

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

WEDNESDAY, THE 22ND DAY OF NOVEMBER 2017

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

A.Nos.2276 to 2281 of 2017

in

O.P.Nos.131 to 133 OF 2013

O.P.No.131 of 2013:

In the matter of Arbitration and
Conciliation Act, 1996

AND

In the matter of Arbitration of
dispute between M/s.Gimpex Ltd. Vs.
M/s. Kalika Cement Ltd., in relation
to the High Seas Sale Agreement
dated 17.04.12 relating to 52,163 MT

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.S.Uma Shankar
No.282, Linghi Chetty Street,
Chennai-600 001

..Petitioner

Vs

*M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23-A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001

..Respondent

(*amended as per order dated 26.04.2013 in A.No.1905/2013)

A. Nos.2276 and 2277 of 2017:

M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001.

:Applicant/Respondent

Vs

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.S.Uma Shankar
No.282, Linghi Chetty Street,
Chennai-600 001 ...Respondent/Petitioner

A. No.2276 of 2017:

Application praying that this Hon'ble Court be pleased to recall the common order dated 28.04.2015 and the further, consequent common order dated 11.09.2015 passed under Section 11 of the Arbitration and Conciliation Act, 1996 in O.P.No.131 to 133 of 2013.

A. No.2277 of 2017:

Application praying that this Hon'ble Court be pleased to stay all further proceedings in Arbitration Case No.1 of 2015 pending on the file of Hon'ble Mr.Justice K.Govindarajan, Judge (Retd.,) High Court, Madras, the learned Arbitrator pending disposal of the main recall petition.

O.P.No.132/2013

In the matter of Arbitration and
Conciliation Act, 1996

AND

In the matter of Arbitration of
dispute between M/s.Gimpex Ltd. Vs.
M/s. Kalika Cement Ltd., in relation
to the High Seas Sale Agreement
dated 27.04.12 relating to 31,500 MT

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.S.Uma Shankar
No.282, Linghi Chetty Street,
Chennai-600 001 ..Petitioner

Vs

*M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23-A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001 ..Respondent

(*amended as per order dated 26.04.2013 in A.No.1908/2013)

A. Nos.2278 and 2279 of 2017:

M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001 ..Applicant/Respondent

-Vs.-

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.Uma Shankar,
No.282, Linghi Chetty Street,
Chennai-600 001 ...Respondent/Petitioner

A. No.2278 of 2017:

Application praying that this Hon'ble Court be pleased to recall the common order dated 28.04.2015 and the further, consequent common order dated 11.09.2015 passed under Section 11 of the Arbitration and Conciliation Act, 1996 in O.P.Nos.131 to 133 of 2013.

A. No.2279 of 2017:

Application praying that this Hon'ble Court be pleased to stay all further proceedings in Arbitration Case No.3 of 2015 pending on the file of Hon'ble Mr.Justice K.Govindarajan, Judge (Retd.,) High Court, Madras, the learned Arbitrator pending disposal of the main recall petition.

O.P.No.133 of 2013

In the matter of Arbitration and
Conciliation Act, 1996

AND

In the matter of Arbitration of
dispute between M/s.Gimpex Ltd. Vs.
M/s. Kalika Cement Ltd., in relation
to the High Seas Sale Agreement
dated 27.04.12 relating to 20,401 MT

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.S.Uma Shankar
No.282, Linghi Chetty Street,
Chennai-600 001

..Petitioner

Vs

*M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23-A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001

..Respondent

(*amended as per order dated 26.04.2013 in A.No.1909/2013)

A. Nos.2280 and 2281 of 2017:

M/s. Aanchal Cement Limited,
Formerly known as
M/s. Kalika Cement Ltd.,
Rep. by its Managing Director,
Mr. Manoj Goel,
No.23A, N.S.Road, Suit-5,
7th Floor, Kolkatta-700 001

..Applicant/Respondent

-Vs.-

M/s. Gimpex Ltd.,
Rep.by its Authorised Signatory
Mr.Uma Shankar
No.282, Linghi Chetty Street,
Chennai-600 001

...Respondent/Petitioner

A. No.2280 of 2017:

Application praying that this Hon'ble Court be pleased to recall the common order dated 28.04.2015 and the further, consequent common order dated 11.09.2015 passed under Section 11 of the Arbitration and Conciliation Act, 1996 in O.P.Nos.131 to 133 of 2013.

