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**IN THE HIGH COURT OF DELHI AT NEW DELHI**

*Reserved on : 12<sup>th</sup> September, 2018*

*Date of decision : 1<sup>st</sup> November, 2018*

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**O.M.P. 1195/2012**

UNION OF INDIA

..... Petitioner

Through: Mr. Vivek Goyal, CGSC and Mr. Bibhash Kumar, Advocate with Mr. Dinesh and Mr. Sunil, Official, Ministry of Commerce.  
(M:9810373320)

versus

M/S DELHI PAPER PRODUCTS PVT LTD.

..... Respondent

Through: Mr. Apar Gupta, Advocate.  
(M:9873340111)

**CORAM:**

**JUSTICE PRATHIBA M. SINGH**

**JUDGMENT**

**Prathiba M. Singh, J.**

1. The present petition challenges arbitration award dated 6<sup>th</sup> June, 2012 passed by the learned Sole Arbitrator. By the impugned award, the learned Arbitrator has declared the banning order dated 30<sup>th</sup> December, 2002, passed against the Respondent, by the Union of India (*hereinafter* 'Government'), as withdrawn/cancelled and has also awarded damages for losses caused on account of the said banning order.

2. The background of the dispute is that M/s. Delhi Paper Products Pvt. Ltd. (*hereinafter* 'Supplier') was awarded three rate contracts in the years 2000-2001 for supply of paper. The Government, on the basis that the Supplier had made false claims for payments against some of the orders which were actually not supplied, by forging documents showing receipts, initiated action against the Supplier.

3. A show cause notice was issued setting out all the allegations in the following terms:-

*“NO.C-37011/8/2002.Vig. DOC  
Government of India  
Ministry of Commerce and Industry  
Department of Commerce  
Supply Division  
C-Wing, Nirman Bhawan  
New Delhi-110011  
Dated: 14<sup>th</sup> November, 2002*

*To,*

*M/s. Delhi Paper Products Co. (P) Ltd.,  
19/IGI, Gurgaon Road, Kapasheda,  
New Delhi-110037*

*Subject:- Administrative action against M/s Delhi  
Paper Products Co.(P) Ltd, New Delhi.*

*Whereas it has brought to the notice of this Department that M/s Delhi Paper Products, New Delhi were awarded DGS&D rate contract bearing no.PP-3/RC-0611800/062000/photocopier Paper/2000-01/D-0488/DPCC/158 dated 8.9.2000 for supply of photocopier paper for the period from 8.9.2000 to 31.8.2001. R/C. was short closed vide amendment dated 27.7.2001 w.e.f. 8.8.2001.*

*Whereas one of the consignees i.e. controller of Stores (S&F), SC. Rly. Placed two separate supply orders against the above R/C. details are below:*

| <i>S. No.</i> | <i>S.O.N &amp; Date</i>                                       | <i>Note No. and Date</i>        | <i>Quantity</i>   | <i>Amount Rs.</i> |
|---------------|---------------------------------------------------------------|---------------------------------|-------------------|-------------------|
| <i>1.</i>     | <i>P.P.<br/>83.01.1004.2<br/><u>90516</u><br/>dtd.21.3.01</i> | <i>DC-3933 IF<br/>27.4.2001</i> | <i>1390 reams</i> | <i>1,40,001</i>   |
| <i>2.</i>     | <i>P.P<br/>83.00.1132.2<br/><u>90517</u><br/>dtd.21.3.01</i>  | <i>DC-3934 IF<br/>27.4.2001</i> | <i>2119 reams</i> | <i>4,18,757</i>   |

*Whereas the consignee vide his letter dated 24.01.2002 reported of Chief Controller of Account (Supply Division), New Delhi that the firm have no complied with the above orders, though the payment was already claimed by them.*

*Whereas the CCA, New Delhi informed the consignee, ACOS that M/s. Delhi Paper have submitted their bells for 95% payment along with advance copies on inspection notes duly signed by the consignee. The copy of the Bills, Inspection Notes, GR and Money Receipt from the transporter to the ACOS and requested to verify the signature available over the receipt certificate.*

*Whereas the consignee ACOS vide communication dated 20.08.02 confirmed that signature on the inspection Notes does not belong to anyone from this office. The Rubber Stamp also did not belong to this office. No receipt particulars are filled in the inspection note. However it is once again confirmed that this office neither received the inspection Notes nor the materials.....*

*Payment by putting the signature and stamp of the concerned consignee on the inspection notes without supplying the material. The misconduct on the part of the firm in grave and prejudicial to the interest of the Government.*

*Now, therefore, M/s Delhi Paper Products, New Delhi are hereby given an opportunity to show-cause when business dealings with them by the Government in the non-statutory sphere should not be banned. Their reply if any, should reach this office within 21 days (twenty one days) of the issue of this Notice failing which the matter will be decided on the basis of available evidence.*

*It may be noted that his notice applies mutata mutandi to all allied firms of M/s Delhi Paper Products New Delhi.*

*By order and in the name of the President.*

*Yours faithfully*

*(M.K. Anand)*

*Dy. Secretary to the Govt. of India*

*Tel. No.3013960”*

4. The Supplier filed its reply to the same. After considering the stand of the Supplier, the Ministry of Commerce & Industry issued banning order dated 30<sup>th</sup> December, 2002. The banning order was issued based on the following findings: -

- (1) The supplies made against the orders issued were duly inspected and rejected.
- (2) Thereafter on the basis of forged inspection notes, claiming actual inspection and receipt of the supplies, payments were received by the Supplier.
- (3) Upon being asked to return the amount so wrongly received, the Supplier returned the amounts. This resulted in closure of the case insofar as the pending issue of payments were concerned.
- (4) The Ministry of Commerce & Industry, however, examined the fact that the Supplier firm had received the advance payments fraudulently.
- (5) The facts on the basis of which the inspection notes were forged by the Supplier were taken into consideration.
- (6) The Ministry came to the conclusion that the Supplier had indulged in serious malpractice of taking fraudulent payments by forging the signature and the stamp of the consignee i.e. the Controller of Stores (S&F), South Central Railways. In fact, the

photocopier paper was never supplied.

