IN THE HIGH COURT AT CALCUTTA

(Ordinary Original Civil Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

IA No. GA 2 of 2015

(Old No. GA 2998 of 2015)

In

CS 2 of 2015

United Machinery & Appliances

Versus

Greaves Cotton Limited

Mr. Jishnu Chowdhury
Mr. Aritra Basu
Mr. Ratul Das
Mr. Dwip Raj Basu
Mr. Roumyadip Saha

… For the plaintiff.

Mr. Jishnu Saha, Sr. Adv.
Mr. Anirban Ray
Mr. Snehashis Sen
Mr. Abhishek Banerjee
Mr. Danyal Ahmed

… For the defendant.

Hearing Concluded On : 20.02.2024

Judgment on : 21.03.2024

Krishna Rao, J.:

1. The instant application is filed by the defendant under Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, seeking to refer the dispute between the parties to Arbitration in terms of Agreement dated 2nd January, 2007.

2. The plaintiff is a manufacturer of diesel generator sets (in short "DG sets") and also carries on allied businesses like assembling diesel generator sets, distribution of DG sets and sale of DG sets. The plaintiff's generator sets are sold under the trade mark and trade name "United Genset", which enjoys substantial goodwill and reputation in Eastern India.

3. The defendant is a manufacturer of diesel engines including diesel generator engines (hereinafter also referred to as "DG engines").

4. The plaintiff had filed a suit before this being C.S. No. 2 of 2015 (United Machinery & Appliances -vs.- Greaves Cotton Ltd.), and has sought for the reliefs mentioned herein below:

> *(a) Decree for Rs. 4,92,76,854/- as pleaded in paragraph 24 above;*
>
> *(b) Mandatory injunction directing the defendant to forthwith take back all the dead stock, more fully stated in Annexure "J"; hereto; alternatively a decree for Rs.31,04,792/-;*

(c) Interim interest and interest on judgment at the rate of 18% per annum;

(d) Mandatory injunction directing the defendant to have all the Bank Guarantees caused to be furnished by the plaintiff more fully stated in Annexure "M" hereto be discharged/ released;

(e) Mandatory injunction directing the defendant to keep the plaintiff indemnified against any loss that the plaintiff may suffer as a consequence of encashment of any of the Bank Guarantees more fully stated in Annexure "M" hereto and decree for such sum as is equivalent to the amount of the Bank Guarantees found to be encashed;

(f) The defendant be directed to render true and faithful accounts of all dealings and transactions with the plaintiff and thereafter an enquiry be made and appropriate decree be made on the result of such enquiry;

(g) Receiver;

(h) Injunction;

(i) Costs

(j) Further or other reliefs."

5. Mr. Jishnu Saha, Learned Senior Advocate representing the defendant submitted that due to shifting of the registered office of the defendant, records were misplaced due to which there was delay in taking steps with respect of the suit filed by the plaintiff and accordingly, the defendant had filed an application being G.A. No. 2232 of 2015 in C.S. No. 2 of 2015 praying for following reliefs:

"a The delay in filing the application be condoned;

b. Time to file written statement by the defendant by extended for a period of eight (8) weeks from the date of the order to be passed therein;

c. Costs of and incidental to this application to be costs in the same;
d. Such further or order or orders be passed and/or direction or directions be given as to this Hon'ble Court may deem fit and proper."

6. Mr. Saha submitted that subsequently, the defendant had discovered that there is an agreement dated 2nd January, 2007 wherein an Arbitration Clause which binds the parties for the purpose of adjudication of disputes which has arisen between the parties. He submits that immediately the defendant has withdrawn the application being G.A. No. 2232 of 2015 and had filed the present application.

