2025 INSC 933

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. OF 2025
ARISING OUT OF SLP (C) No. 10455 OF 2020

THE MANAGING DIRECTOR BIHAR STATE FOOD AND CIVIL SUPPLY CORPORATION LIMITED & ANR. ..APPELLANT(S)

VERSUS

SANJAY KUMAR ..RESPONDENT(S)

WITH

CIVIL APPEAL NO. OF 2025
ARISING OUT OF SLP (C) No. 10926 OF 2020

WITH

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J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

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1. Leave granted.

I. Introduction.

2. These appeals arise out of the final judgment and order passed by the High Court of Judicature at Patna allowing

applications under Section 11 of the Arbitration and Conciliation Act, 1996[1] and appointing arbitrators in several cases.

2.1 Substantial arguments were centred around the issue of arbitrability in cases of serious fraud. We have considered this issue and laid down the principles that govern this issue. We have also considered the stage at which such questions are to be raised while considering an application under Section 11 of the Arbitration and Conciliation Act. Before we deal with these issues the necessary facts are as follows.

II. Facts.

3. The appellant, Bihar State Food and Civil Supplies Corporation[2], undertook the work of procurement of paddy from the farmers in the State of Bihar under a scheme evolved by the Food Corporation of India[3]. The scheme provided that the paddy procured by the Corporation from the farmers has to be converted into rice and the rice shall in turn be purchased by the FCI for distribution under PDS schemes. In furtherance of the scheme the appellant entered into agreements with various rice millers across the state for custom milling of paddy procured from the

[1] Hereinafter referred to as the 'Arbitration Act.'
[2] Hereinafter referred to as the 'Corporation'.
[3] Hereinafter referred to as the 'FCI'.

farmers. As per the agreement various quantities of paddy were allotted to the rice millers and they were to deliver rice quantified at 67% of the paddy supplied to them. Relevant clauses of the agreement including clause 16 relating to arbitration, which is the basis for filing applications under Section 11 of the Arbitration Act is as follows:-

> "*15. The second party agrees that in case, any amount found recoverable on account of default, loss, damage on the part of the second party, the said recoverable amount with interest will be recovered as Land Revenue under Bihar & Orissa Public Demands Recovery Act, 1914, by instituting Certificate case before the concerned District Certificate Officer.*
>
> *16. In case of disputes both parties agree to settle the issue(s) on mutual discussions. Failure to reach agreement the matter will be referred to Arbitrator. It has been also agreed that the Arbitrator will be District Collector of the concerned District whose decision shall be final, concerning the dispute referred to him."*

4. It is evident from the above that under Clause 15, the agreement contemplated recovery of dues as land revenue under the Bihar and Orissa Public Demands Recovery Act, 1914[4]. Further, under Clause 16, if an attempt to settle disputes through mutual discussions fails, then dispute will be referred to arbitration.

5. Within a year of entering into the contracts, the Corporation realised that the respondents have failed to supply the agreed

[4] Hereinafter referred to as the 'Recovery Act'.

amount of milled rice and, therefore, initiated proceedings under the Recovery Act as contemplated under Clause 15 of the agreement. Challenging the legality and validity of initiation of the recovery proceedings, the respondents filed Writ Petitions under Article 226 of the Constitution challenging the demand notices issued under the Recovery Act. These petitions came to be disposed of by the High Court by its orders dated 22.07.2014 and 23.07.2014 by holding that there is a parallel remedy of arbitration provided under the agreement.

6. Dissatisfied with the orders passed by the Single Judge, the respondents approached the Division Bench of the High Court by filing the Writ Appeals. The Division Bench disposed of the appeals by its order dated 17.04.2015, affirming the decision of the Single Judge by holding as under:

> "*If it is well established that even in cases of such nature this Court certainly can interfere. However, one peculiar situation that emerges in these cases is that apart from enabling provision, i.e. Clause-15, the agreements contained Clauses 16 that provided for conciliation or Arbitration. It reads as under:-*
>
> > *16. In case of disputes both parties agree to settle the issue(s) on mutual discussion. Failure to reach agreement the matter will be referred to Arbitrator. It has been also agreed that the Arbitrator will be District Collector of the concerned District whose decision shall be final, concerning the dispute referred to him.*
>
> *From a perusal of this, it becomes clear that if there exists the dispute between the parties, the recourse must be had to conciliation, as a first step and, if that does not fructify, the*

steps need to be taken to get the dispute resolved through Arbitration. It is a different matter that the Collector is the named Arbitrator in all these cases.