A. No.2281 of 2017:

Application praying that this Hon'ble Court be pleased to stay all further proceedings in Arbitration Case No.2 of

2015 pending on the file of Hon'ble Mr.Justice K.Govindarajan, Judge (Retd.,) High Court, Madras, the learned Arbitrator pending disposal of the main recall petition.

These applications coming on this day before this court for hearing the court made the following order:-

Application Nos.2278 & 2280 of 2017, in O.P.Nos.132 & 133 of 2013, have been filed to recall the common order, dated 28.04.2015 and the consequential common order, dated 11.09.2015, passed under Section 11 of the Arbitration and Conciliation Act, 1996 (Act).

2. Application Nos.2277 of 2017, 2279 of 2017 & 2281 of 2017 have been filed for stay of further proceedings in Arbitration Case Nos.1,2 & 3 of 2015, before the Hon'ble Arbitrator.

3. The petitioner, in these applications, was the respondent in the Original Petitions filed by the respondent herein under Section 11(5) of the Act , to appoint an Arbitrator(s) to decide the disputes and differences between them in terms of High Seas Sale Agreement, dated 17.04.2012 & 27.04.2012 . The petitioner herein resisted the applications by contending that whether the transaction between the parties, is a joint venture endeavour or High Seas Sale transaction, has to be

determined, as their specific case is that the High Seas Sale Agreement is a sham and nominal document, not intended to be acted upon whether the claim was a dead one, long barred claim sought to be restored and whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. The memorandum of compromise, which was entered into by the parties was challenged as being a fraudulent document obtained under duress and when such is the case, the matter has to be decided only by the Court and not by way of Arbitration.

4. The Court considered the factual and legal submissions made by the parties and held that the disputes squarely fall within the ambit of clause 5 of the General Conditions of Sale as contained in the High Seas Sale Agreement and accordingly, appointed the Hon'ble Arbitrator as the sole Arbitrator to enter upon the reference, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible. Subsequently, an application was filed by the respondent herein in A.No.597 of 2015, submitting that the Hon'ble Arbitrator, who was appointed by this Court, is not inclined to take up the proceedings for certain reasons and therefore, requested the Court to appoint another Arbitrator. The said Application was disposed of, by order dated 11.09.2015, appointing the present Hon'ble Arbitrator to enter upon a

reference and proceed with the matter. Pursuant thereto, the parties have filed the claim statements on 25.12.2015. Reply statements have been filed by the petitioner herein on 28.04.2016, for which a common rejoinder has been filed on 25.05.2015. I have been informed that the arbitration proceedings have commenced and the witnesses produced by the respondent herein are being cross examined by the counsel for the petitioner herein. While so, on 09.02.2017, a letter was addressed to the counsel for the respondent calling upon the respondent to produce on 16.02.2017, originals of Exhibits C10, C11 & C12 being the High Seas Sale Agreements, dated 17.04.2012, 27.04.2012 and 27.04.2017. When the case was heard by the Hon'ble Arbitrator on 16.02.2017, a memo was filed by the petitioner herein expressing serious doubt as to the existence of originals of Exs.C10, C11 & C12, because two different versions of each Exhibits have been relied upon by the claimant in the application filed by the respondent under Section 8 of the Act in CO.No.4504 of 2016, before the Civil Court at Calcutta. The petitioner further stated that the respondent has relied upon the manufactured and fabricated documents as constituting High Seas Sale Agreement containing Arbitration clause and has wrongfully invoked the jurisdiction of the Tribunal on the basis of the said Exhibits. C10, C11 & C12, without being able to produce the originals of such documents. Therefore, the petitioner prayed before the Hon'ble Arbitrator to direct

the respondent/claimant to file originals of Exhibits C10, C11 & C12 forthwith and compare the originals with the xerox copies, relied upon and filed by the respondent claimant in the arbitral proceedings. Even prior to filing the memo dated 16.02.2017, the petitioner had filed a memo dated 29/30.01.2017, seeking for deferring the arbitral proceedings pending decision of the matter before the Civil Court at Calcutta.

