IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION APPLICATION NO.72 OF 2013

M/s. Atul & Arkade Realty,
(Previously known as Atul Real Estate Holding),
a Partnership Firm registered under the Partnership Act, 1908, having its Office at 501-503, Trade Avenue, Off. Western Express Highway, Suren Road, Andheri (East), Mumbai – 400 093
acting through its partner viz. Atul N. Patel … APPLICANT

VERSUS

1. I.A. & I.C. Private Limited,
A company registered under the Companies Act, 1956 and having its Registered Office at 16, Gundecha Chambers, Nagindas Master Road, Fort, Mumbai – 400 023

2. Shah Pratap Industries Pvt. Ltd.
A Company registered under the Companies Act, 1956, and having its Registered Office at 16, Gundecha Chambers, Nagindas Master Road, Fort, Mumbai – 400 023.

3. J.I.K. Industries Limited,
A company registered under the Companies Act, 1956 and having its registered Office at Pada No.3, Balkum, Thane – 400 608 … RESPONDENTS

Mr. Aspi Chinoy, Senior Advocate with Mr. Rohaan Cama, Mr. Pranav Dessai, Mr. Krishna Balaji Moorthy, Mr. Shekhar Bishnoi i/by Wadia Ghandy and Co., for Applicant/Petitioner.
Ms. Mamta Sadh i/by Mr. S.G.Lakhani, for Respondents.

CORAM : N.J.JAMADAR, J.

RESERVED ON : 21st MARCH, 2022
PRONOUNCED ON : 6th MAY, 2022

JUDGMENT :

1. This Application under Section 11 of the Arbitration and Conciliation Act, 1996 ('the Act') is filed to appoint a retired Supreme Court or High Court Judge or any other person as a sole arbitrator to arbitrate all the disputes which have arisen in relation to a Joint Venture Agreement dated 28th March, 2007.

2. This Application has remained pending before this Court on account peculiar facts and is taken up for hearing and disposal in view of the Order passed by the Supreme Court in Special Leave Petition (Civil) Diary No.24275 of 2021 dated 25th October, 2021.

3. The background facts necessary for the determination of this Application are as under :

The Applicant is a Partnership firm. It is engaged in the business of real estate development in Mumbai. The Respondent No.3 is a company registered under the Companies Act, 1956. Respondent Nos.1 and 2 are the subsidiary companies of Respondent No.3. Respondent Nos.1 and 2 collectively owned the lands admeasuring 22358.48 sq. meters with super structures thereon at Village Balkum, Dist. Thane ('the subject property'). The Respondent Nos.1 and 2 had leased the subject property

to Respondent No.3 for a period upto 4th April, 2007. Respondent No.3 had expressed its unwillingness to renew the lease.

4. In the year 2007, the Respondent No.3 was declared a sick company by the Board for Industrial Finance and Reconstruction (BIFR). The Respondent No.3 owed a sum of Rs.69.85 Crores to the banks and financial institutions. The creditors agreed to accept a sum of Rs.23 Crores under the One Time Settlement scheme in full and final settlement of their dues and claims, if the said amount was paid by 31st March, 2007. Negotiations were held between Shri Rajendra Parikh, the then Managing Director of Respondent No.3, and the Applicant. Pursuant to the negotiations, the Applicant agreed to bring in the said sum of Rs.23 Crores with the understanding that the Applicant and Respondents would enter into a joint venture agreement for the development of the subject property. Accordingly, a joint venture agreement dated 28th March, 2007 came to be executed between the Applicant as a developer, Respondent Nos.1 and 2 as the owners and the Respondent No.3 as a confirming party / lessee, whereunder Respondent Nos.1 and 2 granted rights to the Applicant to develop the subject property.

5. The material terms of the joint venture agreement, according to the Applicant, were : (i) Respondent Nos.1 and 2 agreed to discharge the liabilities of Respondent No.3 to the banks / financial institutions to the extent of Rs.23 Crores so as to clear the encumbrances on the subject property. (ii) The Applicant agreed to

provide the Respondent Nos.1 and 2 with the funds of Rs.23 Crores as and by way of interest free security deposit for its onward remittance to the creditors of Respondent No.3 in full and final discharge of their claims and dues. (iii) The Applicant was to develop the subject property at its costs/expenses. (iv) The said amount of Rs.23 Crores was to be repaid to the Applicant by the Respondents from the profits of the joint venture. (v) The net sale proceeds, after deducting all expenses including costs of constructions etc., were to be shared by the Applicant and Respondents in the ratio of 61:39. (vi) The Respondent No.3 would remove its plant, machinery and employees from the subject property and obtain all necessary regulatory permissions.

6. The joint venture agreement also contained a mechanism for resolution of the disputes through arbitration in accordance with the Act of 1996.

7. The Applicant claimed that pursuant to the joint venture agreement, the Applicant paid a sum of Rs.19,27,06,000/- on 28th March, 2007 to the Stressed Assets Stabilization Fund (SASF). Further payment of Rs.31,74,000/- was made to SASF on 3rd May, 2007. On 29th March, 2007 the Applicant claimed to have paid a sum of Rs.41,20,000/- to the Canara Bank and Rs.31,74,000/- to the State Bank of Bikaner. A further sum of Rs.3 Crores wad paid by the Applicant to SASF on 3rd May, 2007. The Respondent No.3, in turn, stopped all its operations at the subject property. The Applicant was put in possession thereof. The Applicant made arrangements for securing the subject property by appointing security guards.

8. According to the Applicant after the Applicant parted with the consideration of Rs.23 Crores under the terms of the joint Venture Agreement and it was put in possession of the subject property in the month of May, 2012, disputes arose between the Applicant and Respondents. The Applicant asserts that the Respondents attempted to renege from the terms of the joint venture agreement as there was escalation in the prices of the immovable properties in the area where the subject property was situate. The Respondents allegedly made an attempt to dispossess the Applicant from the subject property. Thus, the Applicant claimed to have invoked arbitration by a notice dated 4th September, 2012.

