action. When the very confidentiality and mutual trust amongst the partners was lost there was no meaning in continuing with the partnership firm and in such circumstances no Tribunal or court can go on deciding the share of the appellant at the end of every financial year by allowing the firm to continue. Therefore the grounds urged in para-30 and 31 of the appeal memo hold no water.

***24**. One more glaring defect in the claim petition was that as per the appellant himself, respondent No.5 and 6 are agreed to be inducted as partners, but for want of completion of some more formalities their induction is still pending and they are not partners of the firm, but he has impleaded them as formal parties. When such being the case and when he impleads them as parties to the claim petition and also in the appeal memo, definitely Tribunal had no jurisdiction to look into that dispute when they are not parties to the arbitration agreement. His submission in para-32 of the appeal memo itself is enough to substantiate this observation. He calls them as "proper parties" and not as "necessary parties. This is also one of the reason why the Tribunal declined to arbitrate.*

***25**. In the light of the discussion made by me in the foregoing paragraphs by reference to CMP No.75/2013*

> *and Sections 11 and 16 of Arbitration and Conciliation Act, the grounds urged in para-33 of appeal memo are also unsustainable.*
>
> ***26**. Last but not the least, para-35 of the appeal memo reveals that before filing this appeal the appellant filed W.P.27502/2015 on the file of the Hon'ble High Court, questioning the correctness of the impugned order of Tribunal and having withdrawn it on 21.08.2015 he filed MFA No.6465/2015 and it was came to be disposed off on 22.09.2015, reserving his liberty to move this court. Intentionally I am referring to the said proceedings to show that in a hurry to seek the alleged reliefs the appellant is choosing the wrong foras again and again and instead of correcting himself and puts blame on others."*

63. Sri P.D.Surana with sufficient vehemence emphasized that the principles of law enunciated in the case of ***N.Radhakrishnan vs. Maestro Engineers reported in (2010)1 SCC 72*** is overruled by the Hon'ble Apex Court and it is clearly held that the principles of law enunciated in the said decision is *per incuriam* for having ignored Sections 5, 8 and 16 of the Arbitration and

Conciliation Act, 1996 in the case of ***Avitel Post Studioz Ltd.,*** supra.

64. It is noticed from the decision of ***Avitel Post Studioz Ltd.***, where there is a strong *prima facie* case of fraud, a real risk of hiding or wastage of assets and likelihood of restoration of arbitral proceedings, Courts are justified in granting interim measures to secure the claim and as such, the arbitration proceedings initiated under Section 9 of the Arbitration and Conciliation Act, 1996 is maintainable.

65. Drawing the analogy from the principles of law enunciated in ***Avitel Post Studioz Ltd.,*** supra, Sri Surana would contend that same logic should follow for the main arbitration proceedings as well and unless the alleged fraud affects the public policy or would act as detrimental to the interest of the public at large, mere allegations of the fraud would not take away the power of the arbitrator in arbitrating the dispute. As such, finding recorded by the learned arbitrator cannot be countenanced.

66. He also placed reliance on the principles of law enunciated in the case of ***Vidya Droliya*** supra and contented that scheme of the Arbitration and Conciliation Act, 1996 reflects a strong legislative policy in favour of arbitration and as such, unless the dispute results in a decision in *rem*, all civil disputes which the Civil Court can decide can also be arbitrated.

67. It is also the contention of Sri Surana that a fraud simplicitor would not nullify a valid arbitration agreement and as such refusing to refer a dispute for arbitration is *per se* illegal as held in the case of ***A.Ayyasamy*** supra.

68. Now this Court would deal with these contentions one by one in the light of the revisional grounds.

69. Firstly, in the case on hand, respondent Nos.5 and 6 have been included into arbitration proceedings who are utter strangers to the dispute inasmuch as they are yet to be inducted as partners.

70. The dispute arose multifoldedly on account of the allegation made by the first respondent that there is total non co-operation on behalf of the revision petitioner.