(7) Upon this conduct being detected, the firm returned the 95% advance amount.

(8) That the factum of returning the money does not absolve the Supplier company of indulging in forgery.

5. In view of the above findings, the banning order was passed which reads as under: -

*“Keeping the above facts in view. I hereby order that all Departments/Ministries/Offices of the Government of India are forbidden to have commercial/business dealings with the firm and its subsidiaries, if any. The ban of commercial/business dealings with the firm by the Government in the non-statutory sphere will be operative for a period of ten years commencing from the date of this order i.e. 30-12-2002.”*

6. The said banning order was challenged by the Supplier company before the Delhi High Court vide CWP No.583/2003. A learned Single Judge of this Court vide judgment dated 28<sup>th</sup> February, 2003 considered the stand of the Government that the return of the advance payment proved the forgery committed by the Supplier firm. Accordingly, the learned Single Judge held that there is no force in the contention of the Supplier. The Court held that the concerned authority had recorded its satisfaction objectively and on the basis of material on record. On 3<sup>rd</sup> April, 2003, the appeal (LPA 236/2003) was also withdrawn by the Supplier firm. The Supplier filed another writ petition in W.P.(C) 269/2004 which writ also came to be dismissed with the following observations: -

*“In my considered view, the writ petition is not maintainable. In so far as the issue of banning is*

*concerned, the same has been dealt with in detail by the learned Single Judge while dismissing the writ petition on 28.02.2003. The appeal filed against the said order has been withdrawn by the petitioner and thus the order is final as passed by the learned Single Judge. The review order only says that no ground for review has been made out.*

*In the appellate court the petitioner had withdrawn the appeal to take recourse to some other remedy in view of disputed questions of facts. Once the petitioner himself admits that there are disputed question of facts and withdraws the appeal, there can be no question of filing of fresh petition on that account.*

*In view of the aforesaid, the writ petition is dismissed.”*

7. This order dated 13<sup>th</sup> January, 2004 was carried in appeal in RFA 148/2004 before the Division Bench which was again dismissed in the following terms: -

*“7. The appellant, after the dismissal of the Writ Petition has filed a review application. Since the appellant did not receive the response of the review application, CW NO.7154/2003 seeking directions against the respondent to decide the review petition was filed. During the pendency of the writ petition, review petition was dismissed and consequently on 2.12.2003 the CW No.7154/2003 was disposed of as infructuous. The petitioner thereafter again filed WP(C) No.269/2004 impugning the orders of the blacklisting as well as the order by which the review petition has been dismissed. The learned Single Judge observed that in so far as the issue of banning is concerned, the same has been dealt with in detail by the learned single Judge by dismissing the writ petition on 28.2.2003 and appeal against that order was also withdrawn by the appellant and the order has become final. The learned Single Judge observed that the*

*appellant had withdrawn the appeal before the Division Bench to take recourse to some other remedy in view of the disputed questions of fact. The learned Single Judge also observed that according to the appellant, there were disputed questions there and he had withdrawn that appeal and, therefore, there is no question of filing of the fresh writ petition on that ground. The writ petition was thus dismissed.*

*8. We have heard the learned counsel for the respondent at length and perused various orders issued by the authorities from time to time. In view of the peculiar facts and circumstances, in our considered opinion, no interference is called for. The appeal being devoid of any merit is accordingly dismissed.*

*CMS 1625, 1629/2004 are accordingly disposed of.”*

8. The Supplier firm filed a SLP against this order of the Division Bench dated 15<sup>th</sup> April, 2004 which was dismissed. The said order reads: -

*“Considering that disputed questions of fact are involved, the writ jurisdiction might not have been the proper course. We leave it open to the Petitioner to file a Suit/Arbitration Petition if he so desires.*

*The Suit/Arbitration Petition will undoubtedly be decided without being influenced by any observations in these proceedings.*

*In view of this matter, we see no reason to interfere. The Special Leave Petition is dismissed.”*

9. Thus, the initial order of the learned Single Judge dated 28<sup>th</sup> February, 2003 was on merits. In the appeal against the said order, it was the contention of the Supplier that there were some disputed questions of facts. This was not the finding given by any Court. This statement also formed the basis of order dated 13<sup>th</sup> January, 2004 in the second writ petition as also in

the Division Bench judgment dated 15<sup>th</sup> April, 2004.

10. The Supreme Court, however, permitted the Supplier firm to raise the disputed question of facts in a suit/arbitration petition as writ jurisdiction was not the proper course of action. The Supreme Court also observed that the arbitration petition would be decided without being influenced by any observations made in the said proceedings. Thus all the orders passed in the earlier two writ petitions, both by the Single Judge and the Division Bench of this Court got merged and the final orders passed by the Supreme Court permitted the Supplier to agitate its disputes in arbitration proceedings.

