Varsha

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 183 OF 2025

Capalpha Trade Private Limited
A private limited company incorporated under the provisions of the Companies Act, 2013 and having its registered office at 501, 5th Floor, Stanford Plaza, Opposite Richa Building, Off New Link Road, Andheri West Mumbai 400 053. ...Petitioner
(Org. Claimant)

VERSUS

Dentsu Communications India Pvt. Ltd.
A private limited company incorporated under the provisions of the Companies Act, 1956 and having its registered office at Devchand House, C Block, 2nd Floor, Shivsagar Estate, Dr. Annie Besant Road, Worli, Mumbai 400 018. ...Respondent
(Org. Respondent)

Mr. Nirav Shah a/w. Ms. Aarti R., Mr. Amit Shroff, Mr. Vijay Mulchandani i/b. M/s. Harish Shroff & Co for the petitioner.
Mr. Sharan Jagtiani, Senior Advocate a/w. Ms. Anindita R. Chowdhary, Mr. Sushrut Garg, Ms. Shraddha Achliya for the respondent.

VARSHA VIJAY RAJGURU
Digitally signed by VARSHA VIJAY RAJGURU
Date: 2026.06.30 19:09:25 +0530

CORAM : GAURI GODSE, J.

RESERVED ON: 27th MARCH 2026
PRONOUNCED ON: 30th JUNE 2026

JUDGMENT:

1. This petition is a statutory appeal under Section 37 of the Arbitration and Conciliation Act, 1996 ("Arbitration Act") to challenge the order passed by the learned sole arbitrator allowing the respondent's application under Section 16 of the Arbitration Act. By the impugned order, the learned arbitrator held that the disputes under reference are not arbitrable and that it would be convenient if they were tried by the civil court.

2. The dispute between the parties arises from the terms and conditions set out in the purchase order. Since there was a dispute over payment of the amounts claimed under the purchase orders, the petitioner invoked the arbitration clause and filed an application under Section 9 of the Arbitration Act in this court. During the course of hearing of the application under Section 9 of the Arbitration Act, the parties agreed to make a reference to initiate the arbitration proceedings, and

the application under Section 9 of the Arbitration Act filed before this court was agreed to be treated as an application under Section 17 of the Arbitration Act to be decided by the learned arbitrator.

3. Accordingly, the statement of claim was filed by the petitioner on 20th July 2022. The statement of defence was filed on 2nd November 2022. The petitioner's arguments on the application at Exhibit '17' were concluded, and the respondent's arguments were partially heard. In the meantime, the respondent filed an application under Section 16 of the Arbitration Act, raising an objection to the arbitral tribunal's jurisdiction on the ground that the allegations of fraud, collusion, and forgery involved third parties.

SUBMISSIONS ON BEHALF OF THE PETITIONER:

4. The respondent had secured various orders from state governments to supply food grains for mid-day meals in schools. To conduct such programs, there was an existing arrangement under which the respondent regularly sourced food grains from Suumaya Agro, which is part of the Suumaya group. The respondent approached the claimant for short-term financing of the supply of these food grains by

Suumaya Agro to the respondent. Accordingly, the respondent's CSR division issued a letter of intent on 5th March 2021 to the claimant for the purchase of the food grains for an amount of Rs. 600 crores over a period of 20 months.

5. For short-term financing, the respondent would place its purchase order by email with the claimant, and the claimant would then place a purchase order for the identical description with Suumaya Agro at a lower price, for which Suumaya Agro would raise the invoice with the claimant. Suumaya Agro was to either supply the goods directly under the invoice to the respondent or, as per the respondent's instructions, in a bill-to-ship arrangement. The claimant would release funds to Suumaya Agro only after receiving specific written confirmation from the respondent certifying that the goods were delivered to and received by the respondent, as per the respondent's order to the claimant.

6. The respondent would pay the claimant the invoice amounts raised by the claimant within the prescribed period of thirty days, extendable to fifteen days. Between 21st February and 15 September 2021, the respondent paid

approximately Rs. 175 Crores to the claimant under the agreed mechanism; however, there were persistent defaults thereafter. The claimant had received emails from the respondent stating that the respondent's employees handling its CSR division had suddenly resigned and that the need to process transactions was under review. Thereafter, the respondent claimed they had discovered internal fraud committed by their former employees.

7. At the hearing of the Section 16 application, the claimant's counsel submitted that for the purpose of the arbitration, the claimant would not dispute the respondent's case as to fraud/collusion between the respondent's former employees, and third parties and the claimant will not dispute that there was no delivery of goods by Suumaya Agro, and that the lorry receipts and invoices raised by Suumaya Agro were bogus. It was submitted that the claimant would contest only the respondent's allegations that the claimant was a party to the fraud/collusion, and would contend that the respondent is vicariously liable for the fraud/collusion committed by its former employees.

8. Learned counsel for the petitioner submitted that the findings in the impugned order are contradictory and untenable as the learned Arbitrator proceeded on the basis that the petitioner had made allegations of fraud and various other offences in the reference, which is factually incorrect. The petitioner's claim is based solely on the purchase orders and seeks recovery of money. The only reference to "fraud" in the statement of claim is in response to the allegations made by the respondent. In light of the claimant's statements, the award would not have an *erga omnes* effect or affect the rights and liabilities of third parties.