71. Therefore, there were arbitration cases filed under Section 9 as referred to supra by various parties and ultimately all those cases were decided by settlement.

72. Admittedly there is a change of the contractor for carrying out the development work which is objected by the revision petitioner.

73. Pertinently, it is the revision petitioner being a partner having 10% profit share in the partnership firm, said to have objected for the decision taken by majority of the partners resulting in delay in the project besides escalation in the project costs.

74. Nextly, according to the revision petitioner, 145 flats were sold and value thereof is not credited to partnership account. But it was siphoned to another account in HDFC bank, opened in the name of the partnership firm and also

portion of the money thereof is siphoned to the account of son of the first respondent by name Akash Ranka.

75. There was also a dispute with regard to the payment to be made to the land owners and the same is also resolved by the first respondent and again there was a non co-operation on the part of the revision petitioner.

76. These aspects are complicated questions of law and facts. In other words, recording of voluminous evidence is necessary to appreciate and resolve the dispute between the parties.

77. Further, it is also pertinent to note that firm is not made as a party in the arbitration proceedings. Though no reasons are forthcoming from the orders of the High Court in appointing Justice Ajit J. Gunjal and subsequently Justice. A.C.Kabbin, what can be inferred is those arbitrators did not accept the arbitration, perhaps with the conduct attributable to the parties.

78. This observation is necessary to find out as to who is responsible for the delayed resolution of the dispute between the parties.

79. There is an overwhelming material in the form of pleadings of the revision petitioner, which has been controverted by the first respondent in his objection statement which would make out not a fraud simplicitor but fraud and misrepresentation alleged by each of the parties which is *per se* incapable of resolution unless a thorough enquiry is made.

80. It is in that direction, as per the law existed then, the learned arbitrator relied on ***N.Radhakrishnan*** case supra and recorded a finding that the dispute is incapable of arbitration.

81. Lastly, it is to be noted that subsequent judgment rendered by the higher Courts cannot be the yardstick to find out the validity of an Order which came to be passed following the settled law prevailing at the time of passing

the order, which is subsequently challenged before the Courts.

82. In this regard, this Court gainfully places reliance on the judgment of the Hon'ble Apex Court in the case of ***Neelima Srivastava vs. State of Uttar Pradesh and others*** reported in ***(2021)7 SCC 693***, wherein, at paragraph 29 it is held as under:

> *"xxx xxx xxx Mere overruling of the principles, on which the earlier judgment was passed, by a subsequent judgment of higher forum will not have the effect of uprooting the final adjudication between the parties and set it at naught. There is a distinction between overruling a principle and reversal of the judgment. The judgment in question itself has to be assailed and got rid of in a manner known to or recognised by law. Mere overruling of the principles by a subsequent judgment will not dilute the binding effect of the decision inter partes."*

83. As such, there cannot be any room for the revision petitioner to contend that application of principles of law enunciated in ***N.Radhakrishnan*** case supra has rendered

the impugned order passed by the learned arbitrator as illegal.

84. In the case on hand, no doubt the decision that would be rendered either by the arbitrator or by the Court would not result in a decision in *rem*.

85. However, the allegations of fraud and misrepresentation alleged by the revision petitioner and refuted by the respondent, if established would definitely par take the nature of a criminal offence or little short of a criminal offence under the provisions of Indian Penal Code.

86. There is a direct allegation by the revision petitioner that the amount recovered from the sale of 145 flats is not accounted in the books of the firm. But it is siphoned by the first respondent to the account of his son. In other words, the revision petitioner is attributing criminal misappropriation to the first respondent.

87. Therefore, though learned counsel for the petitioner placed reliance on ***A.Ayyasamy*** case supra, from the

principles enunciated in said case itself, the dispute is incapable of arbitration as the allegations would amount to virtual criminal offence.