11. The order of the Supreme Court is dated 11<sup>th</sup> October, 2004, however, the Supplier firm chose to invoke arbitration only in 2009. In Arbitration Petition No. 282/2009, a learned Single Judge of this Court recorded the arguments of the Government that the arbitration was barred by limitation. Learned Single Judge on this objection held that the blacklisting order had a recurring effect. The arbitration petition was then disposed of with the following observations: -

*“In the present case, petitioner’s plea is that the black listing order though passed in 2002 has a recurring effect as every time the petitioner cannot participate in a fresh tender, its right to challenge the black listing order arises. Consequently, in my view the issue of limitation involves a disputed question of fact which would have to be determined by the Arbitrator after allowing the petitioner to lead evidence that there was a tender floated in the recent past in which the petitioner could not participate due to the impugned black listing order.*

*Accordingly, I refer the matter to arbitration leaving the question of limitation open, to be determined by the arbitrator after allowing the*

*parties to lead evidence on the said issue.*

*Accordingly, the present petition is allowed and respondent is directed to appoint an arbitrator within a period of eight weeks from today.*

*With the aforesaid observations, present petition is disposed of.”*

12. Learned Single Judge, however, did not go into the issue of limitation and left the same to be decided by the Arbitrator as it involved disputed question of facts.

13. On 2<sup>nd</sup> February, 2010, Shri B.L. Chaudhary, Additional Legal Adviser to the Government of India was appointed as the Sole Arbitrator to decide the disputes. Before the Arbitrator, various claims were raised. The findings of the Arbitrator are as under: -

- (1) That the forging of the signatures is immaterial and unwarranted to make a claim for payment as the claim for payment is based on the dispatch document and not on the basis of receipt.
- (2) The findings of the Delhi High Court Single Judge and the Division Benches do not operate as *res judicata*.
- (3) The jurisdiction of the Arbitrator is not concurrent with that of a writ court.
- (4) That the Supplier was given a good conduct certificate on 4<sup>th</sup> September, 2002 just months before the banning order on 31<sup>st</sup> December, 2002.
- (5) The banning order did not appreciate the entire evidence which was on record.

- (6) That a joint investigation report dated 23<sup>rd</sup> July, 2001 showed a re-investigation of the stores which meant that the material was present in the godown of the consignee.
- (7) The Supplier firm did deliver the supply orders, which is clear from the fact that the material was in fact lifted back.
- (8) The consignee vide letter dated 4<sup>th</sup> September, 2002 had informed the Supplier that it would withdraw its complaint but this was not considered at the time of passing the banning order.

14. In view of these findings, the banning order was liable to be treated as withdrawn and the status quo prior to 30<sup>th</sup> December, 2002 ought to be restored. Damages were also awarded by the Ld. Arbitrator.

15. The Supplier firm was a supplier of paper and paper products such as T.P. paper rolls, computer stationery, duplicating/typing/plain copier paper etc. to various Ministries, Government Departments, Statutory Bodies and offices. It used to enter into annually renewed rate contracts with the Directorate General of Supplies & Disposal through its Paper Directorate (DGS&D) for paper products. The rate contract dated 25<sup>th</sup> July, 2001 entered into by the Supplier reads as under: -

*“Rate contract No.PP-3/RC-06011800/082001/D-0488/PP/COAD/1999 Dated 25.07.2001*

*Name of the firm: M/s. Delhi Paper Products Co. (P) Ltd., 19-IGI, Gurgaon Road, Kapasheda, New Delhi-110037.*

*Telephone No. 5063500-600-700-800*

*Fax No. 011-5065901, 5065902.*

*Subject: Rate Contract for the supply of Photocopier Paper Valid from 01.09.2001 to 31.08.2002.*

*Ref(1) This office Tender Enquiry No.PP3/RC-06011800/082001/ Photocopier Paper/2001-2002/P3 opened on 4.5.2001.*

*(2) Your quotation No.DPPC/KPH/2001 dated 2.5.2001 and revised bid No.DPPC/KPH/2001 dated 26.6.2001.*

*Dear Sirs,*

*You are hereby informed that your above referred tender and revised bid mentioned above for the stores specified in the schedule annxed has been acceptedd. This rate contract will be governed by the teams and conditions brought in the form No.DGS&D-1001 amendcd to date. The rate contract and the schedule annexed hereto shall be the sole repository of this rate contract/transaction.*

*Schedule Annexed:*

- 1. Schedule 'A' Description of Stores, Prices, Dutuies/Taxes.*
- 2. Schedule 'B' Special conditions of contract : NIL.*
- 3. Schedule 'C' List of Parallel R/Cs.*

*Yours faithfully,*

*Sd/-*

*(G.P. SINGH)*

*Asstt. Director (Supplies)"*

16. The Supplier had been supplying paper and paper products for approximately 30 years to more than 1,200 consignees all over the country. The South Central Railways had awarded rate contract dated 21<sup>st</sup> March, 2002 for supply of photocopier paper for the period of 1<sup>st</sup> September, 2000 to 31<sup>st</sup> August, 2001. The said rate contracts specifically provided as under: -

*“This order which is intended for the supply of the stores detailed in the schedule below, in accordance with the terms and conditions of the Director General of Supplies and Disposals Rate/Running Contract mentioned above and in the manner specified herein shall operate to create a specific contract between the contractor (with whom the contract referred to and the requisition are placed) of the one.”*