Once the parties have agreed to a particular mode of resolution of dispute, that too, those covered by Arbitration and Conciliation Act, 1996, the question of entertaining the writ petition, in relation to that very dispute, does not arise. The plea of the appellants that the arbitration by the Collector may not be effective, can be certainly agitated before the proper forum, but not in the writ petition. Such a course would invariably be available in the process of availing the remedy of arbitration, but not outside the same.

The Learned Single Judge has taken correct view of the matter in refusing to entertain the writ petitions after taking note of the existence of clauses providing for arbitration. The interests of the appellants have already been adequately protected by stipulating time for the concerned authorities to take action in the event of any representations in terms of Clause 16 being made."

(emphasis supplied)

7. Review Petitions filed against the above referred order by the respondents were also dismissed by the Division Bench. Subsequently, the Enforcement Directorate also initiated proceedings against the respondents under the PMLA.

8. In the meanwhile, it is alleged by the appellants that a massive fraud by rice millers leading to a huge loss of more than a thousand crores to the public exchequer came to light. The Corporation initiated criminal proceedings by filing almost 1200 FIRs against the rice millers situated across the State of Bihar.

The relevant extract from an FIR in one of the cases is extracted below for ready reference:[5]

> *"In context of aforesaid subject, it is to say that, Mr. Sanjay Kumar, age about 40 years, Proprietor, Sanjay Rice Mill, Dubhvaliya, S/o- Mr. Avadh Bihari Sao R/o- VillageDubhvalia, P.S.- Bagha-2, Dist.- West Champaran in Procurement Year 2012-13 executing the Deed of Agreement, for milling procured total 11090.80 quintal paddy, of which 67 % C.M.R. (Rice) is total 7430.83600 quintal, which was to be deposited by him by the last date of 31.12.2013 determined by the Government of India. But by him only 2970.00 quintal C.M.R. (Rice) is deposited in the godown of Food Corporation of India. Repeatedly warning was given to Mr. Sanjay Kumar for depositing rice, but by him rice is not deposited. By him against total 4460.83600 quintal C.M.R. (Rice) @ Rs. 2165.56 per quintal costing total Rs. 9660208.00 [Ninety Six Lakh, Sixty Thousand, Two Hundred & Eight] by the date of 20.05.2016 total 13, 00, 000.00/- [Thirteen Lakh] rupees through Bank Demand Draft is deposited. Thus rest amount of Rs. 8360208.00/- [Eighty Three Lakh, Sixty Thousand, Two Hundred & Eight] are defalcated under criminal conspiracy and heavy damage is caused to the governmental amount. At the same time, up to date of recovery at the rate of 8 % the amount of interest is also recoverable."*

9. Upon completion of investigation, chargesheets came to be filed in the year 2016, whereunder the respondents were charged for committing offences under Sections 420 and 409, IPC. The relevant portion from one such chargesheet is extracted hereinbelow for ready reference:[6]

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[5] First Information Report No. 198/16, Police Station Bagha, West Champaran, Bihar (26.05.2016).
[6] Final Report, Chief Judicial Magistrate, Kaimur Bhabua, Bihar (18.12.2016).