7. Mr. Saha submitted that the agreement dated 2nd January, 2007 was subsequently continued in terms of the minutes of the meeting dated 22nd October, 2009 by which the parties have expressly continued their business till June 2014. He submits that the defendant by a letter dated 3rd July, 2015 has terminated the agreement. On receipt of the letter dated 3rd July, 2015, the plaintiff had sent a reply dated 13th July, 2015 calling upon the defendant to provide the copy of the Agreement dated 2nd July, 2007 and also intimated that the plaintiff has initiated a case against the defendant before this Court for recovery of amount and allied prayers. Mr. Saha submitted that on 8th July, 2015, the defendant had sent a notice to the plaintiff to refer the

dispute to the Arbitrator and the defendant in the said letter also proposed the name of the Arbitrator. On receipt of the said letter, the plaintiff had sent a reply again requesting the defendant to provide the copy of agreement and not agree to appoint Arbitrator.

8. Mr. Saha submitted that Clause 10 of the agreement dated 2nd January, 2007, provides for adjudication of disputes arising therefrom in arbitration. He submits that it is not unusual, agreements to be prepared in duplicate or unusual for agreements to be pre-dated, and that the question as to whether the agreement dated 2nd January, 2007 had been forged and fabricated could not be decided by this Hon'ble Court on the basis of affidavit evidence and must be left to be adjudicated by the Arbitral Tribunal. He also points out that the plaintiff had not denied the terms of the agreement of 2nd January, 2007, had only sought to challenge the same to avoid arbitration.

9. Mr. Saha relief upon the following judgments in support of his submissions:

a. (2016) 10 SCC 386 (A. Ayyasamy vs. A. Paramasivam & Ors.).

b. (2019) 8 SCC 710 (Rashid Raza vs. Sadaf Akhtar).

c. (2021) 4 SCC 713 (Avitel Post Studioz Ltd. vs. HSBC PI Holdings (Mauritius) Ltd.).

d. (2021) 2 SCC 1 (Vidya Drolia & Ors. vs. Durga Trading Corpn.).

e. N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd., (2021) 4 SCC 379

f. Pravin Electricals (P) Ltd. v. Galaxy Infra & Engg. (P) Ltd., (2021) 5 SCC 671

10. Mr. Jishnu Choudhury, Learned Counsel for the plaintiff submitted that in the year 2000, it was agreed between the parties that the defendant would supply D.G. Engines to the plaintiff and the plaintiff being an established OEM (Original Equipment Manufacturer), would thereafter manufacture /assemble D.G. Sets and sell the same under the trade mark "United Gen Set".

11. It had been agreed that the defendant will not engage any other OEM (Original Equipment Manufacturer) in West Bengal and the plaintiff would not enter into other Agreement or arrangement with any other D.G. Engine manufacturer and the parties also agreed with the term that the plaintiff would be given 10% discount on the published price list of the defendant's D.G. Engines and the defendant will not stop supply of D.G. Engines to the plaintiff without giving six months' notice in advance.

12. The procedure as agreed would be that the delivery of D.G. Engines of the defendant would be against supply orders that the plaintiff would issue and the relevant particulars in such regard would be provided by the plaintiff so that the defendant is aware regarding the extent of sales that are being effected by the plaintiff with D.G. Engines supplied by the defendant.

13. By relying on the defendant's representation, the plaintiff set up a new plant at Sanjua, Bibir Hat, 24 Parganas (South), West Bengal – 743377 on a large scale, the land comprises of an area of 2.5 Acres with largest equipments imported from Japan.

14. Mr. Jishnu Chowdhury, Learned Counsel appearing on behalf of the plaintiff submits that the plaintiff by pining its hopes on the defendant had further invested in the form of replacement of machinery, expansion of factory area, other operations along with by employing around 40 number of persons directly and another 60 number of persons through contract labourers, which includes ten qualified engineers who are employed at different levels.

15. Mr. Chowdhury, Learned Counsel appearing on behalf of the plaintiff submits that due to the plaintiff, the defendant's share in Rest of India has also gone up apart from West Bengal and North-East India because of the active participation and aggressive business promotion policies of the plaintiff since the plaintiff was able to capture a large part of the DG sets market in the 30 KVA to 500 KVA categories, whereas the defendant's share in West Bengal market was well below 10% in the year 2000 but had gone up over 15% by 2009 due to higher sale of DG sets by aggressive business promotion by the plaintiff.