17. Under this rate contract, three supply orders dated 21<sup>st</sup> March, 2001 were placed. Details of which are as under: -

| <b><u>Sl. No.</u></b>   | <b><u>Date</u></b> | <b><u>Value (Rs.)</u></b> |
|-------------------------|--------------------|---------------------------|
| P.P. 83.00.1130.90515   | 21.03.2001         | 5,84,100/-                |
| P.P. 83.01.1004.2.90516 | 21.03.2001         | 1,37,610/-                |
| P.P. 83.01.1132.2.90517 | 21.03.2001         | 4,25,919/-                |

18. The above rate contract was governed by the general terms and conditions of contract of DGS&D-68 (Revised). It is the case of the Supplier that the Government nominated an Inspection Officer from 17<sup>th</sup> April, 2001 to 19<sup>th</sup> April, 2001 who made an endorsement on the inspection notes, of satisfactory inspection and acceptance. The said consignments which were pre-inspected by the Inspection Officer were dispatched on 16<sup>th</sup> May, 2001, which were thereafter received by the Railways. All the three inspection notes bore the signature of the person who received the goods at the Government's office in Hyderabad. The transporter brought back the inspection notes with the endorsement by the Officer on behalf of the consignee. Along with the said inspection notes and the truckers G.R. slip, the Supplier made a claim with the Department for payment of 95% of the bill amount. The said payment was received by the Supplier. After the payment was received, a complaint was received from the consignee that the

goods were not as per specification and hence the same were rejected.

19. On 13<sup>th</sup> July, 2001, the supply orders were cancelled. According to the Supplier, in view of the long-standing relationship, it took back the supplies and lifted the material on 7<sup>th</sup> August, 2001. Since the amounts were received prior to the complaint being received, a credit voucher was issued in favour of the consignee and the entire amount was adjusted.

20. The South Central Railways, Secunderabad subsequently on 4<sup>th</sup> September, 2002 withdrew the complaint made against the Supplier and the matter was treated as closed. Thereafter, a show cause notice was issued on the allegation that the signatures on the inspection notes were forged and false.

21. Damages were awarded on the following heads: -

**Claim No.1: Value of stores improperly cancelled** - An amount of Rs.1,37,610/- and Rs.4,25,919/- along with interest @ 1.5 times of SBI rate was awarded in view of the proposition of MSME Act of 2006.

**Claim No.2: Settlement of NPA accounts** - Since the Supplier could not settle its NPA account due to the banning order, 50% of the amount claimed i.e. to the tune of Rs.28,22,152/- was awarded.

**Claim No.3: Accumulated losses from 2003 to 2007** - Nil Award.

**Claim No.4: Losses from short closure** - A large number of contracts were short closed and the value of loss of Rs.45 lakhs was awarded.

**Claim No.5: Litigation expenses** - 50% of the claimed amount i.e. Rs.12,24,238/- was allowed.

The operative portion of the award reads as under: -

*“7. The Claimant has claimed an interest as per MSME Act 2006 on the complete claim amount of*

*Rs.3,11,74,531.37 (Rs. Three Crore Eleven Lacs Seventy Four Thousand Five Hundred Thirty One & Paise Thirty Seven). As per the mandate of MSME Act 2006 (27 of 2006) and the earlier Delayed Payment Act to the SSI & AIU (32 Of 1993), the interest can only be levied on supply of goods and not on any other kind of receivables. Accordingly, the interest provision as applicable to a SSI has been granted on Rs.5,63,529.00 toward supply of goods against the 2 orders which have been in dispute and against which the payments were recovered from the claimant on 27.07.2002. This rate of interest cannot be awarded on the other claims where the interests @18% (simple) has been awarded in accordance with the Arbitration & Conciliation Act, 1996. The claims allowed above at S.No. 3,5 & 6 shall only carry an interest @18% per annum from the date of Award till the date of actual payment.”*

22. The primary ground taken by the Government is that the Arbitrator had no power to go into the legality of the banning order. Thus, the Arbitrator has mis-conducted himself. Further, the Government argues that arbitration is not the forum for deciding on issues related to fraudulent conduct of the Supplier. The banning order was passed by an independent authority and did not arise from the rate contracts which were entered into. The banning order can only be challenged in a court of law and not in arbitration proceedings. The Government further submits that the claims are barred by limitation. The Supplier having played serious fraud, the ban imposed was proportionate. The Arbitrator has failed to consider crucial evidence. Damages also have been awarded on the basis of hypothetical claims.

23. On behalf of the Supplier, it is submitted that the banning order had serious consequences as majority of the supplies made by the Supplier were to the Government. The banning order had an immediate effect of stopping the entire business of the Supplier. The claims were not barred by limitation and no interference is called for.

24. The following four issues arise for consideration: -

- (1) Whether the claim petition was barred by limitation?
- (2) Whether the Arbitrator could have gone into the issue of fraud / forgery?
- (3) Whether the banning order was justified in the facts?
- (4) Whether the Supplier was entitled to claims for damages for losses?