> "*This informant Shahnawaz Ahmed Niyazi son of Md. Niyazuddin resident of Anand Bazar, Cantt Patna present District Manager, Kaimur State Food Corporation, vide office number 577 dated 7.06.2016 on this basis, F.I.R against M/s Shiv Shanti Rice Mill through its proprietor namely Abhishek Kumar son of Shiv Prasahan Ray village - Panchpokhari P.S.- Kudra, District -kaimur on charges of fraudulently embezzling government rice worth Rs 67,83,705.40. found accused, the investigation so far into the case to be true based on the statement of informant, supervision, and available evidences near the incident site. This case has been found true under section 420/409 IPC against the accused Abhishek Kumar son of Shiv Prasahan Ray, village-panchpokhari, P.S.- Kudra, District-Kaimur, the charge sheet received is true and order has been given to submit the charge sheet to senior officer* […]"

10. Pending disposal of criminal proceedings, large number of applications filed by the rice-millers were considered and disposed of by the High Court. Some of the orders were challenged before this Court in *State of Bihar v. Divesh Kumar Chaudhry*[7], decided on 28.02.2017, this Court recording the nature of the crime passed the following order:

> "*2. It has been stated by Mr Sidharth Luthra, learned Senior Counsel appearing for the State/Corporation, that a sum of rupees fifteen hundred crores in all has been allegedly misappropriated by the accused for which 600 FIRs have been filed. According to the case of the State, agreements for milling of paddy were entered into with different rice mills in pursuance of which paddy was handed over for milling but the rice from the milled paddy was not returned or was returned partly. Thus, there is misappropriation to a huge extent. In such circumstances, grant of anticipatory bail/bail will seriously hamper the investigation/trial resulting in huge loss to the State.*

[7] (2018) 16 SCC 817.

3. Our attention has been drawn to the deed of agreement. Clause 3 thereof provides for furnishing of bank guarantee for the value of paddy, which is taken for milling, or for pledging of the immovable property of the value of the paddy. There is also provision in Clause 12 that in case of default of the terms of the agreement, the bank guarantee can be forfeited and legal action initiated for recovery of the amount from the mortgaged immovable property.

[…]

4.3. The investigation will be completed within a period of three months.

4.4. All the accused will be tried only at five places viz. Patna, Gaya, Chhapra, Darbhanga and Purnia by officers of the appropriate rank determined by the High Court within one week from today. The High Court may specify the area of jurisdiction of the said five courts by a public order. If required by the High Court, the State Government may sanction extra strength of officers with requisite infrastructure so that normal work of courts is not disturbed on account of the special arrangement for these cases.

4.5. The officers posted will deal with these cases exclusively. If free from their work, any other work may be assigned to the said officers.

4.6. The authorities concerned will be at liberty to encash the bank guarantee(s) after holding that there is a breach of terms of the agreement which decision will be subject to appropriate remedies of the parties.

4.7. If not otherwise encashed, the bank guarantee will be kept alive till the trial is over. However, deposits/furnishing of bank guarantees will be abide by further orders of the trial court, interim or final.

4.8. If any amount is deposited by the accused, the said amount will be adjusted in the amount of the bank guarantee, which is to be furnished by the accused.

4.9. The accused will surrender their passports to the respective courts within a period of four weeks from today and will not leave the country without prior permission from the court concerned."

11. It is evident from the above that this Court recorded that the PDS scam in the State of Bihar involves misappropriation of more

than a thousand crores by the accused rice-millers, against whom some 600 FIRs have been filed. Having considered the matter in detail, this Court passed orders in certain bail applications and further directed that the investigation should be completed within a period of 3 months. This Court has also directed that all the accused will be tried only at 5 places i.e. at Patna, Gaya, Chhapra, Darbhanga and Purnia for effective conduct of the trials. The High Court was directed to identify and post officers of appropriate rank within one week for conduct of trial. There was also a direction to increase the strength of the officers and provide necessary infrastructure. All these directions indicate that there is public element involved in the conduct of trial efficiently and with integrity.

12. It is also important to mention that, considering the enormity and magnitude of the public money involved, the High Court directed the constitution of a Special Investigation Team (SIT) at the state-level for focussed and concerted action. Concerned about the fact that misappropriation of large amounts in one financial year could not have taken place without a larger conspiracy at the higher level within the Corporation itself, the High Court directed monitoring of the case under the guidance of

the Additional Director General, CID. The relevant portion of the order dated 10.03.2017 in *Satyendra Kumar Keshri v. State of Bihar*[8] is extracted hereinbelow for ready reference.