16. On 22nd October, 2009, a meeting was held between the defendant and the plaintiff wherein the plaintiff agreed to expand its area of operation from West Bengal to Sikkim and Union Territory of Andaman & Nicobar

Island and this was the meeting where the terms which were agreed upon initially was recorded in writing.

17. In or around 2012, the plaintiff came to know from reliable sources that the defendant has started effecting supply directly in Assam from potentials buyers, i.e. M/s Laxmi Tea Industries, M/s. Farnaaz Tea Pvt. Ltd. etc.

18. In or around July 2014, the defendant stopped supplying DG Engines altogether to the plaintiff, as a consequence to which the plaintiff had to stop manufacture of DG sets and its factory had to be closed down and later on 3rd July, 2015, the agreement was terminated.

19. In or around October, 2015, the defendant filed an application under Section 11 of the Act before the Hon'ble High Court of Bombay, which was subsequently withdrawn by the defendant.

20. Mr. Choudhury submitted that the Agreement relied by the defendant in the application filed before the Hon'ble Bombay High Court and the purported Agreement relied in the present application are not the same, since the version relied upon is one which does not contain either the stamp or the signature of the defendant. The plaintiff thereafter was compelled to initiate a Criminal proceeding against the defendant and now the proceeding is pending before the High Court.

21. Mr. Chowdhury submits that, assuming that the purported document filed before the Hon'ble High Court of Bombay in 2015 is correct, then

in that case the purported agreement filed before this Hon'ble Court is interpolated, forged and fabricated and thus a court should not act on basis of an agreement relied by the defendant.

22. Learned Counsel appearing on behalf of the plaintiff also submits that if a plea of fraud permits the entire contract and if there are issues of forgery, fabrication, interpolation and other criminal charges in respect of the physical existence of the document itself, Section 8 or Section 11 application would be dismissed. He submits that while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the Civil Court on the appreciation of the voluminous evidence that needs to be produced, the court can side track the agreement by dismissing the application under Section 8 and proceed with the suit on merits.

23. The Learned Counsel appearing on behalf of the plaintiff submits that all civil or commercial disputes either contractual or non-contractual which can be adjudicated by a Civil Court can also be adjudicated and resolved through arbitration but where the allegation is that the Arbitration Agreement itself is vitiated by fraud or fraudulent inducement or fraud goes to the validity of the underlying contract and impeaches the arbitration clause itself, the matter cannot be referred to the Arbitrator.

24. Mr. Choudhury Learned Advocate in support of his case relied upon the following judgements:

i. *(1982) 3 SCC 508 (Valiammal Rangarao Ramachar –vs- Muthukumaraswamy Gounder & Anr.).*

ii. *(2016) 10 SCC 386 (A. Ayyasamy -vs- A. Paramasivam & Ors.).*

iii. *(2019) 8 SCC 710 (Rashid Raza –vs- Sadaf Akhtar).*

iv. *(2021) 4 SCC 713 (Avitel Post Studioz Limited & Ors. –vs- HSBC PI Holdings [Mauritius] Limited).*

25. Before filling of this present application, the defendant had filed an application being G.A. No. 2232 of 2015 praying for extension of time to file written statement but subsequently the same was withdrawn and filed the present application. The present application was taken up for hearing by this Court and on 16th September, 2015, this Court had dismissed the application of the defendant by passing the following order:

> *"The application is in the nature of demurer. On the basis of the pleadings it is not possible at this stage to arrive at a definite finding that the claim pleaded by the plaintiff and the agreement relied upon by the applicant under the proceeding are one and an extension of earlier agreement of 2000. Moreover, it appears that the defendant has filed an application seeking an extension of time to file written statement by eight weeks from the date of the order. The applicant cannot deny that such an application has been filed after the service of the Writ of Summons accompanied by a copy of the plaint. Although the applicant may not have filed the written statement dealing with the subsistence of the dispute but the applicant has decided to contest the suit by filing a written statement which*

would be in derogation of a right to have the dispute referred to arbitration and accordingly, there is a case of waiver of right to object the jurisdiction of this court. The applicant cannot be heard to contend at this stage that the applicant was not aware of the nature of the dispute when the application for extension of time to file written statement was filed before this Court. Filing of the said application clearly shows that the applicant is willing to have the dispute decided by a Civil Court and not by arbitration.

This order however shall not construed at the hearing of the suit that the court has decided conclusively that subsequent agreement of 2007 is not a continuation of 2000 and whatever agreement was there had merged in the 2007 agreement.

Under such circumstances, the application being G.A. No. 2998 of 2015 stands dismissed."

26. The defendant being aggrieved and dissatisfied with the order dated 16th September, 2015 had preferred a Special Leave Petition and the Hon'ble Supreme Court had disposed of the said SLP by an order dated 14th December, 2016 by passing the following order:

"13. *From the order impugned, it also reflects that before disposing of application under Section 8 of the 1996 Act the High Court has not looked into questions as to whether there is an agreement between the parties; whether disputes which are subject-matter of the suit fall within the scope of arbitration; and whether the reliefs sought in the suit are those that can be adjudicated and granted in arbitration. In view of the above, we think it just and proper to request the High Court to decide the application afresh in the light of law laid down by this Court in para 19 of the judgment in* ***Booz Allen and Hamilton Inc. v. SBI Homes Finance Limited and others*** *(supra) except the point, which has already been answered in the present case by us.*

> ***14.*** *Accordingly the appeal is allowed. The impugned order, passed by the High Court is set aside. The High Court is requested to decide the application (GA No. 2998 of 2015 in CS No. 2 of 2015) in the light of observation, as above. No order as to costs"*

27. Paragraph 19 of the judgment in the case of ***Booz Allen and Hamilton Inc. vs. SBI Homes Finance Limited and Others*** reported *in* ***(2011) 5 SCC 532*** reads as follows:

> *"**19.** Where a Suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide:*
>
> *(i) Whether there is an arbitration agreement among the parties;*
>
> *(ii) Whether all the parties to the suit are parties to the arbitration agreement;*
>
> *(iii) Whether the disputes which are the subject-matter of the suit fall within the scope of arbitration agreement;*
>
> *(iv) Whether the defendant had applied under Section 8 of the Act before submitting his first statement on the substance of the dispute; and*
>
> *(v) Whether the reliefs sought in the suit are those that can adjudicated and granted in an arbitration;"*

28. The defendant has filed the present application to refer the disputes between the parties to the arbitration relying upon Clause 10 of the agreement dated 2nd January, 2007 which reads as follows :

> *"**10.1.** Any dispute or difference whatsoever arising between the Parties out of or relating to the construction, meaning, scope, operation or effect of this Agreement or the validity or the breach thereof shall be referred to a Sole Arbitrator to be appointed by Greaves. The decision of the Arbitrator shall be final and binding upon the parties. The venue of arbitration shall be Mumbai. The arbitration proceedings shall, in all other aspects, be governed by the provisions of the Arbitration and Conciliation Act, 1996 or any subsequent statutory enactment in place thereof.*
>
> ***10.2.** The Courts of Mumbai shall have exclusive jurisdiction."*

29. The plaintiff has denied the agreement and made out a case that the purported agreement relied by the defendant is forged and fabricated document. The Stamp paper was issued on 3rd January, 2007 but the date mentioned in the agreement is 2nd January, 2007. In the month of October, 2015, the defendant had filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 before the Bombay High Court and in the said application, the defendant had relied upon the agreement dated 2nd January, 2007 but in the said agreement there was no seal and signature of the defendant but in the present application, signature and stamp of the defendant are present.