**Issue No.1: Whether the claim petition was barred by limitation?**

25. The banning order admittedly was issued on 30<sup>th</sup> December, 2002. The order was extremely broad and wide. The Government and all its Departments, Ministries and offices were banned/forbidden from having any commercial/business dealings with the Supplier including its subsidiaries. This ban was to be operative for a period of ten years from 30<sup>th</sup> December, 2002 to 29<sup>th</sup> December, 2012. The award was passed on 6<sup>th</sup> June, 2012 i.e. six months before the effect of the ban order was coming to an end. The order of the Supreme Court permitting the Supplier to invoke arbitration was passed on 11<sup>th</sup> October, 2004 but the arbitration itself was invoked only in 2009 i.e. after a period of five years. At the time when the arbitration was invoked, the ban order was still in operation.

26. The nature of a banning order or a blacklisting order is very well known. The Supreme Court has in fact termed such an order as '*civil death*'

to a company. The order was operational in respect of every tender which may have been floated by all Government Departments, Ministries and offices, for storing papers/paper products which the Supplier could have supplied. Every new tender which was floated from which the Supplier was banned, gave a new cause of action to the Supplier. Any order which continuously affects the business of a company or any entity constitutes a continuing cause of action or a recurring cause of action. In the case of a continuing cause of action, limitation is to be viewed differently.

27. On the issue of limitation, the Arbitrator had framed a preliminary issue on 11<sup>th</sup> March, 2010. Pursuant to which, affidavits and pleadings were filed by the parties. On 5<sup>th</sup> January, 2011, the Arbitrator records that the Supplier is facing a continuous injury. The Arbitrator notes several tenders floated by the Government of Himachal Pradesh, Government of Punjab and Government of Madras etc. where the Supplier could not participate. In fact, the Supplier was not even issued the login Id and password by the DGS&D tender management system which disabled them from participating in the various tenders. The Arbitrator holds that *“in view of the above discussion, it appears that there appears to be continuing injury”*. This finding of the Arbitrator is as per law. Section 22 of the Limitation Act, 1963 clearly provides that a fresh period of limitation begins to run every time the injury continues. For the sake of ready reference, Section 22 is set out herein below: -

*“22. Continuing breaches and torts – In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.”*

28. On the basis of the decision of the Supreme Court in ***Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Company and Ors. (1997) 1 SCC 99***, it is clear that the Supplier faced continuous injury and was hence entitled to invoke arbitration even after the lapse of five years. Since the invocation was during the period when the ban order was continuing, it cannot be held that the claims were barred by limitation.

**Issue No.2: Whether the Arbitrator could have gone into the issue of fraud / forgery?**

29. The Supreme Court vide its order dated 11<sup>th</sup> October, 2004 had clearly relegated the parties to arbitration on the ground that the disputes involved questions of fact. The question that arises is as to whether the allegation of the inspection notes having been forged is of such a nature that could not be determined by the Arbitrator.

30. The allegations are of forgery on the inspection notes and of wrong endorsement on the reverse of the inspection notes. The said allegations were to be considered by the Arbitrator in the chronology of events that took place based on the documents on record. The issue did not involve allegations of criminality or adjudication thereof. The Supreme Court, in the judgment of ***A. Ayyasamy v. A. Paramasivam and Others (2016) 10 SCC 386*** held that the categories of non-arbitrable subject matter are devised by Courts and unless there are very serious allegations of fraud, bordering on a criminal offence or where the allegations are very complicated in nature, it can be held that the dispute is not arbitrable.

*“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.*

*25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very 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 fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.*

*26. When we apply the aforesaid principles to the facts of this case, we find that the only allegation of fraud*

*that is levelled is that the appellant had signed and issued a cheque of Rs.10,00,050/- dated 17-06-2010 of "Hotel Arunagiri" in favour of his son without the knowledge and consent of the other partners i.e. the respondents. It is a mere matter of accounts which can be looked into and found out even by the arbitrator. It does not involve any complex issue. If such a cheque is issued from the hotel account by the appellant in favour of his son, it is easy to prove the same and then the onus is upon the appellant to show as to what was the reason for giving that amount from the partnership firm to his son and he will have to account for the same. Likewise, the allegation of the respondents that daily collections are not deposited in the bank accounts is to be proved by the respondents which is again a matter of accounts.*

*28. We, therefore, are of the opinion that the allegations of purported fraud were not so serious which cannot be taken care of by the arbitrator. The Courts below, therefore, fell in error in rejecting the application of the appellant under Section 8 of the Act. Reversing these judgments, we allow these appeals and as a consequence, application filed by the appellant under Section 8 in the suit is allowed thereby relegating the parties to the arbitration."*

31. A similar view has been taken by a Single Judge of this Court in ***Indian Statistical Institute vs. A2Z Constructions Arb. A. 38/2015 (decided on 09.04.2018)***

32. In ***Kulja Industries Limited v. Chief Gen. Manager W.T. Proj. BSNL and Ors. (2014) 14 SCC 731*** the Supreme Court while considering the principles applied for banning orders held as under: -

*"21. The guidelines also stipulate the factors that may influence the debarring official's decision which include the following:*