9. Initially, the Applicant filed a Petition under Section 9 of the Act, seeking the interim measures. By orders dated 26th September, 2012 and 6th April, 2015 the statement made on behalf of the Respondents that the Respondents would not sell, alienate, and create third party rights in respect of the subject property without giving two weeks prior notice to the Applicant, came to be accepted and continued till further orders. Subsequently, the Applicant preferred the instant Application for appointment of an Arbitrator.

10. The Respondents resisted the Applications on two principal grounds : (1) The joint venture agreement being not adequately stamped in accordance with the provisions contained in the Maharashtra Stamp Act, 1952, the same cannot be acted upon. (2) The joint venture agreement is a false, forged and fabricated document.

11. By an order dated 27th March, 2014, this Court ruled that it is only after the examination is complete and the issues as to the existence and chargeability are decided by the Court, that the Court will act upon the document by passing an injunctive relief under Section 9 of the Act or by appointing an Arbitrator under Section 11 of the Act, and, thus, passed the following order :

> "8. In that view of the matter, the following order is passed :
> (i) The parties are directed to lead evidence on the execution of the purported agreement, namely the joint venture agreement of 28.03.2007.
> (ii) The Petitioner to submit its affidavit of documents together with a compilation of documents within a period of four weeks from today.
> (iii) The process of inspection and admission and denial of documents will be completed within a period of two weeks thereafter.
> (iv) The Affidavit of evidence by way of examination-in-chief, if any, may be filed within a period of two weeks after the completion of admission and denial of documents.
> (v) Till the document, namely, the joint venture agreement, is proved, the document may be marked for identification and the question of its admission may be considered later at the hearing of the matter.
> (vi) In the meantime within a period of two weeks from today, the Petitioner to deposit in this Court a sum of Rs.1 Crore towards the differential stamp duty and penalty payable in respect of the document. It is made clear that this is only a tentative figure and does not in any way represent determination by the Court of the differential stamp duty or penalty payable on the document;
> (vii)Both the Applications to be placed on board for directions on 9th June, 2014."

12. The Applicant avers that following the directions for full fledged pre

arbitration trial, pleadings were filed. Recording of evidence of Shri Atul Nathalal Patel, partner of the firm, was commenced. The Applicant asserts that Shri Atul Nathalal Patel was subjected to a lengthy and intensive cross-examination, in which 1133 questions have been asked. The pre-arbitration trial directed by an order dated 27th March, 2014 is yet not concluded even after a lapse of more than 7 years.

13. In the meanwhile, in view of the development in law, post the Arbitration and Conciliation Amendment Act, 2015 and the judicial pronouncements, which have taken the view that at the stage of reference under Section 11 of the Act, the Court is required to confine its enquiry to the existence of the arbitration agreement, the Applicant claimed to have been constrained to approach the Supreme Court assailing the order passed by this Court dated 27th March, 2014.

14. In a Special Leave Petition (Civil) No.24275 of 2021, after noting the submissions on behalf of the Applicant, the Supreme Court passed the following Order :

> "The Court is convened through Video Conferencing.
>
> Delay in filing the Special Leave Petitions is condoned. Exemptions are allowed.
>
> Heard Learned Senior Counsel appearing for the Petitioner and carefully perused the material available on record.
>
> The main grievance of the Petitioner in these Special Leave Petitions is that the application filed by them under Section 9 of the Arbitration and Conciliation Act, seeking interim relief as also under Section 11 of the said Act seeking appointment of Arbitrator, are pending adjudication before the

> High Court of Judicature at Bombay, for a considerable period of time.
>
> Learned Senior Counsel submits that the subsequent Judgments passed by this Court, i.e., (i) Vidya Drolia and Ors. V/s. Durga Trading Corporation (2021) 2 SCC 1, (ii) N.N.Global Mercantile Pvt. Limited V/s. Indo Unique Flame Limited and ors., (2021) 4 SCC 379 and (iii) Pravin Electricals Pvt. Ltd. V/s. Galaxy Infra Engineering Pvt. Ltd. (2021) 5 SCC 671, squarely cover the issues raised in these Special Leave Petitions or those pending before the High Court.
>
> In view of the above, we request the High Court to dispose of matters, pending adjudication before it, within a period of three months from the date of communication of this order, taking into consideration the legal position as of today.
>
> The Petitioner would be at liberty to cite the aforesaid Judgments before the High Court at the time of hearing of the matters.
>
> Before parting with these mattes, we make it clear that we have not expressed any opinion on the merits of the case and the High Court shall deal and decide the cases independently on its own merits and in accordance with law."

15. Pursuant to the aforesaid order, the Applicant has filed an additional Affidavit in support of the prayer for the appointment of the Arbitrator. The Applicant has referred to the prolonged period for which the pre trial arbitration is pending. Certain allegations are made against the Respondents for allegedly adopting dilatory tactics. The Applicant has, thereafter, adverted to the development in law in the context of the inadequacy of the stamp duty which contains the arbitration clause as well as the scope of enquiry under Section 11 of the Act. The Applicant affirms that the Court can reject the prayer for appointment of an

Arbitrator only when it is manifestly and ex-facie certain that the arbitration agreement is non-existent. In case of doubt, the rule is to refer.

16. The resistance on behalf of the Respondents, in the case at hand, according to the Applicant is, at best, in the realm of controversy warranting adjudication. Therefore, the Application deserve to be allowed by appointing the Arbitrator and leaving all the questions including the legality and validity of the joint venture agreement to be decided by the arbitral tribunal.