30. After filing of the suit, the defendant had issued notice to the plaintiff on 3rd July, 2015 by terminating the agreement dated 2nd January, 2007 and the minutes of the meeting dated 22nd October, 2009. In the said notice, the defendant has informed the plaintiff that the business transactions were made by the office of both the parties on the strength of agreement dated 2nd January, 2007 and subsequently by a Minutes

of Meeting dated 22nd October, 2009 and accordingly the existence of the said agreement dated 2nd January, 2007 was confirmed as the business transaction between both the parties are admitted. In reply, the plaintiff has requested the defendant for providing copy of the agreement dated 2nd January, 2007 and also stated that in the minutes of the meeting there is no reference of the agreement.

31. The plaintiff has initiated a criminal case against the defendant for the alleged offence under Sections 418/420/406/465/468/471 of the Indian Penal Code, 1860 and now the matter in pending before the High Court as the defendant has challenged the order of cognizance of the Learned Magistrate. In the case of ***A. Ayyasamy (Supra)***, the Hon'ble Supreme Court held that :

> *"**18.** When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court. The judgment in N. Radhakrishnan does not touch upon this aspect and said decision is rendered after finding that allegations of fraud were of serious nature.*

***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 where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, we are of the opinion 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 simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing 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 for a, 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."

32. In the case of ***Rashid Raza (supra),*** the Hon'ble Supreme Court held that :

*"**4.** The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in paragraph 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."*

33. In the case of ***Valiammal Rangarao Ramachar (Supra)***, the Hon'ble Supreme Court held that:

> *"**3.** Mr. Natesan, learned counsel for the original defendant 2 Valiammal urged that the High Court was in error in holding that the agreement in her favour was anti-dated. In order to substantiate this contention Mr. Natesan took us through both documentary and oral evidence. Having examined the evidence as read by him in the light of the comments made by the High Court we are satisfied that the High Court recorded a correct finding that the agreement in favour of original defendant 3 was ante-dated. There are some tell-tale circumstances unerringly leading to this conclusion but one of which we must take note of is an interpolation of a material nature in Ex. B-1, styled as counterpart agreement, Ex. A-1 being the contract for sale entered into by the vendor-defendant 1 in favour of the present respondent 2, the original plaintiff. This interpolation is indisputably established by a tell-tale circumstance that the interpolated portion is absent in Ex. A-1 which was entered into with the original plaintiff. The interpolation is motivated inasmuch as when translated it meant that the plaintiff who seeks specific performance of his contract was aware of and had the knowledge of an agreement which the vendor appears to have entered into with original defendant 2. There was hardly any explanation about the interpolation offered to the High Court and in fact none was forthcoming to us also. A motivated interpolation in a solemn document completely vitiates the document. And we call it a motivated interpolation because the price of 'B' schedule properties offered by defendant 2 who resists now the specific performance in favour of the original plaintiff in the agreement Ex. A-1. Common course of human conduct has uptil now indicated to us that solemn agreements have been violated when more price is offered, but here is a breach attempted for a lesser price and by a fairly crude attempt which stars in the face. Apart from many others, this one circumstance clearly indicates that the High Court was fully justified in recording the conclusion that the agreement in favour of original defendant 2 was certainly ante-dated or at any rate was not one good enough to*

deny specific performance to the original plaintiff. therefore the appeal preferred by the original defendant 2 must fail on this ground alone."

34. In the case of ***Avitel Post Studioz Ltd. (Supra),*** the Hon'ble Supreme Court held that :

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

35. In the case of ***Vidya Drolia (Supra)***, the Hon'ble Supreme Court held that:

*"**244.** Before we part, the conclusions reached, with respect to question no. 1, are:*

***244.1.** Sections 8 and 11 of the Act have the same ambit with respect to judicial interference.*

***244.2.** Usually, subject matter arbitrability cannot be decided at the stage of Sections 8 or 11 of the Act, unless it's a clear case of deadwood.*

***244.3.** The Court, under Sections 8 and 11, has to refer a matter to arbitration or to appoint an arbitrator, as the case may be,*

unless a party has established a prima facie (summary findings) case of non-existence of valid arbitration agreement, by summarily portraying a strong case that he is entitled to such a finding.