> "*2. There are at least 1202 criminal cases pending throughout the State of Bihar in its every District, having common features, all based on allegation of large scale bungling and misappropriation of public property in the matter of procurement of paddy and supply of Customized Milled Rice (CMR).*
>
> *3. Considering the enormity and magnitude of public money involved, which is said to have been misappropriated and bungled, while hearing this application, I intended to consider possibility of constituting a Special Investigating Team at the State level for more focused and concerted investigation into all the cases. 4. The allegations made in all these First Information Reports are almost identical and show involvement of the personnel of Bihar State Food & Civil Supplies Corporation, State Government Officials/personnel, Rice Mill Owners and other persons connected in the said transactions. This Court had noticed that despite the fact that the allegations in all such cases were Identical in nature, the cases are being investigated by the concerned police Officers on case to case basis. Being of the view that misappropriation of this magnitude Involving more than one thousand crores (nearly 1500 crores) in one financial year could not have taken place simultaneously, through different transactions, throughout the State of Bihar, without there being a larger conspiracy at some higher level, by order, dated 08,02.2017, I had observed that investigation into all the cases should be monitored under the guidance of the Additional Director General, Criminal Investigation Department, Bihar, Mr. Binay Kumar. In the said order, dated 08.02.2017, the Additional Director General, C.I.D. was asked to report to this Court to suggest a tentative team, which he would like to constitute for carrying out the exercise of monitoring all investigations in all such cases, so that it could be convenient for the Court to pass*

[8] Crim Misc. No. 52242 of 2013.

appropriate order constituting Special Investigation Team for the said limited purpose.

5. In compliance with the said order, dated 15.02.2017, Mr. Binay Kumar, Additional Director General, C.I.D, Bihar has filed a detailed affidavit. From the said affidavit it is evident that out of said 1202 cases at least 9 involve misappropriation of Government property worth more than Rs. 8 crores; 18, between 8 crores to five crores; 55, between 5 crores to 3 crores; 261, between 3 crores to 1 crore and 854, one crore and below. It also appears from the said affidavit that at least 9 cases are being investigated by Economic Office Unit of the State of Bihar."

13. Before we refer to the initiation of proceedings under Section 11 of the Arbitration Act in the year 2019, from which the present appeals arise, it is necessary to mention that similar applications under Section 11 of the Arbitration Act were filed by some rice millers and they came to be allowed by the High Court on 19.04.2017 in *Sadhna Kumari* v. *Bihar State Food & Civil Supplies Corporation Ltd.*[9] The decision of the High Court allowing the Section 11 applications was challenged by the Corporation by filing Special Leave Petitions (SLPs) before this Court. By its order dated 29.01.2018, this Court dismissed the SLPs[10]. However, we are informed that the appellants filed Review Petitions[11] against the said order dated 29.01.2018 and the same are pending

[9] Request Case No. 8 of 2016 (High Court of Judicature at Patna).
[10] Special Leave to Appeal (C) No. 450 of 2018.
[11] *Bihar State Food and Civil Supplies Corpn. Ltd. v. Sadhna Kumari*, Review Petition (Civil) D. No. 17336 of 2020.

consideration before this Court. In fact, there is a direction by this Court on 15.10.2020 that the Review Petitions should be listed after disposal of the present batch of appeals.

14. Similarly, some of the respondents had previously filed applications requesting appointment of an arbitrator, and the High Court referred the dispute to the Bihar Public Works Contracts Disputes Arbitration Tribunal. The Tribunal dismissed the reference on jurisdictional grounds on 25.09.2019. The appellant contends that these orders have become final as they were not been challenged under Section 34 of the Arbitration Act.

15. All the above-referred facts span over a period of six years, commencing from the time when agreements were executed in the year 2013 and culminate with the filing of the present applications under Section 11 of the Arbitration Act in the year 2019.