9. Learned counsel for the petitioner submitted that it is settled law that where the party resisting the arbitral reference is the one alleging fraud, jurisdiction will not necessarily be declined. The findings that proceeding with the arbitral reference would be "unfair to the respondent", as it would be constrained to summon third parties as its witnesses in order to establish its case on fraud, is alien to the law. Learned counsel for the petitioner submitted that, as a *dominus litis*, the petitioner is entitled to pursue any and all remedies available to it in law, and the reasoning in the

impugned order that the claimant may, in defending itself against the respondent's allegations of fraud, be compelled to adduce evidence of fraud against the respondent and may also result in injustice/prejudice to the claimant itself, is incomprehensible and alien to the law.

10. Learned counsel for the petitioner submitted that without recording a positive finding that it lacks jurisdiction, the learned Arbitrator has refrained from exercising jurisdiction and held that it is not merely on account of the allegations of fraud by a party, but because of a combination of all the factors that the respondent's application succeeds. Such reasoning is not sustainable in law. The impugned order holds that the arbitration agreement is valid. Neither party is contesting the role of third parties in the fraud, nor making any claims against such third parties. However, the impugned order holds that the tribunal lacks jurisdiction because determining this reference would require impleading third parties. The reliance upon the judgment of the Delhi High Court in ***Simran Sodhi v Sandeep Singh***[1] is erroneous and misconceived. This was a case in which jurisdiction was declined because certain reliefs sought would affect the

1 **2022 SCC OnLine Del 3688**

rights of third parties. In the present case, the learned Arbitrator has observed that the rights of third parties would not be affected by an award passed in this arbitration.

11. The impugned order acknowledges that jurisdiction cannot be declined on the basis that several third-party witnesses are to be summoned. Learned counsel for the petitioner relies upon the decision of the Apex Court in ***Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak***[2]. Similar disputes where there are massive allegations of fraud, the registration of hundreds of FIRs, and with implications on even public corporations, the disputes have been referred to arbitration by courts to specifically examine whether the extent of the fraud will impact the arbitrability of the issue which is before the tribunal in arbitration; and that this must be done in accordance with the several tests laid down by the Apex Court in ***MD Bihar State Food and Civil Supply Corporation Ltd & Anr. Vs. Sanjay Kumar***[3]***.*** Therefore, the arbitral tribunal's finding that the third parties' rights may be affected, despite its specific finding that its award will not have an *erga omnes* effect, is incoherent and ought to be set aside.

2 (1962) 3 SCR 702
3 **2025 SCC 2C 1604**

12. The tribunal has failed to appreciate and correctly apply the law as laid down in ***A. Ayyasamy Vs. A Paramasivam & Ors.***[4], holding that the limited circumstances where fraud is not arbitrable are where the fraud permeates the entire contract, rendering the arbitration agreement void and where the allegations of fraud have implications on the public domain, and 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. Learned counsel for the petitioner also relied upon the decisions of the Apex Court in ***Rashid Raza Vs. Sadaf Akhtar***[5] and ***Avitel Post Studioz Ltd. & Ors. Vs. HSBC PI Holdings (Mauritius) Ltd***[6]. The respondent's allegation of fraud does not meet the test laid down by the Apex Court. It is not the respondent's pleaded case that the arbitration agreement itself is vitiated by fraud, and the impugned order confirms its validity.

13. It is a well-settled legal principle that only the criminal aspect of fraud or forgery, with penal consequences, is not arbitrable, as it is in the realm of public law. The civil claims

4 **(2016) 10 SCC 386**
5 **(2019) 8 SCC 710**
6 **(2021) 4 SCC 713**

arising from these actions are therefore clearly amenable to arbitral reference, as held by the Apex Court in ***N.N. Global Mercantile Pvt. Ltd. Vs. Indo Unique Flame Ltd. & Ors***[7], The tribunal, whilst accepting that the dispute does not attract any of the four tests laid down by the Apex Court in ***Vidya Drolia Vs. Durga Trading Corporation***[8] has concluded that the arbitral reference would be "inexpedient", as it would be desirable for a collective resolution of the disputes by including the third parties. Such a conclusion is arbitrary, impermissible in law and flies in the face of settled law in ***Vidya Drolia***, and ***Nilesh Shejwal Vs. Agrowon Agrotech Industries Pvt. Ltd.***[9].

14. The impugned order has erred in rejecting the claimant's preliminary point as to the maintainability of the Section 16 application, given that it was filed belatedly after the filing of the statement of defence, and after the conclusion of the hearing of the petitioner's Section 17 application, contrary to Section 16(2) of the Arbitration Act. The impugned order erroneously concludes that the jurisdictional objection had in fact been raised in the

7 **(2021) 4 SCC 379**
8 **(2021) 2 SCC 1**
9 **2024 SCC OnLine Bom. 3953**

statement of defence. The impugned order is contrary to the settled law, which precludes a party from pursuing an objection to jurisdiction belatedly. Learned counsel for the petitioner relied upon the Apex Court's decision in ***MSP Infrastructure Ltd. v Madhya Pradesh Road Development Corporation Ltd***[10]***.***

15. According to the learned counsel for the petitioner, the petitioner's claim is not based on the allegations of fraud and more particularly against the third parties. The petitioner's claim is purely based on the contractual terms and conditions as recorded in the purchase orders and the invoices raised by the petitioner. Hence, once the agreement between the parties is held to be legal, valid, and subsisting, the dispute has to be decided by the arbitral tribunal by framing issues on the parties' rival pleadings. If the arbitral tribunal holds that the agreement between the parties is valid and subsisting, the parties cannot be relegated to the Public Fora on the ground that the allegations of fraud would involve third parties.