17. An Affidavit in Reply is filed on behalf of the Respondents. At the outset, the Respondents contend that the Applicant had surreptitiously moved before the Supreme Court without giving notice to the Respondents. The order passed by the Supreme Court, according to the Respondents, does not affect the validity of the order passed by this Court on 27th March, 2014, whereby the Court ordered the parties to lead evidence to establish the existence of the agreement. The order dated 27th March, 2014, thus, holds the field. Therefore, according to the Respondents, there is no propriety in again reviewing the order passed by this court on 27th March, 2014.

18. The Respondents made an endeavour to demonstrate that the delay in proceedings with pre trial arbitration is attributable to the Applicant. On the merits of the matter, the Respondents have adverted to the developments in the intervening period in the nature of lodging of a complaint against the Applicant for forgery. The learned Magistrate by an order dated 25th January, 2017 was persuaded to issue the

process against the Applicant and the co-accused. During the course of investigation, the police have subjected the joint venture agreement to forensic examination and found that the thumb impressions of Mr. Rajendra Parekh, director of the Respondent on the instrument in question are forged. Even the thumb impression of Mr. Atul Nathalal Patel of the Applicant, is not found genuine. Moreover, the Respondents have obtained opinion of two forensic experts. It is opined that the thumb impressions of Mr. Rajendra Parekh on the instrument are forged. The Respondents, thus, contend that the alleged joint venture agreement is false, fabricated and forged and no such agreement was ever executed by the Respondents. They have banked upon the intrinsic evidence of the joint venture agreement to buttress the aforesaid defense.

19. That since there exists no valid and subsisting joint venture agreement between the parties, at this juncture, especially in the backdrop of the fact that the pre trial arbitration process is underway, there is no justification for appointment of an arbitrator, contended the Respondents.

20. In the light of the aforesaid history of the litigation, the original pleadings, the directions of the Supreme Court and the further pleadings pursuant to the orders passed by the Supreme Court, I have heard Mr. Aspi Chinoy, Learned Senior Advocate appearing for the Applicant and Ms. Mamta Sadh, learned Counsel appearing for the Respondents at length. Learned Counsel have taken me through the pleadings and the documents on record including the reports of the forensic experts.

21. Mr. Chinoy, Learned Senior Advocate, commenced his submissions with an emphatic statement that the order passed by this Court on 27th March, 2014 was impeccable at that point of time. However, with the change in law, brought about by the Amendment Act, 2015 and the paradigm shift in the judicial opinion, as regards the scope of enquiry under Section 11, post the amendments introduced by the Amendment Act, 2015, the order passed by this Court on 27th March, 2014 does not hold the field. The said order, according to Mr. Chinoy, must yield to the declaration of law by the Supreme Court restricting the scope of enquiry at the stage of reference of the dispute to arbitration. Mr. Chinoy urged with a degree of vehemence that the Order passed by the Supreme Court on 25th October, 2021, extracted above, is required to read and construed, keeping in view the spirit of the order, liberty to the Petitioner to cite the subsequent judgments passed by the Supreme Court in (i) **Vidya Drolia and Ors. V/s. Durga Trading Corporation**[1], (ii) **N.N.Global Mercantile Pvt. Limited V/s. Indo Unique Flame Limited and ors.**[2], and (iii) **Pravin Electricals Pvt. Ltd. V/s. Galaxy Infra Engineering Pvt. Ltd.**[3], before this Court and the further directions to dispose the matters pending adjudication before the High Court taking into consideration the legal position as of today.

22. Mr. Chinoy would urge that the Court is now required to consider the question of existence of the arbitration agreement in the light of the tests enunciated in

1 (2021) 2 SCC 1
2 (20221) 4 SCC 379
3 (2021) 5 SCC 671

the aforesaid judgments, without being influenced by the observations made in the Order dated 27th March, 2014. The fact that the Supreme Court has not interfered with the Order passed by this Court dated 27th March, 2014 is not decisive as the Supreme Court has directed this Court to decide the issue afresh and dispose of the matters. A formal setting aside of the Order dated 27th March, 2014, is, in the circumstances of the case, according to Mr. Chinoy, cannot be insisted upon.

23. Laying the emphasis on the enunciation of law in the aforecited judgments, Mr. Chinoy would urge that on the anvil of the tests postulated in the aforesaid judgments, it is only in those cases where the Court can conclude without any risk of controvertion that the arbitration agreement does not exist, or for that matter, dispute sought to be raised is non-existent and a deadwood, the Court would be justified in declining to make a reference. In rest of the cases, the principal "when in doubt, do refer" must be given play in full measure. Mr. Chinoy further submitted that the fact that Section 6(A) of the Act, 1996, which explicitly mandated the Court to confine to the examination of the existence of the arbitration agreement, came to be subsequently omitted by an Act of 2019, is also of no consequence. Firstly, the said amendment has not been brought into force. Secondly, by the process of interpretation, it has been postulated that despite the omission of sub-section 6(A) of Section 11 of the Act, the position in law remains that the scope of enquiry under Section 11 of the Act is restricted to the examination of existence of the arbitration

agreement, as the legislative policy is to restrict judicial interference to the minimum and permit party autonomy in the matter of resolution of the disputes.

24. Mr. Chinoy, taking the Court through the documents on record, would further urge that the issue as to whether the joint venture agreement is a forged document is at best debateable. The material on record does not equip the Court to draw a positive conclusion that the joint venture agreement is indeed forged one. In this view of the matter, the dispute is required to be referred to arbitration, especially in view of the fact that there is no denial of the fact that the Applicant parted with the valuable consideration of Rs.23 Crores and the Respondents still hold the said amount.