- (a) *The actual or potential harm or impact that results or may result from the wrongdoing.*
- (b) *The frequency of incidents and/or duration of the wrongdoing.*
- (c) *Whether there is a pattern or prior history of wrongdoing.*
- (d) *Whether contractor has been excluded or disqualified by an agency of the Federal Government or have not been allowed to participate in State or local contracts or assistance agreements on a basis of conduct similar to one or more of the causes for debarment specified in this part.*
- (e) *Whether and to what extent did the contractor plan, initiate or carry out the wrongdoing.*
- (f) *Whether the contractor has accepted responsibility for the wrongdoing and recognized the seriousness of the misconduct.*
- (g) *Whether the contractor has paid or agreed to pay all criminal, civil and administrative liabilities for the improper activity, including any investigative or administrative costs incurred by the government, and have made or agreed to make full restitution.*
- (h) *Whether contractor has cooperated fully with the government agencies during the investigation and any court or administrative action.*
- (i) *Whether the wrongdoing was pervasive within the contractor's organization.*
- (j) *The kind of positions held by the individuals involved in the wrongdoing.*
- (k) *Whether the contractor has taken appropriate corrective action or remedial measures, such as establishing ethics training and implementing programs to prevent recurrence.*
- (l) *Whether the contractor fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the*

*investigation available to the debarring official.*

*22. As regards the period for which the order of debarment will remain effective, the guidelines state that the same would depend upon the seriousness of the case leading to such debarment.*

*23. Similarly in England, Wales and Northern Ireland, there are statutory provisions that make operators ineligible on several grounds including fraud, fraudulent trading or conspiracy to defraud, bribery etc.*

*24. Suffice it to say that 'debarment' is recognised and often used as an effective method for disciplining deviant suppliers/contractors who may have committed acts of omission and commission or frauds including misrepresentations, falsification of records and other breaches of the Regulations under which such contracts were allotted. What is notable is that the 'debarment' is never permanent and the period of debarment would invariably depend upon the nature of the offence committed by the erring contractor.*

*25. In the case at hand according to the respondent-BSNL, the Appellant had fraudulently withdrawn a huge amount of money which was not due to it in collusion and conspiracy with the officials of the Respondent- corporation. Even so permanent debarment from future contracts for all times to come may sound too harsh and heavy a punishment to be considered reasonable especially when (a) the Appellant is supplying bulk of its manufactured products to the Respondent-BSNL and (b) The excess amount received by it has already been paid back."*

In this judgment also, the Supreme Court held that a permanent ban would be too harsh. Under these circumstances, the ban order having served its purpose and the period having lapsed, the appeal was allowed to the extent

that while the banning order was affirmed, the period for the ban to operate had to be re-determined by the competent authority

33. The allegations, in the present case, are not of such a nature which involve or require a complex investigation. There is no maze of transactions or allegations involving multiple parties who are outside the scope of the arbitration. It is the conduct of the Supplier which is to be adjudged on the basis of the documents supplied by it for receiving payments, which have to be tested by the Arbitrator. This is not a case where multiple agencies would be required to conduct any inquiry or investigations in order to determine and arrive at the truth. Thus, this Court holds that the nature of allegations are not of such a nature, so as to render them non-arbitrable. Thus the allegations against the Supplier which include allegations of fraud and forgery are held to be arbitrable in nature.

**Issue No.3: Whether the banning order was justified in the facts?**

34. The case of the Government is that the rate contract for the period of 8<sup>th</sup> September, 2000 to 31<sup>st</sup> August, 2001 was short closed w.e.f. 6<sup>th</sup> August, 2001. The conditions of payments are contained in clause 19(2)(iv) which read as under: -

*“(iv) In the case of local delivery and in case of stores des-patched by road advance 95% payment may be allowed on proof of inspection and delivery to the consignee, the proof of delivery being a provisional certificate from the consignee. The balance 5% will be payable on final acceptance by the consignee as recorded in his final receipt certificate.”*

35. The Supplier had submitted the inspection notes to the Government which was the basis of the payments made. It is the Government's case that

the payment was made on the basis of documents showing inspection and delivery. The Government received a letter dated 24<sup>th</sup> January, 2002 in which it was informed by the consignee that no supply was made. The DGS&D, after payment was made to the Supplier, raised a debit note on the consignee which had then evoked this response. Vide letter dated 24<sup>th</sup> January, 2002, the South Central Railways categorically informed the Department to the following effect: -

*“No.SF DGS&D 2000. R.51/53.*

*Office of the ACOS(S&) SC.  
DT: 24.01.2002.*

*The Chief Controller of Accounts,  
Dept. of Supply,  
16, Akbar Road, Hutments,  
New Delhi-110001.*

*Sub: Supply Order No: PP.83.01.1004.2.90516 dt. 21.3.2001 and Supply Order No: PP.83.00.1132.2.90517 dt. 21.3.1001, Against: R/C. No: PP-3/RC-06214300/062000/Photocopier Paper/ 2000-2001/D-0488/DPPC/158 dt. 8.9.2000 placed on M/s. Delhi Paper Products/NDLS.*

*Ref: This office Lr. of even No. dated 13-12-2001.*

*Your kind attention is invited to the above cited supply orders placed on M/s. Delhi Paper Products/New Delhi which have not been complied so far. However, this office is in receipt of a statement from FA&CAO/WST/SC, namely, “Debits outstanding at the end of 10/01 which shows an payment having been made to the firm against the above order. The details are given below:*

| <i>S. No.</i> | <i>S.O. No/Dt</i> | <i>I/Note No: and date</i> | <i>Description</i> | <i>Qty. details</i> | <i>Pay details</i> | <i>Amount Rs.</i> |
|---------------|-------------------|----------------------------|--------------------|---------------------|--------------------|-------------------|
|               | <i>PP.</i>        | <i>DC-</i>                 | <i>Photocopier</i> | <i>1390</i>         | <i>PA039</i>       |                   |

|    |                                                             |                                |                      |                         |       |          |
|----|-------------------------------------------------------------|--------------------------------|----------------------|-------------------------|-------|----------|
| 1. | 83.01.<br>10042.<br>90516<br>dated<br>21.3.2<br>001         | 39331F<br>of<br>27.4.01        | Paper                | reams<br>9.01<br>(1000) |       | 1,40,001 |
| 2. | PP.<br>83.00.<br>1132.2<br>.90517<br>dated<br>21.3.2<br>001 | DC-<br>39341F<br>of<br>27.4.01 | Photocopier<br>Paper | 2119<br>PA039<br>reams  | PA039 | 4,18,757 |