16. *Impugned Order*: By way of the impugned order dated 03.07.2020, the High Court allowed all the Section 11 petitions filed by the respondents. The High Court held that it is undisputed that the agreements, including the arbitration clauses, were entered into freely by both the parties. At the outset, the High Court considered and rejected the argument of

limitation advanced by appellant on the ground that while cause of action commenced from the issuance of a demand notice under the Recovery Act in 2015, arbitration was invoked only in the year 2019. The High Court relied on one of its previous orders passed in the case of other rice-millers titled *Sadhna Kumari v. State of Bihar*, to reject the argument. The High Court also noted that its previous order appointing arbitrator was affirmed by this Court vide its order dated 29.01.2018 in *Bihar State Food & Civil Supplies Corporation Ltd v. Sadhna Kumari*. In the impugned order, the High Court reiterated the same position and held that detailed arguments on limitation can be looked into by the arbitrator.

17. As regards the objection of non-arbitrability of dispute due to allegations of criminality, the Court felt the allegations are simple accusations as against serious allegation of forgery or fabrication and as such there is no bar. The High Court also held that arbitration as a remedy cannot be foreclosed due to the pendency of proceedings under the Recovery Act as there was no conflict between the two laws. It observed that while Recovery Act operating an independent field provides for a mechanism for determining and recovering a public debt, arbitration, on the

other hand deals with a resolution of wide range of disputes arising out of a contract. The High Court also held that mere issuance of a notice under the Recovery Act cannot lead to the conclusion that claims made thereunder are public debts and subject to exclusive consideration under Recovery Act. It therefore held that courts should not be hasty in concluding that remedy under one law operates in derogation of a remedy under another. Even if there is any conflict, the High Court held that the Arbitration Act would override the Recovery Act since the former is a central legislation.

18. The High Court also stated that the omission on the part of the rice-millers to file an application under Section 8 of the Arbitration Act during the certificate proceedings does not amount to a waiver of the arbitration clause. It was held that powers under Section 11 operate independently of the conditions flowing from Section 8. Lastly, the High Court also held that attempting settlement of disputes through mutual discussion is not a pre-condition for invoking the arbitration under clause 16 of the agreement.

19. We have heard Mr. Ranjit Kumar, learned senior counsel appearing for the appellant and Mr. Amit Sibal, learned senior

counsel appearing on behalf of the respondents-Rice Millers. The submissions of the learned counsels can broadly be divided into four parts, though there are two other incidental submissions which may not have a direct bearing on our final decision. The broad submissions can be formulated as the following issues:

III. Issue.

I. Whether the dispute between the respondents and the appellant arising out of the agreement incorporating the arbitration clause has become non-arbitrable in view of the initiation and pendency of the criminal cases.

II. Whether invocation of the Recovery Act by the appellant-Corporation bars initiation of proceedings under the Arbitration Act.

III. Whether the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is barred by limitation.

IV. Whether the issue relating to legality and validity of invocation of arbitral proceedings under Section 11(6) is conclusively decided by the High Court in *Sadhna*

Kumari v. *Bihar State Food & Civil Supplies Corporation Ltd*, against which SLP was dismissed.

V. Whether the decision in the order of Bihar Public Works Contracts Disputes Arbitration Tribunal operates as res judicata.

VI. Whether issues no. 1 to 5 should be left to the arbitral tribunal to decide in view of sub-section (6A) of Section 11 of the Act.

IV. Submissions.

20. Mr. Ranjit Kumar and Mr. Amit Sibal have extensively argued on the issue of arbitrability, rather on non-arbitrability of the disputes as contended by Mr. Ranjit Kumar. They referred to a number of precedents on the issue of fraud or serious fraud involved in the dispute and also the subject matter for arbitration.