25. Per contra, Ms. Mamta Sadh, learned Counsel for the Respondents would urge that the Applicant cannot draw much mileage from the order passed by the Supreme Court as the Order passed by this Court dated 27th March, 2014 still holds the field. Since the Supreme Court has not expressly set aside the order passed by this Court, at this juncture, there is no propriety in revisiting the issue of existence of the arbitration agreement for the purpose of Section 11 of the Act, 1996. Secondly, the provisions contained in Section 11(6)(A) of the Act do not govern the transaction in question as the Application was preferred much before the introduction of Section 11(6)(A) of the Act and even the Order was passed by this Court before the 2015 Amendment. Thirdly, Ms. Sadh urged, with a degree of vehemence, the case at hand is one of egregious fraud. The contention of the Respondents that the joint venture

agreement was not at all executed by the Respondents and it is a fraudulent document, is not for the sake of allegations, but it is substantiated by the expert opinion of unimpeachable evidentiary value.

26. Taking the Court through the reports of the Finger Print/Thumb Impression Bureau, CID, Mumbai dated 1st April, 2014, the report of a private forensic expert Ms. Nisha Menon dated 20th July, 2012 and the report of Truth Labs dated 18th August, 2012, Ms. Sadh would urge that there is ample expert evidence on record to demonstrate that the finger prints of both Mr. Atul N. Patel, Applicant herein and Mr. Rajendra Parekh, Director of Respondent No.3, were not identical to the specimen thumb prints. In addition, the report dated 3rd February, 2014 of the Director of Forensic Science Laboratory, State of Maharashtra, which was obtained in the complaint, lodged by the Applicant itself, indicates that all the rubber stamps and the circular embossed stamps appearing on the document in question do not tally with the common seal and rubber stamps of the Respondents. Ms. Sadh made a pain-staking effort to take the Court through the documents in question to demonstrate that the documents are not genuine by laying emphasis on their intrinsic evidence.

27. In the face of such overwhelming material, according to Ms. Sadh, at this length of time, the mini trial ordered by this Court, does not deserve to be interdicted . It would be in the fitness of things to allow the mini trial to be completed and, only thereafter, a legitimate finding can be recorded regarding the existence of the

arbitration agreement. Ms. Sadh placed reliance on the judgments of the Supreme Court in the cases of SBP and Co. V/s. Patel Engineering and Anr.[4] and Pravin Electricals Pvt. Ltd. V/s. Galaxy Infra and Engineering Pvt. Ltd. (supra) to bolster up her submissions.

28. To start with, it may be apposite to note that in adherence to the directions of the Supreme Court, the prayer for reference of the dispute to arbitration under Section 11 of the Act, is required to be considered in the light of the judgments of the Supreme Court in the cases of **Vidya Drolia and Ors. V/s. Durga Trading Corporation** (supra), (ii) **N.N.Global Mercantile Pvt. Limited V/s. Indo Unique Flame Limited and ors.** (supra) and (iii) **Pravin Electricals Pvt. Ltd. V/s. Galaxy Infra Engineering Pvt. Ltd.** (supra), which the Supreme Court has explicitly ordered to be brought to the notice of this Court and thereupon to be considered by this Court.

29. The preliminary challenge on behalf of the Respondents that the order passed by this Court on 27th March, 2014 still holds the field, as it has not been interfered with by the Supreme Court, does not merit countenance as the Supreme Court has made it explicitly clear that the Application is required to be determined afresh in the light of the development in law. The fact that the Supreme Court had not either set aside or commented upon the legality and correctness of the Order passed by this Court dated 27th March, 2014, therefore, does not constitute an

4 SCC 2005 (8) 618

impediment in considering the prayer for reference under Section 11 of the Act.

30. At this stage, it may be appropriate to note that the challenge based on insufficiency of the stamp duty on the Joint Venture Agreement, with the development in law, does not any more constitute a hindrance in the reference of the dispute to arbitration. It would be suffice to note that in the case of **N.N.Global (supra),** a three judge bench of the Supreme Court, ruled in no uncertain terms that there is no legal impediment to the enforceability of the arbitration agreement, pending payment of stamp duty on the substantive contract. The adjudication of the rights and obligations under the work order or substantive commercial contract, would, however, not proceed before complying with the mandatory provisions of the Stamp Act. Therefore, in the facts of the case, the ground of inadequacy of the stamp duty on the instrument in question, may not detain the Court from exercising jurisdiction under Section 11 of the Act, 1996. Moreover, in the case at hand, the Court has already secured deposit of Rs.1 Crore towards the differential stamp duty and penalty, if any, and the said deposit would abide eventual order that may be passed.

31. Since the Supreme Court has directed that the Application be decided in the light of the law enunciated in the aforementioned cases, it may be appropriate to note the legal position expounded therein. As **N.N.Global Mercantile Pvt. Limited V/s. Indo Unique Flame Limited and ors.** (supra) and **Pravin Electricals Pvt. Ltd. V/s. Galaxy Infra Engineering Pvt. Ltd.** (supra) deal with particular facets of the

reference to arbitration and **Vidya Drolia and Ors. V/s. Durga Trading Corporation** (supra) considers the core issues as to 'non-arbitrability' and when the subject matter of the dispute is not capable of being resolved through arbitration, and the conundrum 'who decides the arbitrability', it may be expedient to first consider the exposition of law in the case of **Vidya Drolia and Ors. V/s. Durga Trading Corporation** (supra).

32. In para No.2 of the judgment, the Supreme Court framed the issues which warranted consideration :

> "2. A deeper consideration of the order of reference[5] reveals that the issues required to be answered relate to two aspects that are distinct and yet interconnected, namely :
>
> 2.1. (i) Meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration.
>
> 2.2 (ii) The conundrum - "who decides" - whether the Court at the reference stage or the Arbitral Tribunal in the arbitration proceedings would decide the question of non-arbitrability.
>
> 2.3 The second aspect also relates to the scope and ambit of jurisdiction of the Court at the referral stage when an objection of non-arbitrability is raised to an application under Section 8 or 11 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act").