5. The Hon'ble Arbitrator, by an elaborate order, dated 28.02.2017, rejected the memo holding that the respondent cannot seek for deferment of the proceedings on the ground that the matter is pending before the Civil Court at Calcutta. For the memo dated 16.02.2017, the respondent filed a reply, dated 16.03.2017, denying the allegations made against them that they have relied upon the manufactured and fabricated documents. With regard to the request for production of the originals of the three Exhibits, the respondent stated as follows:-

05.It is submitted that, one set of HSS Agreements was prepared in stamp paper. Later the same was copied in a green bond paper. Thereafter the claimant and the respondent had affixed their seal and signature in the stamp paper as well as in the green bond paper.

06.It is submitted that, in so far as HSS agreement dated 17.04.2012, relating to 52163MT is concerned, the HSS

Agreement in stamp paper is being produced herewith. The HSS Agreement in green bond paper is not available in our file.

07. It is submitted that, in so far as HSS Agreement dated 27.04.2012, relating to 31500MT is concerned, the HSS Agreement in stamp paper as well as the HSS Agreement in green bond paper are being produced herewith.

08. It is submitted that, in so far as HSS Agreement dated 27.04.2012 relating to 20401MT is concerned, the HSS Agreement in stamp paper as well as the notarized copy are being produced herewith. The HSS Agreement in green bond paper is not available in our file.

6. The respondent requested the Hon'ble Arbitrator to take the documents filed on record and pass orders. The Hon'ble Arbitrator recorded the minutes of the 7th sitting held on 18.03.2017, as follows:-

The learned counsel for the claimant filed the common reply to the common memo filed by the respondent. The learned counsel has also produced 3 documents namely "High Seas Sale Agreement" in stamp papers saying that they are the originals of EX.C10, C11 and C12. The learned counsel for the claimant has also produced the agreements relating to 31500MT in green paper and 20,401MT in white paper.

According to him even on both the documents the parties have signed, but they are not properly stamped and in the document related to 20401MT, the parties have not been signed as it is not only xerox copy.

The learned counsel for the respondent submitted that with respect to the agreement relating to 52163MT the document produced by the claimant tallies with EX.C10. But in the other two documents produced by the claimant saying that they are the originals of Ex.C.11 and Ex.C.12, the position of the signatures at the bottom of the each page and the seal affixed therein do not tally with Ex.C.11 and Ex.C12 and on that basis, the learned counsel for the respondent submitted that the documents produced in the stamp paper are not the originals of Ex.C.11 and Ex.C.12. The said discrepancies are recorded and the same will be considered regarding the reliability and acceptability of Ex.C.11 and Ex.C.12 at the time of passing award.

The learned counsel for the respondent objected to take on file the annexures to the agreements in the stamp papers alleged to have been filed as originals of Ex.C.11 and Ex.C.12. The learned counsel also further submitted that the claimant has not produced the originals of Ex.C.11 and Ex.C.12, the Arbitration proceedings cannot be

proceeded with respect to Ex.C.11 and Ex.C.12. According to the Tribunal the entire proceedings shall be proceeded with the documents already marked and the admissibility and the reliability of the documents will be considered finally in the Award.

The learned counsel for the respondent requested time to file a rejoinder to the common reply filed by the claimant today. He further submitted that after scrutinizing the documents produced by the learned counsel for the claimant they founded so many discrepancies in respect of the 3 documents namely Ex.C.10, C11 C.12 and the documents produced by the learned counsel for the claimant and they want to file a memo pointing out those discrepancies. Such liberty is granted to the respondent to file such a memo.

The next sitting will be held at 4.00p.m on 28.04.2017 and at 11.00 a.m on 29.04.2017 (two sessions) for cross examination of CW-1. The respondent is directed to file the above said rejoinder and the memo on or before the next date of sitting.

Dated at Chennai at this the 18th March 2017.

7. Before the matter could be taken up on 28.04.2017, the petitioner filed these applications on 05.04.2017, for

recalling the order passed by this Court constituting the Arbitral Tribunal.