V. Principles governing arbitrability in cases involving allegations of serious fraud.

21. In view of our decision, it is unnecessary to delve deep on this issue, but sufficient to restate the law on the subject. The position of law as it applies to initiation of arbitral proceedings in

the teeth of allegations of criminality involved in the dispute, where criminal proceedings are either pending or to be initiated is considered in several decisions of this Court.[12] In *A. Ayyasamy v. A. Paramasivam and Ors.*[13], this Court has considered the matter in detail and laid down certain principles. As the relevant portions of the decision in *Ayyasamy* (supra) have been extracted in the subsequent decisions of this Court in *Ameet Lalchand Shah v. Rishabh Enterprises*[14], *Rashid Raza v. Sadaf Akhtar,*[15] and *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*[16], we are of the opinion that our judgment need not be burdened by extracting excerpts from the judgment all over again. Instead, we seek to restate the principles as follows:-

I. Access to justice for enforcement of rights and obligations is assured by the *usual proceedings in the ordinary tribunals.*[17] It is for this reason that Section 28 of the Indian Contract Act, 1872 while prohibiting agreements in

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[12] *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, 1961 SCC OnLine SC 138; N. Radhakrishnan v. Maestro Engineers, 2010 (1) SCC 72; Swiss Timing Ltd. v. Organising Committee, Commonwealth Games 2014 (6) SCC 677; Meguin Gmbh v. Nandan Petrochem Ltd., (2016) 10 SCC 422; A. Ayyasamy v. A. Paramasivam and Ors* (2016) 10 SCC 386*; Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678; Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710; Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited, (2021) 4 SCC 713; Deccan Paper Mills v. Regency Mahavir Properties, 2021 (4) SCC 786.*

[13] (2016) 10 SCC 386.

[14] (2018) 15 SCC 678.

[15] (2019) 8 SCC 710.

[16] (2021) 4 SCC 713.

[17] *Section 9 of the CPC and Cox and Kings Ltd. v. SAP India Pvt. Ltd.* [2023 INSC 1051].

restraint of legal proceedings saves resolution of disputes through contract, i.e., by arbitration. The conduct of arbitration is governed by the Arbitration and Conciliation Act, 1996.

II. The limits of dispute resolution through arbitration are statutorily incorporated in the Arbitration Act itself. Section 2(3) provides that, "*This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.*"[18] Disputes that shall not be submitted to arbitration have been recognized in a large number of decisions of this Court.[19] Of these, for the present purpose we are concerned with disputes which shall not be submitted to arbitration due to application and operation of criminal laws to the dispute in question.

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[18] It is important to note that the statutory incorporation of the limits of dispute resolution through arbitration is not noticed in many judicial precedents. However, it is true that categories of cases that are not arbitrable are not enumerated in Section 2(3) of the Act. The position as noticed in Ayyasamy is as follows, "*it has to be kept in mind that in so far 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, i.e. public fora are better suited than a private forum of arbitration...*" See Para 25 *Ayyasamy* (supra).

[19] *Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd.*, 2011 (5) SCC 532; *Vidya Drolia v. Durga Trading Corpn. (2021) 2 SCC 1;* and *National Insurance Co. Ltd. v. M/s Boghara Polyfab Pvt. Ltd.* (2009) 1 SCC 267.

III. Same set of facts may lead to civil and criminal proceedings. A civil dispute could involve questions of coercion (section 15 of Contract Act), undue influence (section 16 of Contract Act), fraud (section 17 of Contract Act), misrepresentation (section 18 of Contract Act) for example, and such disputes can be adjudicated as civil proceedings for determination of civil or contractual liabilities between the parties. The same set of facts could have their co-relatives in criminal law. The mere fact that criminal proceedings can or have been instituted in respect of the same incident(s) would not per se lead to the conclusion that the dispute which is otherwise arbitrable ceases to be so.[20]

IV. The reason for permitting submission of such disputes to arbitration is well explained in *Swiss Timing*[21] as, "*To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed*

[20] *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*, (2021) 4 SCC 713, para 43.
[21] 2014 (6) SCC 677. Also see similar reasoning by Justice B.N. Srikrishna in the context of Section 45 of the Arbitration Act in *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd*; (2005) 7 SCC 234 at 267, para 74.

simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, the necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration [...]."

