



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/PETN. UNDER ARBITRATION ACT NO. 146 of 2019

With

R/PETN. UNDER ARBITRATION ACT NO. 148 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

**M/S SAI POLYPLAST
Versus
VIKAS RAJ CHHAJER**

Appearance:

**MR NIRAV THAKKAR with MS ROMA I FIDELIS(3529) for the Petitioner(s)
No. 1,2**

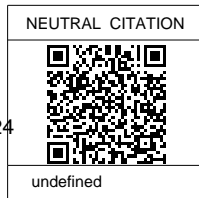
**MR VISHAL J DAVE with MS. HIRAL U MEHTA, MR JAY KOSHTI and MR.
YUVRAJ CHAUHAN for the Respondent(s) No. 1**

**CORAM: HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE
SUNITA AGARWAL**

Date : 16/02/2024

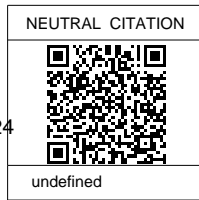
CAV JUDGMENT

1. In these set of applications seeking for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 (in short as "the Act'1996"), the



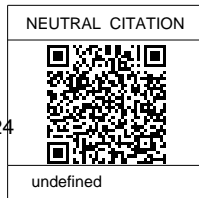
parties are same and issues are interconnected and common and, as such, they have been heard and are being decided by this common judgement.

2. The partnership firm M/s. Om Polyplast (Applicant No.1 in Arbitration Petition No.148 of 2019) came into being vide partnership deed dated 01.04.2012, wherein Pradeep Gaurishankar Trivedi (Applicant No.2), Vikas Raj Chhajer(the respondent) and one Mr. Manoj N.Pandya entered into a partnership. On 01.04.2014, Mr. Manoj N. Pandya had retired from partnership vide a retirement deed. The respondents continued with partnership business of M/s. Om Polyplast of manufacturing PVC bags. Later, the respondent, namely Vikas Raj Chhajer intended to retire from partnership firm and, as such, the partnership-cum-retirement deed was executed on 19.03.2018 between the applicant and Vikas Raj Chhajer. It is stated that vide the said deed, a new partnership firm M/s. Sai Polyplast was created by three erstwhile partners, namely, Pradeep Gaurishankar Trivedi (Applicant No.2) and Vikas Raj Chhajer (respondent herein) and Manoj N. Pandya, who again retired from the partnership firm M/s. Sai Polyplast vide retirement deed dated 01.04.2018. The partnership deed dated 01.04.2018 of creation of M/s. Sai Polyplast contains Arbitration Clause in Clause No.23 thereof. M/s. Sai Polyplast continued with the



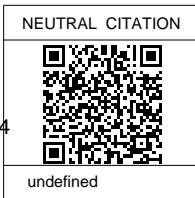
similar business of manufacturing and trading of PVC as that of M/s. Om Polyplast, the erstwhile partnership firm.

3. It is contended in the petition that during the tenure as partner of two partnership firms respondent, namely Vikas Raj Chhajer had entered into *mala fide* transactions from the funds of the partnership firm and purchased many articles for his personal use for which bills were paid through the accounts of the partnership firm. The respondent was handling and managing the work of the partnership firm as the areas of operation of two partnership firms, namely M/s. Om Polyplast and M/s.Sai Polyplast were different; M/s. Om Polyplast was based at Vapi, whereas M/s. Sai Polyplast was in Surat. It is contended that the respondent had defied the deed and trust of the applicant herein and deliberately defaulted to comply with the responsibility, obligations and duty entrusted as a partner. While retiring from M/s. Om Polyplast and entering in M/s. Sai Polyplast, the respondent had misrepresented on factual aspects. During the audit of the erstwhile firm M/s. Om Polyplast, from which the respondent had retired, it was revealed that huge fraud had been played by the respondent. The notice of termination of respondent as a partner of the firm was given on 16.10.2018. The said notice was not refused by the respondent. In the meantime, forensic audit report of M/s. Om Polyplast for the



period from April, 2014 to March, 2018 was submitted on 27.03.2019. It came to the knowledge of the applicant that huge amount of funds of the partnership firms, namely M/s. Om Polyplast and M/s. Sai Polyplast were misappropriated by the respondent and, hence, criminal proceedings on the allegation of cheating and fraud were initiated by the applicant against the respondent and his father-in-law, namely Mr. Mool Chand Jain, who was instrumental in the act of misappropriation. The father-in-law of the respondent, on the other hand, had filed false complaints against the applicant herein.