16. Once the agreement is valid and subsisting, the issues involved in deciding the petitioner's claim can be examined

10 **(2015) 13 SCC 713**

by the learned arbitrator by framing proper issues and permitting the parties to lead evidence. The impugned order is therefore liable to be set aside, and the arbitral reference is required to be restored.

SUBMISSIONS ON BEHALF OF RESPONDENT:

17. The learned senior counsel for the respondent submitted that the demand notice dated 19th October 2021, issued by the petitioner, alleged that the transactions were fraudulent and that collusion occurred among the respondent's former employees. The application under Section 9 of the Arbitration Act, filed in this court, referred to the complaints filed by the petitioner before the Economic Offence Wing. While deciding the application under Section 9 of the Arbitration Act, this court passed an order on 4th April 2022 referring the disputes and differences that arose between the parties under the four purchase orders placed by the respondent and the invoices raised by the petitioner to arbitration. While referring the parties to arbitration, the issues regarding the arbitrability were kept open.

18. After the arbitral tribunal was constituted, the respondent filed a reply to the application under Section 17

of the Arbitration Act. The respondent clearly stated that the transaction relied upon by the petitioner was sham, bogus and fraudulent, as it pertained to the conduct of Suumaya Enterprises appointed by the petitioner. In the petitioner's rejoinder, it was claimed that the transactions were legitimate. In view of the disclosures made before the Economic Offence Wing regarding the undertakings furnished by Suumaya and its directors, the respondent filed an application before the learned arbitrator, stating that the allegations would involve third parties as serious allegations of fraud were made. Considering the documents produced before the learned arbitrator, which involved allegations of fraud against third parties and the respondent's ex-employees, the arbitral claim could not have been decided without examining the allegations of fraud, forgery, and fabrication of the documents. Hence, the learned arbitrator rightly considered the implications of fraud as alleged by the petitioner.

19. The categories of non-arbitrable disputes are carved out by the Apex Court based on common law, and include disputes of a public nature that are not capable of

adjudication or settlement by arbitration. The arbitrability based on public policy cannot be decided in a private arbitration. The courts have, therefore, time and again held in various decisions that disputes involving allegations of public fraud would be more conveniently decided by a civil court. Learned senior counsel for the respondent relied upon the decision *in* ***Booz Allen and Hamilton Inc. Vs SBI Home Finance Ltd. & Ors***[11] and the decision in ***Vidya Drolia*** to support his submissions that the four tests for deciding whether the dispute would be arbitrable are satisfied in the facts of the present case.

20. Learned senior counsel for the respondent submitted that the test for considering whether the dispute is arbitrable is with reference to the cause of action and the subject matter that relates to the action *in rem,* which do not pertain to the subordinate rights in personam when the cause of action and the subject matter affect the third parties, which has an *erga omnes* effect. According to the Learned senior counsel for the respondent, the allegations of fraud involving third parties are serious and complex in nature. The learned senior counsel for the respondent relied upon the decision in

11 **(2011) 5 SCC 532**

A. Ayyasamy to support his submissions that the difference between the simple allegation of fraud and the complex and egregious nature of fraud is to be considered while examining whether the dispute would be arbitrable or whether it would be appropriate to refer the parties to Public Fora. In the present case, the allegations of fraud are serious, involving the fabrication of documents involving third parties. Hence, the petitioner's claim cannot be said to be restricted only to the terms and conditions of the contract. Learned senior counsel for the respondent also relied upon the decision of the Apex Court in ***Rashid Raza Vs. Sadaf Akhtar***[12]***.***

21. Learned senior counsel for the respondent relied upon the decision of the Delhi High Court in ***Bentwood Seating Systems (P) Ltd. Vs. Airport Authority of India and Anr***[13]***,*** and the decision of this court in ***Baban Piraji Ghadge Vs. Amit Sheth and Anr***[14]. He submits that it is a well-settled legal principle that when allegations of fraud, forgery, and fabrication are serious in nature, they are better decided by

12 **(2019) 8 SCC 710**
13 **2025 SCC OnLine Del 1558**
14 **Arbitration Petition No. 61 of 2016**

the civil court, as the witnesses can be cross-examined in open court rather than in a private forum of arbitration.

22. The learned senior counsel for the respondent also relied upon the decision in the case of ***Managing Director, Bihar State Food and Civil Supply Corporation Limited, vs. Sanjay Kumar*** and submitted that the Apex Court reaffirmed the principles governing arbitrability in cases involving allegations of serious fraud. It is held by the Apex Court that where the dispute involves fraud with criminal implications, the dispute should not be decided by the arbitral tribunal, as it would have public implications and ramifications that would directly or indirectly affect the non-parties to the arbitration. Learned senior counsel for the respondent, therefore, submitted that the legal principles decided by the Apex Court in the ***A. Ayyasamy*** and ***Vidya Drolia*** squarely apply to the present case. Hence, the learned arbitrator had rightly held that the determination of the petitioner's claim cannot be decided in an arbitration and has to be decided in a Public Fora.

23. Learned senior counsel for the respondent submitted that, in view of the third party's involvement in the serious

allegation of fraud, which is already investigated by the Economic Offence Wing and the State agencies, the dispute and the petitioner's claim cannot be decided in an arbitration proceeding. The claimant has not abandoned its right to file the civil suit against the third parties. Hence, the dispute cannot be decided in different proceedings in a private arbitration and also in a Public Fora for the same reliefs or the reliefs pertaining to the same transactions. Hence, the learned arbitrator has rightly held that the dispute would not be arbitrable.