244.4. *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, i.e., 'when in doubt, do refer'.*

244.5. *The scope of the Court to examine the prima facie validity of an arbitration agreement includes only:*

244.5.1. *Whether the arbitration agreement was in writing? or*

244.5.2. *Whether the arbitration agreement was contained in exchange of letters, telecommunication etc?*

244.5.3. *Whether the core contractual ingredients qua the arbitration agreement were fulfilled?*

244.5.4. *On rare occasions, whether the subject matter of dispute is arbitrable?"*

36. In the case of ***N.N. Global Mercantile (P) Ltd. (Supra),*** the Hon'ble Supreme Court held that :

*"**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 be adjudicated only by*

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

37. In the case of ***Pravin Electricals (P) Ltd. (Supra)***, the Hon'ble Supreme Court held that:

> *"**29.** The facts of this case remind one of Alice in Wonderland. In Chapter II of Lewis Caroll's classic, after little Alice had gone down the Rabbit hole, she exclaims "Curiouser and curiouser!" and Lewis Caroll states "(she was so much surprised, that for the moment she quite forgot how to speak good English)". This is a case which eminently cries for the truth to out between the parties through documentary evidence and cross-examination.Large pieces of the jigsaw puzzle that forms the documentary evidence between the parties in this case remained unfilled. The emails dated 22nd July, 2014 and 25th July, 2014 produced here for the first time as well as certain correspondence between SBPDCL and the Respondent do show that there is some dealing between the Appellant and the Respondent qua a tender floated by SBPDCL, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. 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 authorised 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 Dhrolia (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."*

38. In the present case, the plaintiff at the very outset denied the arbitration agreement. The defendant relying upon the agreement dated 2nd January, 2007 had initially filed an application under Section 11 of the Arbitration Act, 1996 before the Bombay High Court but subsequently the same was withdrawn with the liberty to file afresh. In the said application, the defendant has enclosed the Agreement but at the relevant point of time, there was no signature and seal of the defendant Company. In the present proceeding, the agreement contains the signature and seal of both the parties. The agreement is dated 2nd January, 2007 but the bond was purchased on 3rd January, 2007. The plaintiff has relied upon the Memorandum of Understanding dated 22nd October, 2009 wherein area of operation of the business of the parties were extended but in the said MOU there is no mentioning about the agreement dated 2nd January, 2007. The defendant has also not filed any documents i.e. invoices, challan or any other correspondences to establish that the purported agreement is in existence.

39. On receipt of the notice dated 3rd July, 2015, the plaintiff had sent a reply and requested the defendant to provide the copy of the agreement dated 2nd January, 2007 but the defendant has not provided the same. Plaintiff has filed a complaint before the Learned Court of Chief Metropolitan Magistrate and upon examination of the witnesses on behalf of the plaintiff, the Learned Magistrate had sent the matter to the concern Police Station for further enquiry. On completion of enquiry, the police has submitted report wherein prima facie a case under

Section 418/420/406/465/468/471 of the Indian Penal Code, 1860 was made out against the defendants and cognizance has been taken against the defendant for the said offence and summons have been issued against the defendant.

40. In the case of ***A. Ayyasamy (Supra), Rashid Raza (Supra)*** and ***(Avitel Post Studioz Ltd. (Supra),*** it is held that where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. In the present case also the allegations of fraud against the defendant is serious in nature, criminal case with respect to agreement is also pending against the defendant thus it would not be proper for this Court to refer the disputes between the parties to the arbitration.

41. In view of the above, the application filed by the defendant being **G.A No. 2 of 2015 (Old No. GA 2998 of 2015)** is **dismissed**.

(Krishna Rao, J.)