33. After an elaborate analysis of historical context, legal provisions and the precedents, the first question was answered in para 76 as under :

> 76. In view of the above discussion, we would like to propound a fourfold test

5 (2019) 20 SCC 406

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 red.

76.2 (2) When cause of action and subject matter of the dispute affects third party rights; have *erga omnes* effect; require centralized 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 waterlight 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. V/s. Meena Vijay Khetan**[6] : (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[7]). 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*

6 (1999) 5 SCC 651
7 (1846) 9 QB 371

(Solleux V. Herbst[8], Wilson V Wilson[9], and Cahill V Cahill[10])"

34. The discussion on the second issue as to "who decides arbitrability" was concluded as under :

> "154. Discussion under the heading "who Decides Arbitrability?" can be crystalised as under :
>
> 154.1 Ration of the decision in Patel Engg. Ltd.[11] on the scope of judicial review by the court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019, is no longer applicable.
>
> 154.2 Scope of judicial review and jurisdiction of the court under Sections 8 and 11 of the Arbitration Act, is identical but extremely limited and restricted.
>
> 154.3 The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub clause (i) of Section 34(2)(b) of the Arbitration Act.
>
> 154.4 Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably

8 (1801) 2 Bos. & P 444
9 (1848) 1 HL Cas 538
10 (1853) LR 7 AC 420 (HL)
11 SBP & Co. V. Patel Engg. Ltd. (2005) 8 SCC 618

> "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct or arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism.
>
> 155. Reference is, accordingly, answered."

35. The observations in paragraph Nos.233, 234 and 238 are also instructive and hence extracted below :

> 233. From the aforesaid discussion, we can conclude that the respondent-defendant has to establish a prima facie case of non-existence of valid arbitration agreement, wherein it is to be summarily portayed that a party is entitled to such a finding. If a party cannot satisfy the court of the same on the basis of documents produced, and rather requires extensive examination of oral and documentary production, then the matter has to be necessarily referred to the tribunal for full trial. Such limited jurisdiction vested with the court, is necessary at the pre-reference stage to appropriately balance the power of the tribunal with judicial interference.
>
> 234. The amendment to the aforesaid provision was meant to cut the deadwood in extremely limited circumstances, wherein the respondent is able to ex facie portray non-existence of valid arbitration agreement, on the documents and the pleadings produced by the parties. The prima facie view, which started its existence under Section 45 through *Shin Etsu case*[12] has been explicitly accommodated even under domestic arbitration by the 2015 Amendment with appropriate modifications.

12 Shin-Etsu Chemical Co. Ltd. V Aksh Optifibre Ltd. (2005) 7 SCC 234

> 238. At the cost of repetition, we note that Section 8 of the Act mandates that a matter should not *(sic)* be referred to an arbitration by a court of law unless it finds that prima facie there is no valid arbitration agreement. The negative language used in the section is required to be taken into consideration, while analysing the section. The Court should refer a matter if the validity of the arbitration agreement cannot be determined on a prima facie basis, as laid down above. Therefore, the rule for the court is "when in doubt, do refer".

36. In the light of the aforesaid enunciation of law, the controversy at hand, which now essentially centers upon the allegations of fraud and forgery in bringing about the joint venture agreement, is required to be determined. The pronouncement in the case of **Vidya Drolia (supra)** also deals with the issue of non-arbitrability in the context of the allegations of fraud and forgery. I deem it appropriate to advert to the discussion in the case of **Vidya Drolia (supra)** on the aspect of fraud a little later, as the evolution of the approach while considering the allegations of fraud, can be better appreciated if reference is made to few previous pronouncements of the Supreme Court on the said aspect.

37. In **Afcons Infrastructure Ltd. V/s. Cherian Varkey Construction Co. (P) Ltd.**[13], the Supreme Court enunciated the categories of cases which are not considered suitable for ADR process having regard to their nature. The relevant part of the observations in paragraph 27 reads as under :

> "27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature :

13 (2010) 8 SCC 24

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.

(v) Cases involving prosecution for criminal offences."

38. In the case of **Booz Allen & Hamilton Inc. V SBI Home Finance Ltd.**[14] it was again reiterated that the disputes relating to rights and liabilities which give rise to or arise out of criminal offences, are non-arbitrable disputes.

39. In the context of allegations of fraud and serious malpratices on the part of the Respondents, in the case of **N. Radhakrishnan V. Maestro Engineers**[15], it was interalia observed in para No.23, as under :

> "23. The learned Counsel appearing on behalf of the Respondents on the other hand contended that the appellant had made serious allegations against the respondents alleging that they had manipulated the accounts and defrauded the appellant by cheating the appellant of his dues, thereby warning the respondents with serious criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed on a decision of this Court in **Abdul Kadir Shamsuddin Bubere V. Madhav Prabhakar Oak**[16] in which this Court under para 17 held as under :
>
> *"17. Three is no doubt that were serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference.*
>
> In our view and relying on the aforesaid observations of this

14 (2011) 5 SCC 532
15 (2010) 1 SCC 72
16 AIR 1962 SC 406

> Court in the aforesaid decision and going by the ratio of the abovementioned case, the facts of the present case do not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute."

40. These judgments were referred to in the case of **A. Ayyasamy V. A. Paramasivam**[17]. A distinction was made in the case of **A. Ayyasamy (supra)** in the potency of the defence of fraud, namely serious allegations of fraud and allegations simplicitor for the sake of resistance to reference to an arbitration. In paragraph 23, the Supreme Court (speaking through Hon'ble Shri Justice Sikri) ruled as under :

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

17 (2016) 10 SCC 386

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 side-track 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."