24. With regard to the concessional statements made on behalf of the petitioner, the learned arbitrator has rightly held that the concession would not come to the aid of the claimant to hold that the allegations of fraud can be segregated to decide the petitioner's claim. Since the claimant had not abandoned its right to file civil proceedings against the third parties based on the same allegations on collusion and conspiracy, the learned arbitrator rightly held that the different proceedings before the private arbitration or the Public Fora for the same relief is not favourable and therefore, it would be suitable and convenient and

appropriate that the dispute is examined in a civil court where even the third parties involvement is not restricted. Considering the allegations involved in the criminal proceedings which also form the basis of the arbitral claim, the learned arbitrator, by referring to the criminal proceedings and the petitioner's special leave petition filed before the Apex Court involving the same transactions and the allegation of commission of heinous crimes, found it fit that the dispute would not be arbitrable and it should be conveniently decided in a civil court.

25. To support the submissions that the party is not required to file an application under Section 16(2) of the Arbitration Act separately and that an arbitrator is bound to decide the issue of jurisdiction if the objection of arbitrability is clear and consistent with the provisions of sub-section (2) of Section 16 of the Arbitration Act, the learned senior counsel for the respondent relied upon the decision of this court in ***ICICI Bank Ltd. Vs. Welways Engineers (India)***[15]. He also relied upon the decision of the Apex Court in ***Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Co.***[16] to support his submissions that though the respondent had participated in

15 **2016 SCC OnLine Bom 2644**
16 **(2006) 7 SCC 275**

the hearing of the application under Section 17 of the Arbitration Act, it would not amount to any waiver of the respondent in raising the jurisdiction objection in view of the supplemental and incidental proceedings produced before the arbitral tribunal.

26. Learned senior counsel for the respondent relied upon the decision of the Apex Court in ***ONGC Vs. Discovery Enterprises Pvt. Ltd. and Anr***[17] to support his submissions that the scope of review under Section 37 of the Arbitration Act for examining the order passed under Section 16 of the Arbitration Act is limited to the extent of exercising the appellate power by being mindful of the fact that the statute has entrusted the arbitral tribunal with the power to rule of its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for resolution of the dispute.

27. Hence, according to the learned senior counsel for the respondent, no interference in the impugned order is called for.

17 **(2022) 8 SCC 42**

CONSIDERATION OF SUBMISSIONS:

28. To consider the submissions made on behalf of both parties, it is necessary to correctly understand the petitioner's claim. The petitioner's claim is to recover the amount under the contract with the respondent for the trade financing arrangement for the products purchased by the respondent from Suumaya Agro, which is not a party to the arbitral reference. According to the claimant, they released funds to Suumaya, and the respondent was bound and liable to pay the claimant the amounts corresponding to the invoices raised by the claimant on the respondent. The claimant has relied upon purchase orders, sub-purchase orders, delivery confirmation, lorry receipts, and invoices along with other documents and emails, in support of the claim to recover the amounts.

29. The learned arbitrator has discussed in detail the particulars of the LOI acted upon by the parties and the reference, which involves 14 identical purchase orders and the various emails exchanged between the parties. The particulars of the agreement between the respondent and Suumaya are also discussed in detail in the impugned order.

The learned arbitrator has noted the arguments on behalf of the claimant by relying upon the claimant's notice under Section 8 of the Insolvency and Bankruptcy Code 2016 (IBC) and the complaint to the Economic Offence Wing against the respondent and Suumaya.

30. The respondent has alleged fraud, collusion, and conspiracy against the claimant, Suumaya, and the respondent's ex-employees. The respondent denies that there was an agreement between them and Suumaya. It is alleged that the claimant had an arrangement with Suumaya. The respondent alleged that the transactions relied upon by the claimant were sham, bogus and a result of collusion between Suumaya group, the claimant and the former employees of the respondent. It is contended by the respondent that after the hearing on the application under Section 17 commenced, they discovered further documents which showed the allegations of fraud made by the claimant. However, the claimant made concessional statements before the learned arbitrator that they would not be making any such allegations of fraud in the arbitral claim. The respondent contended that despite such concessions, the reference

would not be arbitrable, as the serious allegations of fraud, collusion, and conspiracy were made by the claimant, as evidenced by the documents produced along with the application under Section 16.

31. The learned arbitrator has referred to the allegations in the criminal complaint registered against the respondent as accused and its employees as co-accused. In the criminal complaint filed by the claimant, it is alleged that an amount of ₹150 crores due and payable to the claimant was misappropriated by the accused persons and they had conspired and connived to commit various offences against the claimant, including the offences punishable under Sections 406, 420, read with 120B and 34 of the Indian Penal Code.

32. The learned arbitrator has further discussed the particulars of the chargesheet and the investigations carried out, including the seizure of hard disks, bogus lorry receipts, invoices, documents, correspondence, ledger accounts, and bank accounts, as well as a list of about 40 witnesses and statements recorded during the criminal investigation. The impugned order further records the particulars of the orders

passed by the learned magistrate and a copy of a special leave petition filed by the claimant against the order passed by this court granting bail to Ishita Gupta of Suumaya group. The contents of the special leave petition filed before the Apex Court are reproduced in the impugned order.