8. The learned counsel for the petitioner submitted that on 26.11.2016, originals were not produced before the Hon'ble Arbitrator and the Hon'ble Arbitrator had marked xerox copies subject to admissibility, proof and relevance. The so called originals of Ex.C-10 & C-12 do not tally and so far as Ex.C-11, the original was not produced before the Hon'ble Arbitrator. The applications filed by the respondent under Section 8 before the Civil Court at Calcutta, was dismissed for non-production of the originals of the High Seas Sale Agreement. It is submitted that the respondent/claimant produced before the Hon'ble Arbitrator three documents as annexures A, B & C along with their common reply, dated 16.03.2017. Annexure A was stated to be the original of the High Seas Sale Agreement, dated 17.04.2012 for 52163MT i.e., Ex.C-10. Annexure B contained two documents one of which was stated to be the original of Ex.C.12 and other to be a scanned copy on green bond paper of Ex.C-12. Annexure C contained two documents, one of which was stated to be the original of Ex.C-11 and the other was stated to be a notarised xerox copy made from a scanned copy on green bond paper of Ex.C-11. It is submitted that though Annexure A appears to be original of Ex.C-10, on scrutiny, discrepancies were found. With regard to Annexure B, serious discrepancies were noted

between Ex.C-12 and what was filed purporting to be original of Ex.C-12. With regard to Annexure C, claiming to corresponding to Ex.C-11, while Ex.C-11 appears to contain the alleged signature of only one person on behalf of the petitioner on a round seal of Kalika Cement Ltd., Asansol. The stamp paper original filed in Annexure C, contained two signatures on behalf of Kalika Cement Limited and not on round seal, but two horizontal seals popularly known as "For Seal", of Kalika Cement Limited on the first two pages and on the 3rd page, a scanned signature of only one person purporting to be a director of Kalika Cement limited, under a scanned copy of the seal "Kalika Cement Limited", below typed words, "For Kalika Cement Limited". But the seal and signature on the third page are not original seal or original signature but both are scanned. Moreover, the green bond paper copy contained in Annexure C bears the signature and round seal of a Notary by name Mr.P.K.Datta. The signature of the said Notary is totally different from page to page in all the three pages, discernible even to the naked eye making it highly suspicious and unreliable.

9. Apart from the above, various other discrepancies were focused by the learned counsel for the petitioner and infact, colour photostat copies of the documents marked before the Hon'ble Arbitrator were produced and the learned counsel for the petitioner in the presence of the learned

counsel for the respondent, explained to the Court as to why the petitioner has stated that the documents are fraudulently created and the discrepancies are very serious in nature and when such is the case pleaded by the petitioner, the matter can be resolved only before the Civil Court and not by way of an Arbitration. It was further submitted that when the issue was raised before the Hon'ble Arbitrator, it was recorded that the reliability and acceptability of Exs.C-11 & C-12 will be considered at the time of passing the award. The learned counsel further submitted that the respondent claimant has played fraud in obtaining orders from this Court in the application under Section 11, by filing xerox copies of the documents by falsely stating that they are true copies and now being unable to produce the originals, from which, they were copied and the respondent claimant is trying to invent unacceptable stories to cover up the fraud of having filed different photostat copies of the same alleged originals in different proceedings, differing in seals and signatures of both the parties. It is further submitted that the fraud goes to the root of the matter and relates to forgery and fabrication of the very agreement said to contain the arbitration clause. The charges being serious, viz., fraud forgery and fabrication of documents, which have been *prima facie* shown by the petitioner casting a heavy burden on the respondent to rebutt the same, this issue is not an arbitrabal issue, but can be decided only by appropriate