4. A legal notice dated 30.05.2019 was sent by the respondent with respect to payment of dues, which was replied by the applicant vide letter dated 10.07.2019. In the forensic audit report of M/s. Sai Polyplast for the period from April, 2018 to June, 2018 dated 27.03.2019, the misappropriation of the aforesaid partnership firm was reported.
5. Multiple litigations were instituted by both the parties. Settlement talks were held since July, 2019, however, nothing could be materialized and hence the applicants are constrained to file applications under Section 11 of the Act'1996. The cause of action for filing the applications seeking for appointment of Arbitrator is that the respondent had committed fraud in the firms and when it was detected



by the applicant from the audit reports, arbitration clause was invoked asking the respondent to refer the matter to the Arbitrator. The respondent has failed to do so and, hence, the instant application. The arbitration clause in the above noted two partnership deeds, read as under:

6. Arbitration clause of M/s. Om Polyplast Clause 11 of the deed dated 01.04.2012.

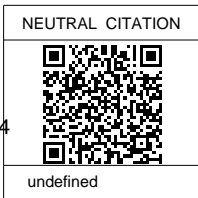
“Arbitration:-

That all disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective representatives or between any partners or representatives of the other partners touching this deed or the construction or application thereof or any clause or thing herein contained on any account, valuation or division of assets debts or liabilities to be made hereunder or any act, deed or omission of any partner or as to any other matter in any way relating to the partnership business or the affairs thereof or the rights, duties or liabilities of any partner under this deed shall be referred to arbitration in accordance with the provisions of the Indian Arbitration Act, 1996 or any substituted enactment or modification thereof for the time being in force. Such reference to arbitration shall be a condition precedent to the obtaining of any relief in any court of law in respect of any such dispute or difference.”

Arbitration Clause of M/s. Sai Polyplast Clause 23 of the deed dated 01.04.2018.

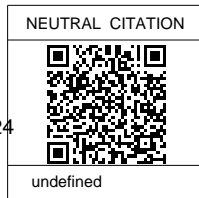
“23. Arbitration:-

All the disputes and questions whatsoever which shall either during the partnership or afterwards arise between the partners or their respective representatives touching these presents or the construction or application thereof or any clause or thing herein contained or a account valuation or division of assets, debts, or liabilities to be made hereunder or as to any act, deed or omission or



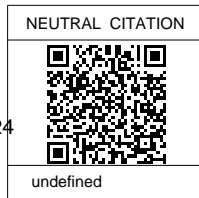
any partner or as to any other matter in any way relating to the partnership business or the affairs thereof or the rights duties or liabilities or any person under these presents shall be referred to arbitration in accordance with and subject to the provisions of Arbitration Act and Conciliation Act, 1996 or any statutory modification or re-enactment thereof for the time being in force.”

7. The respondent in his affidavit-in-reply stated that vide letter/ notice dated 31.05.2019, the answering respondent had demanded amount qua the share of profit from the business of M/s. Om Polyplast amounting to Rs.18,83,900/- and salary to the tune of Rs.1,40,000/- in addition to 20% of the share of profit of the firm, namely M/s. Sai Polyplast. The respondent was never given charge of the finance department. Further, since the allegations against the respondent are of fraud by siphoning huge amount from the firm, which have arisen from criminal disputes between the parties, qua which various FIRs have been filed by both the parties, the dispute is non-arbitrable. It was contended that any dispute arising from criminal case cannot be determined by invoking arbitration clause.
8. The respondent has also raised the dispute with regard to the correctness of the audit report and the impartiality of the auditor/chartered accountant appointed by the petitioner No.2 himself. The contention is that the allegations reported in the forensic audit report are incorrect, false and fabricated



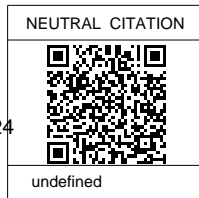
in collusion with the auditor/chartered accountant hired by the petitioner No.2.