41. In paragraph No.45, the Supreme Court (speaking through Hon'ble Justice Dr. Chandrachud) cautioned against the use of N. Radhakrishnan case (supra) as a precedent and distinguished the same as under :

> "45. The position that emerges both before and after the decision in N. Radhakrishnan (supra) 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 (supra) 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 emphasis that the judgment in N. Radhakrishnan (supra) 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 (supra). 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 (supra) 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."

42. In the case of **Rashid Raza V. Sadaf Akhtar**[18] after following **A. Ayyasamy (supra)**, the Supreme Court enunciated the twin test for considering the issue of non-arbitrability in the backdrop of the allegation of fraud.

> "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 won 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."

43. The entire law on the aspect of fraud, in the context of the resistance for reference to arbitration, was revisited by the Supreme Court in the case of **Avitel Post Studioz Ltd. V/s. HSBC PI Holdings (Mauritius) Ltd.**[19]. The Supreme Court postulated the tests to be applied in assessing the plea of fraud as under :

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

18 (2019) 8 SCC 710
19 (2021) 4 SCC 713

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

44. The Supreme Court expressly observed that **N. Radhakrishnan (supra)** lacks in precedential value and further explained the rider subject to which the decisions in **Afcons Infrastructure Ltd. (supra)** and **Booz Allen (supra)** are required to be read. Paragraph No.43 of Avitel (supra) reads thus :

> "43. In the light of the aforesaid judgments, paragraph 27(vi) of Afcons (supra) and paragraph 36(i) of Booz Allen (supra), must now be read subject to the rider that the 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."

45. Following the aforesaid pronouncement in the case of **Avitel (supra),** the Supreme Court explained the aspect of non-arbitrability in the context of fraud in the case of Vidya Drolia (supra) as under :

> "74. The judgment in Avitel Post (supra) 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 (supra) 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 ot 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. V/s. Satpal Singh Bakshi[20] which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."

46. In the case of **N.N.Global (supra),** a three Judge Bench of the Supreme Court again considered all the previous pronouncements including **A. Ayyasamy (supra), Avital Post (supra)** and **Vidya Drolia (supra)** and illuminatingly postulated the law in the following words :

> "45. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself……
>
> 50. The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, Arbitral Tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can

20 2012 SCC Online Del 4815

be adjudicated only by a court of law, since it may result in a conviction, which is the realm of public law."

47. In the case of **Pravin Electricals (supra),** another three Judge Bench of the Supreme Court was again confronted with resistance to arbitration rooted in the allegations of fraud. In the facts of the said case, where the issue of genuineness of the signatures on the instrument in question was referred to CFSL and the latter did not express any definite opinion, yet there were attendant circumstances which rendered it difficult to record positive finding that there existed an arbitration agreement, the Supreme Court adopted the 'prima facie review test' and directed that the determination as to whether the arbitration exists, must be left to be decided by the arbitrator.

The observations in paragraph Nos.29 and 30 read as under :

"29….. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in Haryana by parties whose registered Offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorized to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists between the parties. The prima facie review spoken of in Vidya Drolia (supra) can lead to only one conclusion on the facts of this case – that a deeper consideration of whether an arbitration agreement exists between the parties must be left to an arbitrator who is to examine the documentary evidence produced before him in detail after witnesses are cross-examined on the same.

> 30. For all these reasons, we set aside the impugned judgment[21] of the Delhi High Court insofar as it conclusively finds that there is an arbitration agreement between the parties. However, we uphold the ultimate order appointing Justice G.S.Sistani, a retired Delhi High Court Judge as a sole arbitrator. The learned Judge will first determine as a preliminary issue as to whether an arbitration agreement exists between the parties, and go on to decide the merits of the case only if it is first found that such an agreement exists. It is clarified that all issues will be decided without being influenced by the observations made by this Court which are only prima facie in nature. The Appeal is allowed in the aforesaid terms."

48. In view of the aforesaid pronouncement, the progressive development in law, in the context of the resistance to reference to arbitration on the basis of the allegations of fraud, forgery and the like vitiating factors, can be traced as under :

Initially, the judicial opinion favoured determination of the allegations of fraud by the Court. Thus, where there were serious and specific allegations of fraud, forgery and fabrication of documents, it was considered that the Arbitrator was not equipped to determine such allegations and a court of law would be more competent and have the means to decide those questions. In keeping with the principle of minimal judicial interference in the matter of arbitration and respecting the party autonomy, where the parties have exercised the option to resolve the disputes in a swift and inexpensive manner through a forum of choice, the non-arbitrability of the dispute for the mere reason that the adversary made allegations of

21 Galaxy Infra & Engg. (P) Ltd. V/s. Pravin Electricals (P) Ltd., 2002 SCC Online Del. 1722

fraud, gave way to a more balanced approach. A distinction has, therefore, been made between the cases involving serious allegations of fraud and allegations of fraud 'simplicitor'. Lest, it would give a long leash to a party to obviate the dispute resolution mechanism of choice, simply by making the allegations of fraud with a view to derail the resolution.

49. The non-arbitrability of the dispute, in the backdrop of the allegations of fraud, has also been subjected to two tests**.** First, whether the alleged fraud affects the underlying contract, rendering it void. Two, whether the fraud is restricted to the affairs of the parties, inter se, without any implication in the public domain. To put it in other words, the civil aspect of fraud may legitimately form a subject matter of arbitration. However, the criminal aspect of fraud, which entails penal consequences, can only be adjudicated by a court of law. In contemporary arbitration, the broad proposition that the allegations of fraud are non-arbitrable is not favoured. If an allegation of fraud can be adjudicated upon before a civil court, there is no justifiable reason to exclude such disputes from being resolved through arbitration.

50. On the aforesaid touchstone, readverting to the facts of the case, the following issues bear upon the determination. Are there specific allegations of fraud; do the allegations have an element of spontaneity; are the allegations grave and potent; whether the allegations relate to, and undermine, the validity of underlying contract or they pertain to the transactions pursuant to the contract; is there any public law

element involved; what is the nature of the material in support of the allegations; and whether in the context of the allegations and attendant facts and circumstances, the ground of fraud is such that it must be determined by the Court and the determination by the arbitrator, would be inefficacious and prejudicial to public interest.