V. For an important policy consideration, our Court has drawn a distinction between "serious fraud" and "fraud simpliciter" to segregate and exclude disputes involving serious fraud from arbitrability[22]. Disputes involving serious fraud may not be submitted to arbitration as explained, to some extent in *Ayyasamy* (supra) as they,

[22] The position in our country is different from global practices which do not draw such distinction as noticed by Gary B. Born in his Book commentary where he was observed "*Indian courts have adopted a comparable, albeit less expansive, treatment of fraud claims, at least in a domestic context. The Indian Supreme Court has held that at least some claims of "serious fraud," in a domestic setting, are nonarbitrable, while claims of "ordinary" fraud are arbitrable. The Indian approach, although undesirable from a policy perspective and out-of-step with that of most national courts, is arguable consistent with the Convention's treatment of the nonarbitrability doctrine*" See Gary B. Born, *International Commercial Arbitration Volume 1*, § 6.04 (O) (3rd edn, Kluwer Law International B.V., 2021).

"are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits […]"

VI. "Serious allegations of fraud" is to be understood in the context of facts. In *Rashid Raza* (supra)[23] this Court laid down two tests. 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

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[23] (2019) 8 SCC 710, para 4; as subsequently affirmed in *Avitel Post Studioz Ltd & Ors.* v. *HSBC PI Holdings (Mauritius) Ltd;* (2021) 4 SCC 713, para 35 at pg. 753.

> *"**35.** After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain."*

to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

VII. Disputes involving allegations of serious fraud need more clarity so that there is certainty about the availability of the remedy. At least one instance of serious fraud will be where disputes involving allegations having criminal law implications transcend inter se disputes between the contracting parties and attain public implications, where the ramifications could directly or indirectly affect non-parties and impact, integrity in governance, accountability in public service, distribution of essential commodities, safety and security of the nation for example.

Consideration of such disputes have public law implications and shall 'not be submitted to arbitration'.[24]

VIII. Arbitral Tribunal will be within its jurisdiction to consider allegations of fraud even with respect to the specific terms or clauses in the contract as an arbitration agreement stands independent of the contract and continue to bind and govern the parties even if the contract is terminated or challenged and this question is no more res integra. There is however an exception, the following is its articulation[25].

IX. However, the allegations of fraud with respect to the arbitration agreement itself stand on a different footing. This position is generally recognized as a dispute which is in the realm of non-arbitrability[26]. In such cases, the arbitral tribunal will not examine the allegation of fraud but will consider the submission only for the purpose of examining exclusion of jurisdiction. This principle, in its

[24] See: A. Ayyasamy v. A. Paramasivam and Ors.; (2016) 10 SCC 386 para 25, *Rashid Raza* v. *Sadaf Akhtar;* (2019) 8 SCC 710 para 4, *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*, (2021) 4 SCC 713, para 35.

[25] *Interplay Between Arbitration Agreements*; (2024) 6 SCC 1.

[26] *Ayyasamy* (supra), para 25; It is explained that the Court can do so in 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****...*"

application, can be seen in the judgment of this Court in *Avitel*.[27]

X. The burden of proof is on the party who raises the plea.[28]

XI. When a plea of non-arbitrability is raised, the Court will examine it as a jurisdictional issue only to enquire if the dispute has become non-arbitrable due to one or the other reason as indicated by us hereinabove.

22. Though we have referred in detail to the facts of the case and have formulated the general principles of non-arbitrability on the basis of the decisions referred to by Mr. Ranjit Kumar and Mr. Amit Sibal learned senior counsels, there is a fundamental barrier that would disable us from applying the said principles to the facts of the present case.

VI. Re: Issue No.6: Scope of enquiry by the referral court when an application under Section 11(6) of the Act is opposed on the grounds of serious fraud.

23. Section 11 of the Act has perhaps been the only provision which would have been interpreted and re-interpreted by the Supreme Court for the longest time ever. After two decades of its

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[27] *Avitel* (supra); "*54.1. That there is no such fraud as would vitiate the arbitration clause in the SSA entered into between the parties as it is clear that this clause has to be read as an independent clause. Further, any finding that the contract itself is either null and void or voidable as a result of fraud or misrepresentation does not entail the invalidity of the arbitration clause which is extremely wide* [...]"

[28] *Ayyasamy* (supra), para 45.1.

interpretation commencing from 1996, Parliament intervened and supplied sub-section (6A) to Section 11 of the Act as per which the consideration by a referral court shall be *confine(d) to the examination of the existence of an arbitration agreement*.