9. It is further contended that the partnership deed, which contains arbitration clause is insufficiently stamped. The details of FIR lodged by the parties have been given in a table in the affidavit-in-reply filed by the respondent, a perusal thereof indicates that the criminal cases have been filed under Sections 406, 420, 467, 468, 471, 120-B, 114 and 195 of the Indian Penal Code.
10. It is contended that the FIRs are pursuant to the same set of transactions of the firm as voiced in the petition. The complaints with regard to tax evasion by the partnership firm M/s. Om Polyplast has been made before the Income-Tax authority situated at Vapi and Jodhpur in the year 2018-19. The present petition is nothing but a falsification of the books of accounts and a counter-blast to the action taken by the respondent and, as such, is liable to be dismissed.
11. Learned counsel for the respondent has placed reliance upon the decision of the Apex Court in the case ***Afcons Infrastructure Ltd and others vs. Cherian Varkey Construction Co.(P) Ltd and others, (2010) 8 SCC 24*** to contend that it is categorically held therein that as to what categories of cases are considered to be not suitable for ADR Process(Alternative Dispute Resolution process) in paragraph



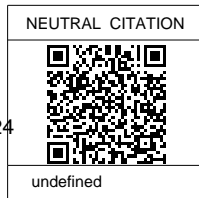
No.'18' of the said decision. Reference has been given to the category of cases where normally the reference to any of the ADR process cannot be made, which include cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc. and the cases involving prosecution for criminal offence. It was argued that referring to Paragraph Nos.'32' and '33' of the said decision, it was noted therein that arbitration is an adjudicatory dispute resolution process, by a private firm governed by the provisions of Act'1996, the said Act itself makes it clear that there can be reference to arbitration only if there is an arbitration agreement " between the parties", however, the Court has no power, authority or jurisdiction to refer unwilling parties to arbitration, in case there is no agreement in writing between the parties for reference to arbitration. It was, thus, contended that in cases, where there is an agreement between the parties to refer the dispute to arbitration and where the dispute is arbitrable, the matter can only be referred to arbitration.

12. It was vehemently contended that, in the instant case, in view of the nature of disputes between the parties where the allegations are made of inquiry into the fraud committed by the respondent, no reference can be made of such dispute to the Arbitrator. The allegations are of criminal offence based



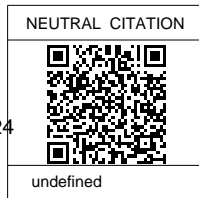
on the allegations of the fraud, criminal breach of trust, dishonesty, fraudulent action, mischief, actions and inactions contrary to the partnership deed, as stated in the notice issued to the respondent where no amount due towards the respondent has been stated, no inquiry can be made by the Arbitrator. It was argued that, in any case, looking to the nature of allegations of siphoning of funds of the partnership firm and the cross-FIR being filed by the parties, the dispute is not governed by the arbitration clause and cannot be referred to the Arbitrator. Both the petitions are, thus, liable to be dismissed.

13. Learned counsel for the petitioner, however, relied upon the decision of the Apex Court in the case of ***Avital Post Studioz Limited and others vs. HSBC PI Holdings (Mauritius) Limited, (2021)4 SCC 713*** to substantiate his stand that even the dispute involving the question of fraud, false representation, diversion of funds, which are *inter se* parties, having no public flavour, is arbitrable. The allegations of fraud and misrepresentation does not entail the invalidity of the arbitration clauses. The only exceptions are where the Court finds *prima facie* that there is no valid arbitration agreement or the arbitration agreement became null and void, inoperative or incapable of being performed. All disputes relating to right in personum including the issues of



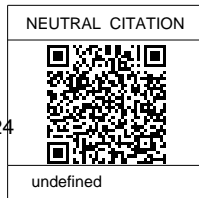
misappropriation of funds, malpractices raised in a dispute between the partners can be gone into by the Arbitrator.

14. Heard learned counsel for the parties and perused the record. To deal with the controversy at hand, it would be apt to go through the decisions of the Apex Court on the issue of arbitrability of dispute where fraud is alleged.
15. In the case of ***World Sport Group (Mauritius) Limited vs. MSM Satellite (Singapore) Pte. Limited, (2014) 11 SCC 639***, it was held that the arbitration agreement does not become “inoperative” or incapable of being performed” where the allegations of fraud have to be inquired into and the Court cannot refuse to refer the dispute to arbitration as provided in Section 45 of the Act’1996 in the matter of enforcement of foreign awards, on the ground that allegations of fraud have been made by the party, which can only be inquired into by the Court and not by the Arbitrator. The Court can decline to make a reference to a dispute covered by the arbitration agreement, only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.
16. In ***A. Ayyasamy vs. A. Paramasivam and others, (2016)***



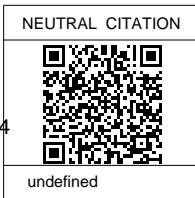
10 SCC 386, the trial Court had rejected the application under Section 8 of the Act'1996 holding that as there were serious allegations as to fraud and malpractices committed by the appellant, therein, in respect of the finances of the partnership firm, the case does not warrant to be tried and decided by the Arbitrator, and Civil Court would be very competent, which has requisite means to decide such complicated matters.