88. The counter-allegations levelled by the first respondent in the objection statement attributing the conduct, non co-operation etc. resulting in not only delay in implementation of the project, but also affected the financial health of the firm inasmuch as contractor was to be removed, additional amount was to be settled to the owners, new contractor was to be brought in and project could be completed with escalated costs, require adjudication by the Civil Court as the facts are complex enough based on voluminous evidence.

89. There is also allegation by the revision petitioner that documents were falsified and resolutions were prepared fraudulently to suit the decisions of the first respondent. Though the same is refuted, it is one of the parameters which would support the decision of the learned arbitrator in holding that the dispute is non-arbitral dispute following

the decision of ***A.Ayyasamy*** referred to and relied on by the revision petitioner himself.

90. Adverting to the principles ***Avitel Post Studioz Ltd.,*** and ***Vidya Drolia*** supra, their Lordships were concerned about the immediate protection of the assets of the disputing parties pending consideration of whether the dispute is arbitral or not, by interim measures, by resorting to powers under Section 9 of the Arbitration and Conciliation Act, 1996.

91. Therefore, those principles cannot be imported to decide the issue with regard to the non maintainability of the claim before the arbitrator on the ground that the dispute is not an arbitrable dispute.

92. Therefore, even though there cannot be any dispute as to the principles of law enunciated in ***Avitel Post Studioz Ltd.,*** and ***Vidya Drolia*** supra, this Court is of the considered opinion that the same would not advance the case of the revision petitioner anything further insofar as holding that the finding of the learned arbitrator that the

dispute is not arbitrable and confirmed by the First Appellate Court is suffering from any legal infirmity within the limited revisional Jurisdiction.

93. Even though Sri Sreevatsa would try to distinguish the principles of law enunciated in ***Rameswarlal Bagla*** and ***Suresh Kumar Sanghi***, this Court is of the considered opinion that the facts involved in the present case would not warrant this Court to place further reliance on the principles of law enunciated in those two decisions and as such, the same is not dealt in detail.

94. Insofar as ***ITI Ltd***. supra, this Court did not dispute the fact that the revision petition is maintainable under Section 115 of the Code of Civil Procedure and therefore, no detailed discussion is necessary.

95. Insofar as ***SBP & Co.,*** supra is concerned, there is no dispute as to the power of Court in appointing an arbitrator and a subsequent arbitrator by exercising the power under Section 11 of the Arbitration and Conciliation Act and therefore this Court is not venturing to take a

detailed discussion on that, having regard to the point that is to be thrashed out in the revision.

96. In view of the foregoing discussion, this Court is of the considered opinion that the finding recorded by the learned arbitrator that the dispute is incapable of arbitration is just and proper even after noting that the principles of law enunciated in ***Radhakrishnan's*** case supra is overruled in ***Avitel Post Studioz Ltd*** supra.

97. Having said thus, this Court is of considered opinion that the right of the revision petitioner is not at *jeopardy*. When the finding recorded by the learned arbitrator confirmed by the First Appellate Court is upheld in this revision inasmuch as the revision petitioner can always fall back on the civil remedy by approaching the Civil Court in a duly constituted comprehensive suit.

98. In that suit, he may also seek for all the prayers as he has sought before the arbitrator.

99. Obviously, the time spent before the arbitrator and these proceedings would be excluded under Section 14 of the Limitation Act in such intended proceedings.

100. Such an observation in this revision would quell all the possible apprehensions of the revision petitioner as well.

101. In view of the foregoing discussion, the following:

ORDER

(i) Civil Revision petition is ***dismissed***.

(ii) No order as to costs.

(iii) It is made clear that the observations made by this Court, arbitrator and the First Appellate Court shall not affect the rights of the parties in the intended suit.

(iv) The dispute in the intended proceeding shall be decided by the competent Court, in accordance with law, uninfluenced by the observations made by this Court.

Sd/-
(V. SRISHANANDA)
JUDGE

kcm