24. Even after the introduction of sub-section (6A), it took almost a decade for us to have clarity and certainty till the seven judges bench decision of this Court in the case of *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re*[29] was delivered.

25. In the seven judges bench decision, this Court considered in detail the separability of the arbitration agreement from the contract, the empowerment of the arbitral tribunal to examine its own competence and finally the limits of referral courts scrutiny. The relevant portions are as under:

> *"**165.** The legislature confined the scope of reference under Section 11(6-A) to the examination of the existence of an arbitration agreement. The use of the term "examination" in itself connotes that the scope of the power is limited to a prima facie determination. Since the Arbitration Act is a self-contained code, the requirement of "existence" of an arbitration agreement draws effect from Section 7 of the Arbitration Act. In Duro Felguera [Duro Felguera, S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764] , this Court held that the Referral Courts only need to consider one aspect to determine the existence of an arbitration agreement — whether the underlying contract contains an arbitration agreement which provides for arbitration pertaining to the disputes which have arisen*

[29] (2024) 6 SCC 1.

between the parties to the agreement. Therefore, the scope of examination under Section 11(6-A) should be confined to the existence of an arbitration agreement on the basis of Section 7. Similarly, the validity of an arbitration agreement, in view of Section 7, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. This interpretation also gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by Arbitral Tribunal under Section 16. We accordingly clarify the position of law laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] in the context of Section 8 and Section 11 of the Arbitration Act.

166. *The burden of proving the existence of arbitration agreement generally lies on the party seeking to rely on such agreement. In jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Referral Court is not the appropriate forum to conduct a mini-trial by allowing the parties to adduce the evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal. This position of law can also be gauged from the plain language of the statute.*

167. *Section 11(6-A) uses the expression "examination of the existence of an arbitration agreement". The purport of using the word "examination" connotes that the legislature intends that the Referral Court has to inspect or scrutinise the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. [P. Ramanatha Aiyar, The Law Lexicon (2nd Edn., 1997) 666.] On the other hand, Section 16 provides that the Arbitral Tribunal can "rule" on its jurisdiction, including the existence and validity of an arbitration agreement. A "ruling" connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court is only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction, including the issues pertaining to the existence and validity of an arbitration agreement. A similar view was adopted by this Court in Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. [Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd., (2005) 7 SCC 234]."*

26. The above referred decision is followed in subsequent decisions of this Court in *SBI General Insurance Co. Ltd.* v. *Krish Spinning*[30], *Aslam Ismail Khan Deshmukh* v. *ASAP Fluids Private Ltd & Anr.*[31] and *Office for Alternative Architecture* v. *Ircon Infrastructure and Services Ltd.*[32]

27. The curtains have fallen. Courts exercising jurisdictions under Section 11(6) and Section 8 must follow the mandate of sub-section (6A), as interpreted and mandated by the decisions of this Court and their scrutiny must be "*confine(d) to the examination of the existence of the arbitration agreement*".

28. We have examined the matter in detail. There is an arbitration agreement. The matter must end here. While we agree with Mr. Ranjit Kumar submissions that his client has much to say, let all that be said before the arbitral tribunal. *It is*, as we have said elsewhere, *just as necessary to follow a precedent as it is to make one*.

29. All the issues raised by Mr. Ranjit Kumar, senior counsel are kept open for being raised and contested before the arbitral tribunal. The issues that we have not taken up and left it to the arbitral tribunal are jurisdictional issues, involving barring of the

[30] 2024 SCC OnLine SC 1754.
[31] (2025) 1 SCC 502.
[32] 2025 SCC OnLine SC 1098.

arbitral proceedings due to limitation or for the reason that they are non-arbitrable. These issues shall be taken up as preliminary issues and the arbitral tribunal will consider them after giving opportunity to all the parties.

30. In view of the above discussions, the appeals stand dismissed. There shall be no order as to costs.

.....J.
[PAMIDIGHANTAM SRI NARASIMHA]

.....J.
[MANOJ MISRA]

NEW DELHI;
AUGUST 05, 2025