33. The learned arbitrator held that the claimant has made serious allegations of misrepresentation, misappropriation of funds, forgery, inducement, fabrication, deceit, and criminal breach of trust against the respondent, its officers, and the entities of the Suumaya group in the criminal complaint. It is observed that the transactions are not only between the claimant and the respondent, but also between the respondent and Suumaya and the respondent and third parties. It is noted by the learned Arbitrator that the nature of the alleged offences is heinous and invites prison sentences of various durations, including life imprisonment, and the cognisance of the offences has been taken by the economic offence wing, and a charge sheet has been filed.

34. The claimant's statements are recorded in the impugned order, which states that they would contest only the respondent's contention that the claimant is party to the

alleged fraud and collusion and would not base its cause of action against the respondent on fraud or collusion for the purpose of the arbitral reference. It is further stated by the claimant that if the respondent claims that its officers have committed a fraud in collusion or otherwise, the claimant will contend that the respondent would nevertheless be liable to the claimant on the ground of vicarious liability. Thus, the claimant would proceed on the basis that the respondent's employees have acted fraudulently in collusion with others, not including the claimant, and would not invite the Arbitral Tribunal to decide the issue whether the respondent's officers acted fraudulently in collusion with others, not including the claimant or otherwise. The claimant also stated that they would proceed on the basis that there was no delivery of the goods and that the lorry receipts and invoices raised by Suumaya were bogus, as alleged by the respondent, without the claimant's involvement.

35. The reference is held to be non-arbitrable mainly on the ground that the allegations of fraud, collusion and conspiracy made by the respondent in arbitration proceedings and by the claimant in the criminal proceedings involve third parties

and therefore it would be appropriate that the disputes are adjudicated in a civil court. The arbitration agreement is held to be valid. To determine the correctness of the reasons recorded in the impugned order, it is necessary to refer to the well-established legal principles.

LEGAL PRINCIPLES:

36. In ***Ayyasamy,*** it is held that disputes involving serious fraud may not be submitted to arbitration when very serious allegations of fraud 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. However, the guiding principles for judicial decision-making are laid down in paragraphs 48 and 53 as under:

" **48.** The basic principle which must guide judicial decision-making is that arbitration is essentially a voluntary assumption of an obligation by contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The commercial understanding is reflected

in the terms of the agreement between the parties. **The duty of the court is to impart to that commercial understanding a sense of business efficacy**.

……

53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. **Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.**"

emphasis applied by me

37. In ***Rashid Raza***, the Apex Court held that the principles of law laid down in ***Ayyasamy*** 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.

38. In ***Avitel Post Studioz Ltd.***, the Apex Court, with approval, quoted the legal principles settled in ***Rashid Raza*** and held that serious allegations of fraud arise only if either of the two tests laid down is satisfied, and not otherwise. It is held that the first test is satisfied only when 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 and 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, 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.

39. In ***Avitel Post Studioz,*** the Apex Court discussed various decisions, including ***Booz Allen***, regarding cases involving serious and specific allegations of fraud, document fabrication, forgery, coercion, etc., as well as cases involving prosecutions for criminal offences. It is held that when same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud,

misrepresentation, etc. which can be the subject-matter of such proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.

40. In ***Vidya Drolia***, the Apex Court referred with approval the legal principles settled in ***Avitel Post Studioz*** and ***Rashid Raza***. It is held that the Arbitral Tribunals, not being courts of law or established under the auspices of the State, cannot act judicially so as to affect those who are not bound by the arbitration clause. It is thus held that Arbitration is unsuitable when it has *erga omnes* effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. It is held that Arbitrators, like the courts, are equally bound to resolve and decide disputes in accordance with the public policy of the law and that complexity is not sufficient to ward off arbitration. It is held by the Apex Court that the Arbitration Act has been enacted to promote arbitration as a transparent, fair, and just alternative to court

adjudication. The tests for determining non-arbitrability and non-arbitrable criminal cases are laid down as under:

"**76.** In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (*1*) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (*2*) When cause of action and subject-matter of the dispute affects third-party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (*3*) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (*4*) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.* [*Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651] : (SCC p. 669, para 35)

> "*35*. … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v.*Leeman* [*Keir* v. *Leeman*, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (*Soilleux* v.*Herbst* [*Soilleux* v.*Herbst*, (1801) 2 Bos & P 444 : 126 ER 1376], *Wilson* v.*Wilson* [*Wilson* v.*Wilson*, (1848) 1 HL Cas 538] and *Cahill* v.*Cahill* [*Cahill* v.*Cahill*, (1883) LR 8 AC 420 (HL)]).

77. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralised forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trade marks are

exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable.

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."

41. In ***Bihar State Food & Civil Supply Corpn. Ltd.***, the Apex Court reiterated the principles governing arbitrability in cases involving allegations of serious fraud, as considered in decisions of the Apex Court in ***Abdul Kadir Shamsuddin Bubere***, ***A. Ayyasamy***, ***Rashid Raza,*** and ***Avitel Post Studioz***. It is held that the law is settled on a distinction between "serious fraud" and "fraud simpliciter" to segregate and exclude disputes involving serious fraud from arbitrability, and that serious allegations of fraud must be understood in the context of facts and the two tests to be applied in view of the well-settled legal principles. It is further held that 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 that are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the

public law domain. It is held that disputes involving allegations of serious fraud require greater clarity to ensure certainty about the availability of the remedy. At least one instance of serious fraud will be where disputes involving allegations having criminal law implications transcend inter se disputes between the contracting parties and attain public implications, where the ramifications could directly or indirectly affect non-parties and impact integrity in governance, accountability in public service, distribution of essential commodities, safety and security of the nation.