*It is requested to bestow your kind attention in the matter and Clarify the same immediately duly arranging to recover the above Cited amount if already paid to the firm, under advise to all Concerned.*

*Matter may be treated as most urgent.*

*ACOS(S&F)SC.”*

36. Upon receipt of the letter dated 24<sup>th</sup> January, 2002, the Department inquired and received the inspection note and receipt certificates duly signed by the consignee i.e. the South Central Railways. These documents were forwarded by the DGS&D on 12<sup>th</sup> April, 2002 to South Central Railways seeking further clarifications and comments. Again further clarifications were sought on 21<sup>st</sup> May, 2002 from the consignee. The South Central Railways thereafter replied on 20<sup>th</sup> August, 2002 in the following manner: -

*“No.:SF. DGS&D.2000.R.51/53. Dt: 20.08.2002.*

*To:*

*POORTINIP*

*110001*

*FAX No: 0113345536*

*0113340497*

*FOR ATTENTION OF SHRI G.P. SINGH, ASST.  
DIRECTOR (S) –*

WITH REFERENCE TO YOUR LETTER NO. PP.3-R.-06011800/062000/DD/D-0488/OPPC/COAD/158 DT: 14.08.2002 IT IS INFORMED THAT THE SIGNATURE ON THE INSPECTION NOTE DOES NOT BELONG TO ANYONE FROM THIS OFFICE. THE RUBBER STAMP ALSO DOES NOT BELONG TO THIS OFFICE. NO RECEIPT PARTICULARS ARE FILLED IN THE INSPECTION NOTE. HOWEVER, IT IS ONCE AGAIN CONFIRMED THAT THIS OFFICE NEITHER RECEIVED THE INSPECTION NOTES NOR THE MATERIALS  
MATTER URGENT.

..... AOJ”

37. From the above letter, it is clear that the actual agency i.e. the South Central Railways which was to have confirmed the receipt of the goods informed the DGS&D that: -

- (a) The signatures on the inspection note did not belong to anyone from its office.
- (b) The rubber stamp also does not belong to the said office.
- (c) Receipt particulars were not filled in the inspection note.
- (d) The office did not receive the inspection note.
- (e) The office did not receive the material.

It was on the basis of this categorical letter received from the South Central Railways that the show cause notice was issued.

38. From the above documents and events, it is clear that there are two different versions; one of the Supplier and one of the Government. The Supplier claims that it had supplied the products after it was duly inspected by the inspector and endorsed on the inspection notes. The goods were in fact received by the consignee duly endorsed on the reverse of the inspection notes and thereafter due to bad quality, the supply order was cancelled and the goods were lifted back. Thereafter, the payment of 95% that was made

was refunded/adjusted.

39. On the other hand, the stand of the Government is that the inspection notes were forged by the Supplier. The supply was never made. The seal was also forged and the payment was wrongly claimed. The only letter which is on record to support the plea of the Supplier is the letter dated 30<sup>th</sup> November, 2002 wherein the South Central Railways has stated that the complaint against the firm was withdrawn and the case was closed. There is no document by the South Central Railways to confirm that the supplies were actually received. The Supplier himself relies on the cancellation order dated 13<sup>th</sup> July, 2001 and has misinterpreted the same. This document which is Exhibit C-4 of the arbitral record clearly records the reason for cancellation as being “as you have failed to supply”. However, in the affidavit filed on behalf of Supplier of Shri Mukesh Gupta, the reason for cancellation, as per this document is claimed as “not required”. This statement of the Supplier is clearly contrary to the record. A perusal of one of the said documents forming part of Exhibit C-4, shows that the reason for cancellation is categorical i.e. as you have failed to supply. A text of the said letter dated 13<sup>th</sup> July, 2001, is set out herein below: -

**“Supply order no. 90516 & 90517**

*Dear Sirs,*

*Please note that the purchase order mentioned above, is hereby cancelled for the quantity mentioned below:*

| <i>Description of Item</i>            | <i>Quantity ....</i>        |
|---------------------------------------|-----------------------------|
| <i>Photo Copier paper (A-4 size).</i> | <i>2119 +<br/>1390Reams</i> |

*In this connection please note the reasons for cancellation as per Item No.2.....*

*(1) Not required.*

- (2) *As you have failed to supply.*
- (3) *As you are unable to supply as per your letter.*
- (4) *Fresh purchase will be arranged at your risk and expenses if necessary. This is without prejudice to other rights of President of India under the contract and under law.*

*Your faithfully,*

*Sd/-*

*(N.V. Ramana) ACOS/G.”*

40. This document relied upon by the Supplier himself belies the entire case of the Supplier. This shows that the consignee had never received the supplies. This in fact also leads to the conclusion that the bogey of inspection notes having been signed by the inspector and the consignee's officer having signed on the reverse of the inspection notes were all false. The consignee's documents clearly show the contrary. The findings of the Arbitrator that the Supplier had produced a valid inspection note and that the forging of signatures is immaterial and unwarranted is untenable on the face of these documents. Though this Court is not to conduct a re-appreciation of the evidence, what cannot be ignored is the fact that the agency which is supposed to have received the supplies itself confirmed that there was a failure to supply.