51. In the reply dated 3rd October, 2012 to the notice invoking arbitration, the Respondents made a categorical statement that the alleged Joint Venture Agreement dated 28th March, 2007 relied upon by the Applicant, was a forged, fabricated and got up document and, thus, denied the execution of the said agreement. This stand of the Respondents, in the reply to the notice, indicates that the Respondents alleged fraud and forgery at the first possible opportunity. A specific defence of fraud in relation to, and forgery of, the Joint Venture Agreement dated 28th March, 2007 was raised and the said allegation had an element of spontaneity as well.

52. This propels me to the nature and potency of the allegation of fraud. Whether it is a case of mere allegation, for the sake of allegation. The material on record would indicate that the Respondents alleged that the signatures of Mr. Rajendra Parekh on the instrument in question were forged, the thumb impressions of Mr. Rajendra Parekh were also forged. In addition, it is the case of the Respondents that the rubber stamp and common seals appearing on the agreement in question and the power of attorney, were also not genuine. This nature of the allegations cannot be termed as allegation 'simplicitor'. The Respondents have disputed the execution of

the instrument, in all facets, by asserting that not only the signatures and thumb impressions of Mr. Rajendra Parekh, are forged, but even the rubber stamps and circular embossed seals of the entities are fabricated.

53. The allegations pertain to the very execution of the underlying agreement. The agreement is not genuine, it is vitiated by fraud and forgery, contend the Respondents. The allegations, thus, fall in the realm of a contract 'brought about by practicing fraud' and not fraudulent act or conduct of the Applicant, post execution of a lawful contract. In other words, the allegations are of such a nature that, if proved, they would negate the very existence of the agreement containing the arbitration clause.

54. Now the nature of material pressed into service on behalf of the Respondents to buttress the allegations of fraud. The Respondents have banked upon the reports of the forensic experts. First, the report dated 1st April, 2014 is submitted by the Director (Superintendent of Police) (FP), Finger Prints Bureau, CID, Mumbai, in MECR No.7/12 registered at MIDC Police Station for the offences punishable under Sections 409, 420 read with 34 of the Indian Penal Code. The finger print expert has opined that the questioned finger prints on the joint venture agreement are not identical with specimen finger prints of Mr. Rajendra Parekh and Mr. Atul Patel, the Applicant. It would be contextually relevant to note that MECR No.7 / 12 was registered at the instance of the Applicant. Second, the report dated 20th July, 2012

submitted by Ms. Nisha Menon, hand writing and finger print expert, opines that the disputed finger prints (D-1) on the joint venture agreement is not matching with the specimen finger prints of Mr. Rajendra Parekh. Another private finger prints expert – Truth Foundation, has examined the disputed finger prints on the agreement in question and opined that the said thumb impression is not identical with any of the thumb/finger impressions on the specimen finger print sheet of Mr. Rajendra Parekh. The report dated 3rd February, 2014 issued by the Directorate of Forensic Science Laboratories in connection with C.R.No.7/12 records that the rubber stamp and circular embossed seal, which appear on the documents in question, do not tally with the specimen rubber stamp and circular embossed seal.

55. Ms. Nisha Menon, in another report dated 15th October, 2012, has further opined that the six disputed signatures purportedly made by Mr. Rajendra Parekh on page Nos.48 and 49 of the Joint Venture Agreement dated 28th March, 2007 are not from the source of the admitted signatures and the specimen signatures of Mr. Rajendra Parekh. At this juncture, it would be necessary to immediately notice that in respect of the very same disputed signatures, the Additional Chief State Examiner of Documents, CID, Mumbai, has opined on 26th June, 2013 that the person who wrote the enclosed specimen signature, also wrote the disputed signatures (i.e. Mr. Rajendra Parekh).

56. In addition to the aforesaid reports, Ms. Sadh, the Counsel for the

Respondents, laid emphasis on the intrinsic evidence of the documents like the copy of the Records of Right annexed to the Joint Venture Agreement, was issued on 21st April, 2007, though the agreement was purportedly executed on 28th March, 2007. Secondly, the receipt allegedly executed by the Respondents on 3rd May, 2007, bears continuation pagination, despite having been executed much later. This justifies an inference that all the documents were printed on one and the same day and exemplifies the fraud perpetrated by the Applicant.

57. The situation which thus obtains is that there are reports of the finger print experts, which suggest that finger prints affixed on the agreement in question, do not tally with the finger prints of Mr. Rajendra Parekh and Mr. Atul Patel, who have purportedly affixed those thumb impressions. The expert has also opined that the rubber stamps and circular embossed seals of the entities, on whose behalf the Joint Venture Agreement and the power of attorney were executed, do not tally with the specimen rubber stamp and circular embossed seals. Whereas, as regards the execution of the Joint Venture Agreement by Mr. Rajendra Parekh, by putting the signatures thereon, there is a duality of opinion. The State Examiner of Documents has opined that the disputed signatures appear to have been written by the person who wrote the specimen signatures. Ms. Nisha Menon, private expert, opined to the contrary.

58. The aforesaid material is required to be appreciated in the context of the

claim of the Applicant as regards the affixing of the thumb impressions, rubber stamps and common seal of the Respondents. In paragraphs 3.9 and 3.10 of the Application, the Applicant avers that after the Joint Venture Agreement was executed (signed) by the executants as well as the witnesses and the signatures were attested, the original agreement was retained by the Applicant and the counter-part thereof was handed over to Mr. Rajendra Parekh. It is the case of the Applicant that the thumb impressions and rubber stamp and common seal of the Respondents were not affixed at that point of time. On the next date i.e. 29th March, 2007, the broker Mr. Yogesh Desai collected the Joint Venture Agreement and represented that he would obtain the thumb impressions, common seal and rubber stamp of the respective entities on the original Joint Venture Agreement. Thereupon, the Applicant claimed to have handed over the Joint Venture Agreement and bankers cheque to the said broker Mr. Yogesh Desai with instructions to handover the same to Mr. Rajendra Parekh.