Civil Court. In this regard, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of **A.Ayyasamy vs. A.Paramasivam & Ors.**, reported in **(2016) 10 SCC 386**. It is further submitted that this Court has sufficient power to recall its earlier order and this power is inherent in the Court, if it is found that the order has been obtained by fraud or forgery. In support of such contention, reliance was placed on the decision in the case of **Indian Bank vs. Satyam Fibres (India) Pvt., Ltd.**, reported in **(1996) 5 SCC 550**. Reliance was placed on the decision of the High Court of Bombay in the case of **Mr.Baban Piraji Ghadge vs. Mr.Amit Jayant Sheth in Arbitration Petition No.61 of 2016, dated 18.04.2017**, wherein the Court took into consideration the decision in the case of **A.Ayyasamy**(supra), and held that in certain cases, the arbitration clause can be ignored by Court and the Court may refuse to refer to arbitration, particularly in cases of allegations of fraud/fabrication of documents, where the fraud goes to the validity of the contract itself. Further, it is submitted that the respondent/claimant having not approached this Court with clean hands and having suppressed material facts and produced fraudulent documents, is not entitled for any relief. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Oswal Fats & Oil Limited vs. Additional Commissioner (Admn)**

reported in **(2010) 4 SCC 728**.

10. The learned counsel appearing for the respondent submitted that though the petitioner has used very strong expressions of fraud and fabrication, it is to be noted that the petitioner does not dispute the seal and signature and infact, the petitioner also produced some documents before the Hon'ble Arbitrator. This issue was infact canvassed before the Hon'ble Arbitrator, who has dealt with the matter in his order dated 18.03.2017. Further, it is submitted that the present petitions are an exact replica of the petition, which was filed by the petitioner before the Hon'ble Arbitrator in the form of a memo, dated 28.04.2017. In the said memo, the petitioner prayed for expunging Ex.C-10, C-11 & C-12 and to restrain the respondent claimant from relying upon those three documents and also expunge the evidence of Binod Choudhury. The respondent filed a reply dated 30.04.2017, pointing out that the petitioner is attempting to shirk the arbitration proceedings, when the petitioner had raised similar objections by way of preliminary objection, dated 25.01.2016 and additional preliminary objection, dated 07.03.2016, under Section 16 of the Act before the Hon'ble Arbitrator and the same were negatived by order dated 12.03.2016. Once again, another memo, dated 30.01.2017 was filed by the petitioner praying for deferring the arbitration proceedings on the ground that the City Civil

Court at Calcutta had dismissed the petition filed by the respondent under Section 8 of the Act. This memo was negatived by the Hon'ble Arbitrator by order dated 28.02.2017. Thereafter, during the course of cross examination of the respondent, the petitioner filed another memo, dated 16.02.2017, on the ground that there are discrepancies in the seal and signature of the High Seas Sale Agreement and sought for direction to the respondent to file the originals and compare the originals with xerox copies in the arbitration proceedings and duly record the discrepancies.

11. The respondent in reply, filed original High Seas Sale Agreement along with memo dated 16.03.2017, and the same was considered by the Hon'ble Arbitrator in proceedings dated 18.03.2017, by stating that the arbitration proceedings will be proceeded with the documents already marked and the admissibility and reliability of the documents will be considered finally in the award. Further, with the consent of the counsels on both sides, the date for continuing cross examination of the petitioner was fixed on 28.04.2017 and 29.04.2017, after which, on 03.04.2017, the petitioner has filed these petitions to recall the order constituting the Arbitral Tribunal. The said petitions were numbered during the first week of April and thereafter on 24.04.2017, the petitioner filed an adjournment petition before the Hon'ble

Arbitrator, which was dismissed by the Hon'ble Arbitrator, on 25.04.2017, stating that the cross examination of CW1 will be proceeded with on 24.04.2017 and 30.04.2017. Whiles, on 29.04.2017, when CW-1 was present for cross examination, the memo dated 28.04.2017, was filed. Therefore, it was contended that the conduct of the petitioner is only to drag on the matter without meeting the case on merits. The orders passed by the Hon'ble Arbitrator, dated 26.11.2016 & 18.03.2017, is a complete answer to the issue regarding the production/non-production and marking of the documents and the same cannot be revisited by the petitioner on any grounds, much-less the grounds mentioned in these applications. The respondent further stated that there is no forgery, fabrication of the documents, as claimed by the petitioner and the objection raised after the commencement of the arbitration proceedings are trivial. It is further submitted that the Hon'ble Arbitrator passed a detailed order on 15.05.2017, which covers all the issues and the reasons contained therein are a complete answer to the claim made by the petitioner in the present applications. Further, it is submitted that no such objection was taken by the petitioner under Section 16, when the respondent moved the application under Section 11, and the High Seas Sale Agreement was not disputed and therefore, the petitioner is deemed to have waived such objections in the light of Section 4 of the Act. In this regard, the learned counsel