17. While dealing with the said stand of the respondent therein on the question of maintainability of the suit on the ground that the parties had agreed to settle the disputes through the means of arbitration having regard to the existence of the arbitration agreement between them, the question as to the correctness of the stand of the trial Court was examined by the Apex Court. It was noted at the beginning that in so far as Arbitration and Conciliation Act, 1996 is concerned, it does not make any specific provision for including any category of disputes terming them to be non-arbitrable. A number of pronouncements have been rendered laying down the scope of judicial intervention in case where there is an arbitration clause, with clear and unambiguous message that in such an event, judicial intervention would be very limited and minimal.
18. When arbitration proceedings is initiated by one of the



parties, because of existence of the arbitration agreement between them, Section 5 of the Act by a non-obstante clause, provides clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of the arbitration clause or the competence of the arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the arbitral Tribunal itself which is to decide, in the particular case, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid ground. Once the arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage, the aggrieved party is allowed to raise such objection before the Court in the proceedings under Section 34 of the Act'1996 while challenging the arbitration award.

19. Considering the decision of the Apex Court in the case of ***Kvaerner Cementation India Limited vs. Bajranglal Agarwal and another, (2012) 5 SCC 214***, it was noted therein that the Courts have held that certain disputes like

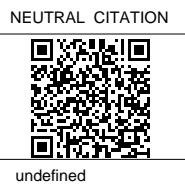


criminal offence of a public nature, disputes arising out of the illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration amongst various categories of disputes as referred to be non-arbitral. Fraud is one such category spelled out by the decisions of the Apex Court, where disputes would be considered as non-arbitral. However, moot question addressed therein was whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the Civil Court.

It was observed in Paragraph no.18 as under: -

“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.”

20. It was further observed in paragraph Nos.'25','35','38','43',45.2','53' as under:



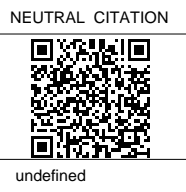
“25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very 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....

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....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.”

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35. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration “subject to the dispute being governed by the arbitration agreement”



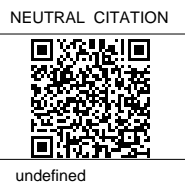
unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz-Allen and Hamilton Inc. v. SBI Home Finance Ltd.[13], this Court held that adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as:

- (i) Disputes relating to rights and liabilities which give rise to or arise out of criminal offences;*
- (ii) Matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;*
- (iii) Matters of guardianship;*
- (iv) Insolvency and winding up;*
- (v) Testamentary matters, such as the grant of probate, letters of administration and succession certificates; and*
- vi) Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.*

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishore Shah v. Jayesh Dinesh Shah[14], this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.

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38. Hence, in addition to various classes of disputes which are generally considered by the courts as appropriate for decision by public fora, there are classes of disputes which fall within the exclusive domain of special fora under legislation which confers exclusive jurisdiction to the exclusion of an ordinarily civil court. That such disputes



are not arbitrable dovetails with the general principle that a dispute which is capable of adjudication by an ordinary civil court is also capable of being resolved by arbitration. However, if the jurisdiction of an ordinary civil court is excluded by the conferment of exclusive jurisdiction on a specified court or tribunal as a matter of public policy such a dispute would not then be capable of resolution by arbitration.

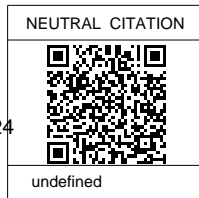
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43. Hence, allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

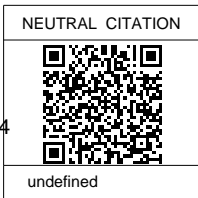
45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. 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. 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.