41. The findings of the Arbitrator that the Supplier did effect delivery is contrary to the record. The Arbitrator seeks to rely upon a joint investigation report dated 23<sup>rd</sup> July, 2001 as per which a quality re-inspection was carried out. However, the Arbitrator presumes that this so-called inspection related to the consignments under the supply orders in question. The said inspection report actually relates to supply order 90515 and not to 90516 and 90517, which were the supply orders against which no supplies were made.

The relevant portion of the inspection report which shows that it merely related to supply order 90515, reads as under:

**“INVESTIGATION REPORT**

|                                   |                                                                                                  |                                                                                                                                              |
|-----------------------------------|--------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------|
| <i>File Ref. HYD/Compt/GE/279</i> |                                                                                                  | <i>Dated:20/23.7.2001</i>                                                                                                                    |
| 1.                                | <i>Name of office/circle which carried out inspection of stores</i>                              | <i>Director (GA), Delhi Circle</i>                                                                                                           |
| 2.                                | <i>Name and address of the consignee</i>                                                         | <i>ACOS, SIF, SC Rly, Secunderabad</i>                                                                                                       |
| 3.                                | <i>Name and address of the form</i>                                                              | <i>M/s Delhi Paper Products Co. Pvt. Ltd., 19 IGI, Gurgaon Road, Kapashera Marg, New Delhi 110037</i>                                        |
| 4.                                | <i><u>Contract Number &amp; date</u><br/>(In case of R/C supply Order No. also to be stated)</i> | <i>R/CNo. PP3/RC-06011800/Photocopier Paper 2000-2001/D-0488/DPPC/158dt8/9/2000 COS,SC Rly S/oNO PP <u>83.00.1130.90515</u> dt.21/3/2001</i> |
| 5.                                | <i>Description of stores with specification drg. No. of approved sample if any</i>               | <i>Photocopier Paper 210x297mm (A.4)GSM 80 ±3%.Specification as per R/C</i>                                                                  |
| 6.                                | <i>Quantity rejected</i>                                                                         | <i><u>5900 Reams (590 Cartons</u><br/><u>Each Carton contains 10</u><br/><u>Reams)</u>"</i>                                                  |

42. The Ld. Arbitrator has, on the basis of a joint investigation relating to a different supply order, completely erroneously concluded that the supplies were in fact made. The finding of the arbitrator reads:

*“20. The documents so exhibited by respondent show a joint investigation report dated 23.07.2001 showing a quality re-inspection of stores at consignees godown,*

*there by establishing the presence of stores in consignees godown. A question so arises as to how the supplies can be taken up for joint investigation once the supply order has been cancelled on 13.07.2001 and the claimant has been asked to lift back the supplies. Further facts so established on appreciating the evidence on record the fact that the receipt portion of the Inspection No (Advance Payment Copy) reflects a similar receipt an all the three I/Note of the three supply orders i.e. 90515, 90516 & 90517”*

43. This is a complete perversity when seen in light of the show cause notice and the inspection report. The show cause notice is clear. It alleges that no supplies were made against supply orders 90516 and 90517. Any supply made against supply order 90515, with which the Inspection report was concerned, was wholly irrelevant and alien to the issue at hand. The inferences drawn by the Arbitrator are clearly contrary to the letter dated 20<sup>th</sup> August, 2002 of the South Central Railways as also the letters dated 24<sup>th</sup> January, 2002 and the cancellation orders.

44. The cancellation of the supply orders having been placed on record by the Supplier and there being no explanation as to how it can claim that the supplies were actually made, the findings of the Arbitrator are clearly contrary to the record. In fact in paragraph 12 of the claim petition, it is only a plea of the Supplier that it was forced to lift back the materials and in support thereof it relies on a self-serving letter dated 7<sup>th</sup> August, 2002, which it claims to have written to the Commercial Taxes Department at Bhoraj, Adilabad. This letter is not a confirmation by the consignee that supplies were made and were lifted back. Thus, it is quite clear that the stand of South Central Railways and the letter written by it having been completely ignored by the Arbitrator, the award suffers from a patent illegality. The

Supplier having indulged in claiming payments against fraudulent supplies, was rightly banned/blacklisted.

45. The ban order is accordingly upheld. Any person who indulges in such fraudulent practices does not deserve to be viewed sympathetically. The ban order was valid for a period of ten years and the time has already lapsed and has come to an end in December, 2012.

46. The Supplier is, however, permitted to participate in future tenders without any reference to the ban order inasmuch as the Supplier cannot be punished perpetually. By applying the doctrine of proportionality, the tenure of the ban is upheld, however, the Supplier is no longer required to be punished for all times to come and is permitted to bid in future tenders without any reference to the ban order.

**Issue No.4: Whether the Supplier was entitled to claims for damages for losses?**

47. Since the banning order is being upheld, none of the claims of the Supplier are liable to be allowed. The award of damages on various counts is accordingly set aside.

48. The OMP is allowed in the above terms.

**PRATHIBA M. SINGH  
JUDGE**

**NOVEMBER 01, 2018**

*Rekha*