placed reliance on the decision in the case of **Bharat Sanchar Nigam Ltd., vs. Motorola India Pvt Ltd.**, reported in **(2009) 2 SCC 337 & UOI vs. Pam Development Pvt Ltd.**, reported in **(2014) 11 SCC 366**. The issues having been gone into by the Hon'ble Arbitrator, cannot be once again raised before this Court. In this regard, the learned counsel referred to the reply statement filed by the petitioner herein to the claim statement filed by the respondent claimant and has drawn the attention of this Court to paragraph 5(k) wherein the petitioner has admitted that High Seas Sale Agreement was entered into between the parties. The learned counsel relied on the decision in the case of **Sunder Kukreja & Ors., vs. Mohan Lal Kukreja & Anr.**, reported in **(2009) 4 SCC 585**, to support his contention that it would be appropriate to leave the question regarding genuineness of the documents to be decided by the Hon'ble Arbitrator. Reliance was placed on the recent decision of the Hon'ble Supreme Court in the case of **Duro Felguera, S.A vs M/s. Gangavaram Port Limited** reported in **2017 (12) Scale 433**, and this judgment pronounced by the Hon'ble Mrs. Justice R. Banumathi was agreed to by Hon'ble Justice Kurian Joseph, who concurred with the opinion by a separate order, dated 10.10.2017.

12. In reply, learned counsel for the petitioner requested this Court to peruse the averments set out in

paragraphs 39, 44, 45, 47 & 50 of the present petitions, which are the sum and substance of the petitioner's contentions before this Court.

13. I have elaborately heard the learned counsels appearing for the parties and perused the materials placed on record.

14. In the recent decision of the Hon'ble Supreme Court in the case of **Duro Felguera, S.A** (supra), all the earlier decisions rendered by the Hon'ble Supreme Court on Section 11 of the Act, were considered and the conclusions were summed up in paragraph 47 of the Judgment. For the case on hand, paragraph 47 (vi) would be relevant, which reads as follows:-

(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

15. In terms of the above decisions, once the matter reaches the Arbitral Tribunal or the sole Arbitrator, the High Court would not interfere with the orders passed by

the Arbitrator, during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act. By applying the above legal principle to the case on hand, the only conclusion that can be arrived at is to reject the application as not maintainable. One more good ground to reject the application is that these applications are filed to recall an earlier order passed under Section 11 of the Act, after the matter reached the Hon'ble Arbitrator and the matter is at the stage of the cross examination of the respondent claimant. Therefore, these grounds are sufficient to reject the present applications.

16. From the facts narrated above, it is seen that ever since the matter was referred for arbitration after the filing of the claim petition, the petitioner has been filing several memos in which, the Hon'ble Arbitrator has passed orders. The respondent's contention is that the intention of the petitioner is to drag on the matter and not participate in the arbitral proceedings. When the case was at the stage of cross examination, a memo dated 28.04.2017, was filed to expunge the three Exhibits marked as Exs.C-10, C-11 & C12 and to restrain the claimant from relying upon those three documents and also to expunge the evidence of the witness Mr.Binod Choudhury. The respondent has filed a reply to the said memo, dated 30.04.2017. The

Hon'ble Arbitrator has passed an elaborate order on 15.05.2017, as to the justifiability of the prayer sought for by the petitioner herein. At this juncture, it would be beneficial to refer to the findings recorded by the Hon'ble Arbitrator in paragraphs 15 to 18 of the order:-

15. In the common memo filed by the respondent, the reliefs as mentioned in para No.1 are sought for. Such prayers are sought for based on the allegations that the claimant has attempted to commit a fraud by filing xerox copies of the documents, by not producing the originals and certified the same falsely that they were true copies of the originals, and the documents produced as original are totally variance with the exhibits already marked. It is further stated that the documents marked as Ex. C-10, C-11 and C12 are forged and fabricated for the purpose of this proceedings.