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



21. In a recent decision in the case of **Rashid Raza vs. Sadaf Akhtar (2019) 8 SCC 710**, a dispute has arisen as to the maintainability of the application under Section 11 of the Act'1996 seeking appointment of an Arbitrator under the arbitration clause, contained in the partnership deed between the parties. In the said case, an FIR was lodged by one of the partners alleging siphoning of funds and various business improprieties that were committed and the matter was under investigation. The High Court therein citing the decision of the Apex Court in **A. Ayyasamy** (supra) had dismissed the application under Section 11 noticing paragraph No.'16' of the said decision that the dispute may require evidence on the part of both the parties to come to a finding ,which can be properly undertaken by a Civil Court of competent jurisdiction. Reverting to the said decision of the High Court, it was observed by the Apex Court that the law laid down by the Apex Court in **A. Ayyasamy's** case was not in paragraph No.'16' rather in paragraph No.'25' that mere allegation of fraud simpliciter may not be a ground to nullify the fact of arbitration agreement between the parties. It is only in those cases where the Court finds that there are very serious allegations of fraud, which make a virtual case of criminal offence or where the allegations of fraud are so complicated that it becomes absolutely essential that such complex issues



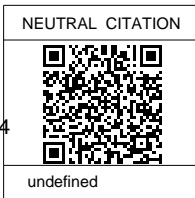
can be decided only by the Civil Court on the appreciation of the voluminous evidence that needs to be produced, the dispute can be said to be non-arbitrable.

22. The above principles in **A. Ayyasamy** (supra), have been noted and the tests laid down, therein are discussed as under:-

“4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication serious 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.

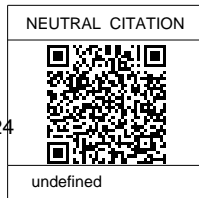
5. Judged by these two tests, it is clear that this is a case which falls on the side of “simple allegations” as there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, arbitration clause concerned in the said deed. Secondly, all the allegations made which have been relied upon by the learned counsel appearing on behalf of the respondent, pertain to the affairs of the partnership and siphoning of funds therefrom and not to any matter in the public domain.”

23. In another recent decision in **Avital Post Studioz Limited** (supra), the Apex Court has considered the law in India qua arbitrability when the allegations of fraud are raised by one of the parties to the arbitration agreement. Referring to a long line of decisions of the Apex Court in **Afcons Infrastructure Ltd** (supra), **A. Ayyasamy** (supra) and **Rashid Raza**(supra) it was held in paragraph No.35 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 or breach thereof, but questions arising in the public law domain.”*

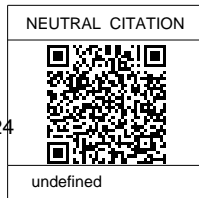
24. It was observed that the broad statement of law in ***Afcons Infrastructure Ltd*** (supra) in item (iv) of quote in paragraph No.14 that “Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc, is to be understood in the sense laid down in ***A.Ayyasamy*** (surpa) **and *Rashid Raza*** (supra).
25. The proposition of law laid down by the Apex Court in the case of ***P. Swaroopa Rani vs M.Hari Narayan, 2008 (5) SCC 765*** was noted that it is well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether the Civil proceedings or Criminal proceedings shall be stayed depends upon the facts and circumstances of the case. Referring to other decisions of the Apex Court, it was noted that if primacy is to be given to the other proceedings, indisputably the civil suit must be determined on its own merit, keeping in mind the evidence



brought before it and not in terms of evidence brought in the criminal proceedings.

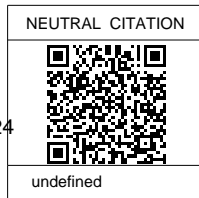
It was noted that the issue on the law of conflict of evidence between the civil and criminal courts stands crystallized to the fact that the findings of fact recorded by the Civil Court do not have any bearing so far as criminal case is concerned and vice-verse. Standard of proof is different in civil and criminal cases. In civil cases, it is preponderance of probabilities, while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory or any legal principle that findings recorded by the Court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter and both the cases have to be decided on the basis of the evidence adduced therein.

In light of the aforesaid, it was observed that the decision of the Apex Court in ***Afcons Infrastructure Ltd*** (supra), ***Booz Allen Hamilton Inc. v. SBI Home Finance Ltd & Ors, (2011) 5 SCC 532***, must 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 subject matter of such proceedings under Section 17 of the Contract Act and/or the tort of deceit, the mere fact that the



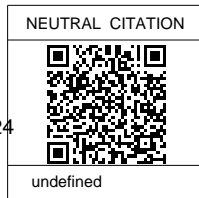
criminal proceedings can or have been instituted in respect of same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.