42. In ***Bihar State Food & Civil Supply Corpn. Ltd.***, the Apex Court has explained that the conduct of arbitration is governed by the Arbitration Act, and that the limits of dispute resolution through arbitration are statutorily incorporated in the Arbitration Act itself in Section 2(3); however, categories of cases that are not arbitrable are not enumerated in Section 2(3) of the Act. The Apex Court discussed the principles settled in ***Ayyasamy*** for the categories of non-arbitrable subjects carved out by the courts, keeping in mind the principle of common law that certain disputes which are of a public nature, etc., are not capable of adjudication and

settlement by arbitration and for the resolution of such disputes, courts, i.e. public fora, are better suited than a private forum of arbitration. The Apex Court further discussed that disputes that shall not be submitted to arbitration have been recognised in a large number of decisions, including ***Booz Allen, Vidya Drolia***, and ***Avitel Post Studioz,*** for disputes that shall not be submitted to arbitration due to the application and operation of criminal laws to the dispute in question. It is held that the mere fact that criminal proceedings can or have been instituted in respect of the same incident would not per se lead to the conclusion that the dispute which is otherwise arbitrable ceases to be so. It is thus held as under:

"**22.4.** The reason for permitting submission of such disputes to arbitration is well explained in *Swiss Timing* [*Swiss Timing Ltd.* v. *Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642. Also see similar reasoning by B.N. Srikrishna, J. in the context of Section 45 of the Arbitration Act in *Shin-Etsu Chemical Co. Ltd.* v.*Aksh Optifibre Ltd.*, (2005) 7 SCC 234 at 267, para 74 : (2005) 127 Comp Cas 97.] as : (SCC p. 693, para 28)

"*28*. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract *void*, the necessary plea can be taken on the basis of the conviction to resist the *execution/enforcement* of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is *void* or *voidable*, it would have the wholly undesirable result of delaying the arbitration."

43. In ***N.N. Global Mercantile***, the Apex Court was dealing with the issues regarding the application of the doctrine of separability of an arbitration agreement from the underlying substantive contract and its unenforceability if the underlying contract was not stamped and, whether allegations of fraudulent invocation of the bank guarantee furnished under the substantive contract, would be an arbitrable dispute. The Apex Court held that a conjoint reading of Sections 5 and 16 would indicate that all civil commercial matters, including the

issue as to whether the substantive contract was voidable, can be resolved through arbitration.

44. In ***Nilesh Shejwal***, this Court referred the parties to arbitration, rejecting the respondent's objection to arbitrability in light of the allegations of forgery and document fabrication. This Court relied upon the legal principles settled in ***Ayyasamy*** and ***Vidya Drolia*** and held that the petitioner may face the charge in the criminal prosecution, and it may also have a repercussion in determining whether the termination was justified or not but filing of criminal proceedings by itself will not make the dispute that has arisen between the parties, which is set out in the notice invoking arbitration, to be a non-arbitrable.

45. In ***ICICI Bank Ltd***, relied upon by the respondent, this Court held that when objection of jurisdiction is on record before the learned arbitrator in detail and the contents of such objection are in conformity with the provisions of Section 16(2) of the Arbitration Act, the learned arbitrator was bound to consider such objection. In ***Rashtriya Ispat Nigam Ltd.***, the Apex Court held that a defendant's waiver of

a right in the lis must be gathered from the facts of each case.

46. In ***MSP Infrastructure Ltd.***, the Apex Court held that Section 16(2) disables a party from petitioning a tribunal to challenge its jurisdiction belatedly, having submitted to the jurisdiction of the tribunal, filed the statement of defence, led evidence, made arguments and ultimately challenged the award under Section 34 of the Arbitration Act, 1996. It is held that a party must raise any objection to the jurisdiction of the tribunal before or at the time of submission of its statement of defence. In ***Vidya Drolia***, it is held that a party opposing arbitration, as per sub-section (2), should raise the objection to the jurisdiction of the tribunal before the Arbitral Tribunal, not later than the submission of the statement of defence. However, the Arbitral Tribunal, as per sub-section (4), is empowered to admit a plea regarding lack of jurisdiction beyond the periods specified in sub-sections (2) and (3) if it considers that the delay is justified.

47. In ***ONGC Ltd.***, the Apex Court held that if the Arbitral Tribunal accepts a plea that it lacks jurisdiction, the Court in the exercise of the appellate jurisdiction, under Section 37(2)

(*a*) must have due deference to the grounds which have weighed with the Tribunal in holding that it lacks jurisdiction having regard to the object and spirit underlying the statute which entrusts the Arbitral Tribunal with the power to rule on its own jurisdiction. It is held that the decision of the Tribunal that it lacks jurisdiction is not conclusive; however, in the exercise of this appellate power, the court must be mindful of the fact that the statute has entrusted the Arbitral Tribunal with the power to rule on its own jurisdiction with the purpose of facilitating the efficacy of arbitration as an institutional mechanism for the resolution of disputes.