16. This stand taken by the respondent was only on the basis that the documents marked as Ex.C-10, C11, C12 are not tallying with the documents produced by the claimant as originals. The Learned Senior counsel for the respondent pointed out certain discrepancies. But at this stage the correctness of the same need not be gone into except recording the same as requested by the learned counsel.

17.It is relevant to mention that

though the claimant filed Ex C10, C11 and C12 along with Claim Statement, no such plea objecting the said documents was raised by the respondent in the counter statement. Only on the basis of the discrepancies pointed out comparing both the documents such plea of forgery has been raised. As rightly pointed out by the learned counsel for the claimant, the documents filed by the claimant as originals are not yet marked and so they cannot be dealt with now to decide the issues. Merely because certain signatures and seals in the documents produced as originals are not tallying with the documents marked as Ex. C-10, C11 and C12 it cannot be said that Ex C10, C11 and C12 are forged especially when the respondent is taking a stand that the documents produced as originals are not the originals of Ex C10, C11, and C12. So if at all it can be said they are not the originals of Ex.C10, C11 and C12 and it is for the claimant to prove the same if they want to rely on the same. The learned senior counsel for the respondent did not raise any such contention regarding the contents contained in Ex C10, C11 and C12. No such plea also raised in the Memo. Moreover, the learned Senior counsel for the respondent categorically submitted that the respondent had executed three HSS Agreements, as

alleged by the claimant, but they are sham and nominal documents and they were only for Port Clearance purpose. It is also relevant to mention that the copies of the such three HSS Agreement have also been furnished in the typed set filed by the respondents. So it is clear there is no dispute regarding the existence of HSS Agreements with the content contained in Ex C10, C11 and C12 with the signatures and seals.

18. So merely because some of the signature and seal in the originals produced by the Claimant do not tally with Ex C10, C11 and C12, it cannot be concluded that those exhibits (Ex.C10, C11, C12) are forged at this stage. If they are not tallying, as pointed out, the same will be dealt with at the final stage regarding the consequences of the same. Except relying on the documents produced as originals by the claimants, the respondents has not made out any other ground to reject Ex C10, C11 and C12 at this stage itself. If such a plea is pressed into by the respondent during the final stage, it will be adequately dealt with in the award along with other issues. On the other hand, it would not be construed that the documents, taken on file and marked, do not amount to its proof. If they are not proved as required under law, it will not be relied on, while disposing of the matter.

17. After recording the above findings and referring to the decision of the Hon'ble Supreme Court in the case of ***Bipin Shanthilal Panchal vs. State of Gujarat*** reported in ***AIR 2001 SC 1158***, the Hon'ble Arbitrator held that the admissibility and reliability of the documents will be decided finally.

18. I find that the present attempt of the petitioner is virtually a second attempt having not been able to succeed before the Hon'ble Arbitrator. On facts, I hold that such attempt of the petitioner is impermissible and not to be encouraged and if it is so done, the very object resorting to an alternate dispute redressal mechanism would stand defeated. In my considered view, the Hon'ble Arbitrator has rightly held that the admissibility and reliability of the documents will be done at the final stage and the question of scrapping those documents or the evidence at this stage would not arise.

19. In the case of ***Sunder Kukreja*** (supra), the dispute was between brothers one of whom filed a petition under Section 20 of the Arbitration Act, 1940, praying for an appointment of an Arbitrator. The petition was opposed by the other brother contending that the petitioner has misrepresented the facts that there is no subsisting arbitration agreement between the parties, the petitioners have not come to Court with clean hands and the petitioner