26. Reference was made to the decision of the Apex Court in ***Fazal D. Allana vs. Mangaldas M. Pakvasa, 1921 SCC Online Bom 122***, wherein noticing Section 17 of the Contract Act, which defines fraud, it was observed in ***Avital Post Studioz Ltd*** (supra) that Section 17 of the Contract Act only applies if the contract itself is obtained by fraud or cheating. However, a distinction is made between a contract being obtained by fraud and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating. The latter would fall outside Section 17 of the Contract Act, in which the remedy for damages would be available, but not the remedy for treating the contract itself as being void. The fraud that is practiced outside of Section 17 of the Contract Act, i.e. in the performance of the contract, may be governed by the tort of deceit, which would lead to damages, but not recession of the contract itself. (Reference to **1950 SCC 794 State of Tripura vs. Province of East Bengal**). It was noted that both kinds of fraud are subsumed within the expression “fraud” when it comes to arbitrability of an agreement, which contains an arbitration clause.
27. Applying twin tests laid down in the case of **A. Ayyasamy**

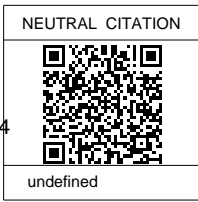


(supra) and approved in **Rashid Raza** (supra) therein to decide the question of arbitrability of dispute in a matter where there are allegations of fraud, it was held in paragraph No.'35' quoted hereinabove.

28. It was, thus, held that 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, the application invoking arbitration clause can be rejected. Where there are simple allegation of fraud touching upon the internal affairs of the party *inter se* which has no implications in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration.
29. While applying the law laid down in the Apex Court, in the facts of the instant case, it may be noted that in both the petitions under Section 11 of the Arbitration Act, 1996, reading of the arbitration clause noted hereinabove indicates that all disputes and questions whatsoever arising between the partners, during the partnership or afterwards, relating to account, evaluation or division of assets, duties or



liabilities to be made thereunder, or as to any act, deed or omission of any partner or as to any other matter in any way relating to the partnership business or the affairs thereof or the rights, duties or liabilities of any person under the deed, shall be referred to arbitration in accordance with the provisions of the Act' 1996. The result is that all disputes and differences between the parties arising out of or in relation to the contract, namely partnership deed on the allegations of action or omission of the partner or the rights, liabilities of the partner has to be determined by referring the dispute to arbitration in accordance with the law. The allegations in the criminal proceedings drawn by the rival parties by lodging the FIR are pertaining to the allegations of fraud and misappropriation of funds committed by one partner in the accounts of the firm, being inter se parties, having no implications in the public domain, does not stand to the twin tests laid down by the Apex Court in **A. Aiyaswami's** case affirmed in **Rashid Raza** (supra). The phrase in **Afcons Infrastructure Ltd** (supra) relied on by the learned counsel for the respondent has to be understood in view of the law laid down by the Apex Court in **A. Ayyasamy** (supra) and **Rashid Raza** (supra), as held in **Avital Post Studioz Ltd** (supra). The dispute pertaining to impersonation, false representation and diversion of funds raised herein is held to

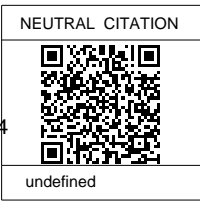


be arbitrable, in view of the law laid down by the Apex Court discussed hereinabove. The objection as to the maintainability of the applications under Section 11 of the Act'1996 is liable to be turned down.

30. Noticing the above, I proceed to pass the following :

O R D E R

- (i) Both the petitioners are **ALLOWED**.
- (ii) Mr. V.P. Patel, Former Judge, Gujarat High Court residing at Residence : D-39, Swastik - 1, Bungalow & Row House, Opp. Gujarat High Court, RC Technical Road, Ghatlodiya, Ahmedabad - 380061, (Mobile Number: 7574812176 and email address: vishnukumarppatel@gmail.com is appointed as sole Arbitrator to resolve the disputes between the parties in accordance with the Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021. Both parties would be governed by said Rules.
- (iii) Registry is directed to communicate this order to the sole arbitrator forthwith by speed post. No order as



to costs.

Consequently, all pending connected application/s, if any, stands disposed of.

SUDHIR

(SUNITA AGARWAL, CJ)