ANALYSIS:

48. The learned Arbitrator was of the opinion that the statements made on behalf of the claimant would not change the claimant's case that there is a fraud and other serious offences and that the same have been committed by the respondent and others in collusion and conspiracy with each other. It is held by the learned Arbitrator that, the respondent has maintained its allegations against the claimant based on which various conclusions and findings may be arrived at on the point that the respondent or the claimant is guilty of the

offence having acted in collusion or having conspired with one or more of the third parties, or that the claimant and respondent both are innocent and are victims of the offences. It is held that even a prima facie conclusion cannot be recorded as to whether the claimant or respondent has made false allegations against the other or with a view to jeopardising the reference. According to the learned arbitrator, the reference would necessarily involve a consideration of every allegation of fraud, collusion and conspiracy involving third parties.

49. The learned Arbitrator has observed that the claimant has not agreed to proceed on the basis that it is involved in the commission of the offence and that the respondent is entitled to establish its defence based on the alleged offences involving the claimant without any procedural hurdles. Hence, the learned arbitrator has recorded the following reasons to hold that the reference is non-arbitrable:

(i) The cases involving collusion and conspiracy invariably require the impleadment of the parties alleged to be involved, and third parties cannot be compelled to join the reference. The respondent

would have to summon the third parties as its own witnesses, which would be unfair to the respondent.

(ii) In civil proceedings, the respondent has various options for filing a suit, including impleading all third parties, and even in the claimant's suit, the respondent can seek the impleading of third parties. The respondent can also file a counterclaim impleading all the third parties.

(iii) Even if the claimant agreed to proceed on the basis that the respondent's employees have acted fraudulently in collusion with others, but not including the claimant, the respondent's difficulties would remain, as the respondent would still have to establish the claimant's involvement in the offences.

(iv) The claimant has not abandoned its right to file a suit or other proceedings against the respondent and the third parties based on the commission of the alleged offences. In such an event, the same evidence in all probability will be produced by the respondent and the claimant. The claimant would file separate proceedings before a private and a public forum for the same relief regarding the same

transactions, but on different causes of action. Thus, when a case of fraud results in such consequences, the dispute would be non-arbitrable. A consolidated proceeding in a civil court would be appropriate.

(v) The order proceeds on the basis that reference would be maintainable, irrespective of whatever allegations of fraud and other serious offences are made by the claimant or by the respondent. The order is based on the combined effect of various factors.

(vi) Dealing with the question of fraud would require a trial and would pose no difficulty in the reference, provided all the parties concerned are parties to the reference, and the fact that the allegations would require a consideration of voluminous documents and several issues would make no difference.

(vii) There is a high degree of probability that in defending itself against the respondent's allegations, the claimant may find it necessary to steer or even veer in the direction of its allegations of the same nature, but against the respondent, which may arise in the midst of the trial. Hence, the claimant, while

> defending the allegations of fraud against it, may understandably be compelled to adduce evidence against the respondent. However, it is observed that such a probability is not a basis for passing the order, but may result in injustice to the claimant in this reference.

50. Thus, the learned arbitrator has held that a reference would be maintainable, irrespective of whether the allegations of fraud and other serious offences are made by the claimant or the respondent. However, according to the learned Arbitrator, the order was based on the combined effect of various factors. The learned arbitrator has concluded that, although dealing with the question of fraud would require a trial, it would pose no difficulty in the reference, provided all the parties concerned or parties to the reference are present. He has also concluded that an arbitral tribunal can always deal with the most complex and complicated issues, and for a variety of reasons, dealing with such matters would pose less difficulties in an arbitration; however, it was not possible in the present case for the other reasons he recorded in the order.

51. To summarise the reasons in the impugned order, according to the learned Arbitrator, the claimant would file separate proceedings before a private and a public forum for the same relief regarding the same transactions, but on different causes of action and that when a case of fraud results in such consequences, the dispute would be non-arbitrable. This reasoning would not stand the test laid down by the Apex Court, inasmuch as the arbitral claim, based on enforcement of the contract between the parties, is held to be valid. The dispute between the parties to the arbitration, per se, would not assume a public character, rendering it incapable of adjudication and settlement by arbitration only on the ground of the pendency of criminal proceedings. The arbitration agreement can be nullified only if the reference falls within the well-recognised categories of non-arbitrable subjects. The circumstances surrounding the arbitral claim can be addressed by summoning the third parties to record evidence. The respondent has not denied the contract between the parties but has disputed the nature of the transaction pleaded by the claimant, which can be adjudicated in arbitration based on the evidence to be led by the parties.

52. Thus, the findings recorded in the impugned order show that the reference can be dealt with by recording evidence, but only for a collective resolution of the disputes by including third parties; the learned Arbitrator allowed the application under Section 16. There is no clear finding recorded that the arbitral tribunal would lack jurisdiction, in view of the allegations of fraud, or as to why the allegations are egregious enough to render the reference non-arbitrable. It is only for convenience purposes that the resolution of the dispute is held to be better suited in public fora. The learned arbitrator, in so many words, held that the mere allegation of fraud and other offences made against the respondent would not necessarily lead to the application being allowed, as the allegations against the claimant would not be sufficient to refrain from entertaining the reference if all the parties concerned were before the tribunal. However, no claim is made against third parties. For the purpose of deciding the claim based on the terms and conditions and scope of the contract, the third parties can at any time be summoned for recording evidence. Even the learned arbitrator has held that third parties can be summoned to record evidence.