59. The aforesaid stand of the Applicant is, in a sense, compatible with two diverse possibilities. One, it may lend credence to the defence of the Respondents that the thumb impression, rubber stamp and circular embossed seal, were not affixed on the Joint Venture Agreement by Mr. Rajendra Parekh and the Respondent Companies, as alleged by the Applicant. Two, it may explain away the allegations of fraud in the sense that the Joint Venture Agreement was indeed executed on 28th March, 2007 and, thereafter, the thumb impressions, seals and the stamps were impressed thereon.

Which of the two is preponderately probable is a matter for adjudication.

60. Either way, the issue revolves around the execution of the Joint Venture Agreement.

61. It is imperative note that the allegations of fraud do not pertain to the acts to be performed by the public authorities or the record to be maintained by the public authorities. They are essentially in the context of the execution of the Joint Venture Agreement. It would be necessary to note, at this juncture, that criminal proceedings alleging offences having been committed in the course of the transaction, including in respect of the agreement in question, have already been initiated by the Applicant and the Respondents. The criminal aspect of fraud, forgery and fabrication would, thus, be adjudicated in the proceedings which have already been initiated.

62. This leads me to the pivotal question as to 'who should decide' the arbitrability where the existence of arbitration agreement itself is allegedly vitiated by fraud. Whether the fraud alleged in the execution of the Joint Venture Agreement, is of such a nature that it must be decided by the Court. Upon a careful consideration of the material on record, as indicated above, the fraud and forgery alleged by the Respondents, are rooted in the execution of the Joint Venture Agreement. Applying the test of prima facie review, where the issue lies in the corridor of uncertainty and the Court not being equipped to record a finding with certainty that the Joint Venture Agreement is completely vitiated by fraud can, at this stage, a reference to arbitration

is warranted ?

63. The pronouncement of the Supreme Court in the case of **Pravin Electricals (supra)** provides a legitimate answer. In the case of Pravin Electricals (supra), the situation was converse; in the sense that the report of the CFSL was inconclusive. In the case at hand, there are conflicting opinions as regards the signatures of Mr Rajendra Parekh on the Joint Venture Agreement. Secondly, the issue of affixing of the thumb impression, stamps and circular embossed seal of the entities, is again a matter which requires determination in the light of the averments in the Application referred to above. In the ultimate analysis, the question which crops up is, whether the Joint Venture Agreement is legal and valid.

64. In such circumstances, the course adopted by the Supreme Court in the case of Pravin Electricals (Supra) by directing the Arbitrator to first determine as to whether the arbitration agreement exists between the parties in the light of the defence rooted in the fraud and forgery, as a preliminary issue, appears expedient. The context can be lost sight of. The Application is preferred in the year 2013. A mini-trial envisaged by the order of this Court dated 27th March, 2014 has not progressed beyond the cross-examination of the Applicant's first witness, despite lapse of eight years. An inquiry as whom of the parties is to blame, would not advance the cause of expeditious resolution of the dispute.

65. On the contrary, in my considered view, the cause of expeditious

resolution of the dispute would be subserved by making a reference to the Arbitrator to decide the question of existence of the agreement in the light of the challenge to the execution of the agreement and, if a finding is recorded that the arbitration agreement exists, decide the respective claims/counter claims of the parties on merits. The evidence which has been recorded till date, during the course of mini-trial, can very well be considered by the Arbitrator in arriving at a decision.

66. For the foregoing reasons, the Application deserves to be allowed. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) Shri Justice R.G.Ketkar, a former Judge of this Court, is appointed as a Sole Arbitrator to decide all the disputes and differences between the Applicant and the Respondents arising out of the Joint Venture Agreement dated 28th March, 2007.

(iii) The Arbitrator shall first decide, as a preliminary issue, as to whether the Joint Venture Agreement is a legal and valid instrument and whether the arbitration agreement exists between the parties.

(iv) The entire record and proceedings in the mini-trial including the depositions of the witness/es and the documents tendered be transmitted to the learned Arbitrator.

(v) The evidence recorded and the documents tendered in this Application during the mini-trial, shall be read as evidence in the arbitration proceedings.

(vi) Only after the learned Arbitrator finds that the Arbitration Agreement exists, the learned Arbitrator shall adjudicate upon the claims and counter claims, if any, and/or all the disputes which arise out of the Joint Venture Agreement dated 28th March, 2007.

(vii) In the event the aforesaid preliminary issue is answered in the negative, the mandate of the Arbitrator would stand terminated.

(viii) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) read with Section 12(1) of the Act, 1996 within two weeks with the Prothonotary and Senior Master and provide copies to the parties.

(ix) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(x) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(xi) In the circumstances of the case, no order as to costs.

(xii) By way of abundant caution, it is clarified that the learned Arbitrator shall not be influenced by any of the observations made hereinabove, as they are confined to determine the issue of exercise of jurisdiction under Section 11 of

the Act.

(N.J.JAMADAR, J.)

67. At this stage, the learned Counsel for the Respondents seeks stay to the execution and operation of this judgment.

68. Since the questions of law have arisen in this Application and the Court is deviating from the earlier order of mini trial, albeit in view of the development in law, it may be appropriate to stay the execution and operation of this judgment for a period of 8 weeks from today.

69. Hence, the execution and operation of the judgment is stayed for a period of 8 weeks from today.

(N.J.JAMADAR, J.)