has deliberately omitted to mention the fact of the retirement from the business under the retirement deed. The genuineness of the retirement deed was challenged by the petitioner, who asserted that no retirement deed was executed and it is a forged and fabricated document. The learned Single Judge, who heard the Arbitration Petition, referred the disputed document for opinion of the Central Forensic Science Laboratory, the Laboratory concluded that the signatures were not genuine. The learned Single Judge held that the plea that there was no dispute because of the alleged retirement deed and the receipts can be easily gone into by the Arbitrator and in view of the report of the forensic expert, it cannot be *prima facie* said that the dispute does not exist. On appeal before the Hon'ble Division Bench, it was held that there is a dispute as to the very existence of an arbitration clause by reason of supersession of the agreement, in which the same is contained by another subsequent agreement arrived at between the parties and the said dispute cannot be referred to arbitration. The order passed by the learned Single Judge was set aside and the matter was remanded for fresh consideration. The Hon'ble Supreme Court held that the judgment of the Hon'ble Division Bench cannot be sustained and that it was not correct in holding that the dispute should not have been referred to the Arbitrator in view of the alleged retirement deed. It was further held that the very genuineness of the retirement deed was challenged and

infact, the forensic expert gave a report that it was not genuine and the learned Single Judge has recorded *prima facie* satisfaction that the dispute has not become dead and in the light of the decision of the Hon'ble Supreme Court in the case of **M/S.Shree Ram Mills Ltd vs M/S.Utility Premises (P) Ltd** reported in **(2007) 4 SCC 599**, it would be appropriate to leave the question regarding the genuineness of the alleged retirement deed to be decided by the Arbitrator. In the present case, the Hon'ble Arbitrator has exactly done what the Hon'ble Supreme Court has held in the case of **Sunder Kukreja** (supra).

20. The learned counsel for the petitioner placed much reliance on the decision in the case of **A.Ayyasamy** (supra). In the said decision, the Hon'ble Supreme Court referred to the 246th Law Commission Report, which has recognised that in cases of serious fraud, Courts have entertained civil suits. Secondly, it has tried to make a distinction in cases, where there are allegations of serious fraud and fraud simplicitor. Therefore, it was held that in those cases, where there are serious allegations of fraud, they are to be treated as non-arbitral and only civil Court will decide such matter. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, it was held that it may not be necessary to nullify the effect of the arbitration agreement between the parties. In my view, the plea of fraud has been raised before the Hon'ble Arbitrator and the Hon'ble Arbitrator is

yet to give a ruling on that and has passed a detailed order holding that the admissibility and reliability of the documents will be gone into. Mere use of the expression of "fraud" or "fraudulent transaction" will not make the transaction as fraudulent. The Hon'ble Supreme Court has drawn a distinction by categorising the cases into two namely, where serious allegations of fraud are made and where allegations of fraud simplicitor are made.

21. Admittedly, before this Court in an application filed under Section 11, the petitioner did not dispute the High Seas Sale Agreement, rather the petitioner's contention was that it was a sham document not intended to be acted upon and the nature of transaction was a joint venture endeavour. The Court considered the matter and passed the order appointing the Hon'ble Arbitrator. By virtue of these applications, the petitioner is not entitled to seek review of the order. That apart, the petitioner had not taken such a stand of fraud and forgery before the City Civil Court at Calcutta nor while defending the application filed by the respondent under Section 8 of the Act in the suit.

22. In the reply filed to the the claim petition before the Hon'ble Arbitrator, the existence of the High Seas Sale Agreement has been admitted. Therefore, I have no hesitation to hold that even assuming there is an allegation of fraud, it can be only an allegation of fraud

simplicitor and it is insufficient to nullify the effect of the arbitration agreement between the parties, as such issues will be and can be determined by the Hon'ble Arbitrator.

23. The decision in the case of **Baban Piraji Ghadge** (supra) of the High Court of Bombay is distinguishable on facts though there is a reference to the decision of the Hon'ble Supreme Court in **A.Ayyasamy**.

24. In the light of the above discussion, it is held that the present attempt of the petitioner is to stall the arbitration proceedings, which is not permissible and on the grounds raised by the petitioner in these Petitions, the order passed by this Court appointing the Hon'ble Arbitrator(s) vide orders dated 28.04.2015 and 11.09.2015 cannot be recalled and the applications are dismissed. In the light of the above conclusion, this Court has not considered the plea of waiver under Section 4 as raised by the learned counsel for the respondent and the same is left open to be raised before the Hon'ble Arbitrator. No costs.

sd/-T.S.S.J
22.11.2017

//Certified to be a true copy//

Dated this the day of 2017

jj 14.12.2017

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.