53. The learned Arbitrator has relied upon paragraphs 23 and 25 of the Apex Court's decision in ***A. Ayyasamy*** and held that where there are serious allegations of fraud, they are to be treated as non-arbitrable, and that only the civil court should decide such matters. However, the learned arbitrator further held that, in view of the concessional statements made on behalf of the claimant, the award may not have *erga omnes* effect, and the rights and liabilities of third parties may not be affected, and it can even be assumed that the subject matter or the dispute would not require a collective adjudication. But it is further held that the proceedings would be inexpedient, as it would be desirable for a collective resolution of the disputes by including the third parties.

54. The learned Arbitrator has also expressed an opinion that the mere requirement of summoning several third parties ought not to defeat a valid agreement. Thus, the learned arbitrator concluded that although the arbitration agreement is valid, it would be more convenient for the differences and disputes to be tried by a civil court; therefore, it is necessary

to nullify the effect of the arbitration agreement, which is otherwise valid.

55. In light of the legal principles settled by the Apex Court, as discussed in the above paragraphs, only for convenience purposes, the effect of the arbitration agreement cannot be nullified. The reasons recorded by the learned arbitrator, as referred to in the above paragraphs, themselves are sufficient to hold that the reference in the present case cannot be considered as not arbitrable. Nothing is indicated to show as to how the allegations with criminal law implications, transcending inter se disputes between the parties, would have ramifications that could directly or indirectly affect non-parties and impact the integrity of governance and accountability in public service, as well as the safety and security of the nation. To fit within the categories of non-arbitrable, as laid down by the Apex Court, neither are there allegations 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, nor do allegations of serious fraud show any clarity to ensure certainty about the availability of the remedy. The ground of

mere convenience before the civil court cannot be accepted as valid to hold the reference non-arbitrable.

56. It is settled law that actions in *rem* are excluded from arbitration, which binds only the parties to the arbitration agreement. In the present case, nothing is indicated to show that the dispute is of a public nature and incapable of adjudication and settlement by arbitration. In the absence of any finding as to why a public forum would be better suited than a private forum of arbitration, the arbitration agreement cannot be nullified. No reason is recorded in the impugned order that the award would affect any third party and in what manner. No reason is recorded as to why an effective and enforceable award would not be possible.

57. It is a well-established legal principle, as discussed in the above paragraphs, that the mere fact that criminal proceedings have been instituted in respect of the same incident would not *per se* lead to the conclusion that the dispute which is otherwise arbitrable ceases to be so. No risk or prejudice to any of the parties is seen in permitting arbitration to proceed simultaneously with the criminal proceedings. Even if the criminal proceedings result in

conviction, nothing is shown as to how it would vitiate the underlying contract or how, on the basis of the conviction, the award would be unenforceable. Similarly, if the criminal proceedings result in an acquittal, the underlying contract would not be vitiated. Therefore, mere pendency of criminal proceedings or the alleged offences punishable with severe imprisonment, including life imprisonment, cannot itself be a ground for allowing the application under Section 16. It is necessary to record reasons as to how the allegations in the criminal complaint would amount to an allegation of serious fraud in the arbitral reference resulting in public implications.

58. Considering the pleadings of the parties and the reasons recorded in the impugned order, in light of the well-settled legal principles, I do not find any substance in the objection raised on behalf of the petitioner that the jurisdictional objection should not have been entertained after the statement of defence was filed. However, a valid reason sustainable in law must be recorded to hold that a public forum is better suited. Mere convenience or inconvenience of the parties is not recognised in law as a valid reason to hold an arbitral tribunal to lack jurisdiction. In

the present case, the parties to the reference have chosen to resolve their dispute through arbitration before a private tribunal, and the claim is only against the party to the agreement for enforcement of a contract which is otherwise held to be valid.

59. In ***Simran Sodhi***, the Delhi High Court followed the legal principles settled by the Apex Court in ***Ayyasamy*** and ***Vidya Drolia***, and, on the facts of that case, held that the allegation raised by the petitioner against the respondent was not that of fraud simplicitor. It was held that the allegations of creating a false and fabricated agreement constitute criminal offences, which, if proved, would be visited upon with penal consequences and criminal sanctions, and an investigation into the allegations would therefore lie in the realm of public law affecting the rights of a third party. Hence, it was held that the allegations of fraud/forgery would not be *lis in personam* and cannot be referred to arbitration.

60. In the decision of the Delhi High Court in ***Bentwood Seating Systems*** relied upon by the learned counsel for the respondent, the High Court in the facts of the case, held that

the allegations of fraud were extremely serious and the plea of fraud was of such a nature that it permeats the validity of entire contract including the agreement to arbitrate; hence upheld the order under Section 16 holding that the dispute was non-arbitrable. Even in the decision of ***Baban Piraji Ghadge*** of this court, the dispute was held to be non-arbitrable as the allegations of forgery and fabrication of the partnership deed constituted serious criminal offences and affected the validity of the arbitration clause. Hence, these decisions are of no assistance to the respondent in the facts of the present case.

61. Therefore, for the reasons recorded above in the exercise of appellate power under Section 37 of the Arbitration Act, keeping in mind the purpose of facilitating the efficacy of arbitration as an institutional mechanism agreed by the parties for the resolution of their disputes, the impugned order needs interference. Hence, the impugned order dated 3rd August 2023 is set aside, and the application under Section 16 of the Arbitration Act filed by the respondent is dismissed. The arbitration proceedings are

restored and shall continue from the stage at which the respondent filed the application under Section 16.

[GAURI GODSE, J.]