IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION APPLICATION NO. 6 OF 2024

Goqii Technologies Private Limited .. Applicant
Versus
Sokrati Technologies Private Limited .. Respondent

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Mr. Vishal Kanade with Monil Punjabi Ahuja i/b Syed Naserali Rizvi for the applicant.
Mr. Sarosh Bharucha, Sanjay Sinha, Siddhant Sinha, Onkar Savarkar, Ankita Pannikar, Kaevaan Setalvad, Rushabh Vidyarthi i/b Hammurabi & Soloman Partners for the respondent.

CORAM: BHARATI DANGRE, J.
DATED : 30th APRIL, 2024

JUDGMENT:-

1 The limited scope of judicial scrutiny at the pre-referral stage is navigated through the test of 'prima facie review'. This is explained in the following words in Vidya Drolia and ors Vs. Durga Trading Corporation,[1]:

> *"133 Prima facie case in the context of Section 8 is not to be confused with the merits of the case put up by the parties which has to be established before the Arbitral Tribunal. It is restricted to the subject-matter of the suit being prima facie arbitrable under a valid arbitration agreement. Prima facie case means that the assertions on these aspects are bona fide. When read with the principles of separation and competence-competence and section 34 of the*

1 (2021) 2 SSC 1

Arbitration Act, the referral court without getting bogged down would compel the parties to abide unless there are good and substantial reasons to the contrary.

134 Prima facie examination is not full review but a primary first review to weed out manifestly and ex-facie non-existent and invalid arbitration agreements and non-arbitrable disputes. The prima facie review at the reference stage is to cut the deadwood and trim of the side branches in straightforward cases where dismissal is barefaced and pellucid and when on the facts and law the litigation must stop at the first stage. Only when the court is certain that no valid arbitration agreements exists or the disputes/subject-matter are not arbitrable, the application under section 8 would be rejected. At this stage, the court should not get lost in thickets and decide debatable questions of facts. Referral proceedings are preliminary and summary and not a mini trial. This necessarily reflects on the nature of the nature of the jurisdiction exercised by the court and in this context, the observation of B.N. Srikrishna, J of "plainly arguable" case in Shin-etsu chemical co.Ltd. are of importance and relevance. Similar views are expressed by this court in Vimal Kishor Shah wherein the test applied at the pre-arbitration stage was whether there is a "good arguable case" for the existence of an arbitration agreement.

138 In the Indian context, we would respectfully adopt the three categories in Boghara Polyfab (P) Ltd. The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/ issues which are presumptively, save in exceptional cases, for the Arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in rem; whether the subject matter of the dispute affects third party rights, have erga omnes effect, requires centralised adjudication; whether the subject matter relates to inalienable sovereign and public interest functions of the State; and whether the subject matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide."

2 Recently, a Division Bench of the Apex Court in *NTPC Vs. SPML Infra Limited*[2], observed that following the general rule and the principle laid down in *Vidya Drolia*, the Courts have consistently held, that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of

2 (2023) 9 SCC 385

non-arbitrability with the following exception to the general principle, the Court may not refer the parties to arbitration, when it is clear that the case is malafide and ex-facie non arbitrable, when arbitration was refused, as the claims of the parties were demonstratively time barred.

Their Lordships of the Apex Court focused on the eye of the needle and observed thus:-

> *"Eye of the Needle:*
>
> *25 The above-referred precedents crystallise the position of law that the pre-referral jurisdiction of the courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the referral court. The secondary inquiry that may arise at the reference stage itself is with respect to the non- arbitrability of the dispute.*
>
> *26. As a general rule and a principle, the arbitral tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the referral court may reject claims which are manifestly and ex-facie non-arbitrable24. Explaining this position, flowing from the principles laid down in Vidya Drolia (supra), this Court in a subsequent decision in Nortel Networks (supra) held:*
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> > *"45.1 ...While exercising jurisdiction under Section 11 as the judicial forum, the court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute..."*
> >
> > *27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral courts must not undertake a full review of the contested facts; they must only be confined to a primary first review and let facts speak for themselves. This also requires the courts to examine whether the assertion on arbitrability is bona fide or not. The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration.*
> >
> > *28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the referral court to protect the parties from being forced to arbitrate*

> *when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by courts to refuse reference in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia (supra), if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Limited v. Rajapura Homes Pvt. Ltd.*

3 The present case is one amongst the rare of the cases, where I deem it necessary to have scrutiny at the stage of a reference being made for arbitration, in the wake of the existing arbitration agreement between the parties and by applying the *prima facie* test of non arbitrability, on hearing the learned counsel Mr.Kanade for the applicant and Mr.Sarosh Bharucha for the respondent, and on gleaming the facts placed before me, I have reached a conclusion that the claim sought to be taken for arbitration is a dishonest claim and do not deserve utilization of the resources through the mechanism of arbitration.

The conclusion to the above effect is drawn by me in the wake of the existing facts which I must cursorily refer to.

4 The applicant Goqii Technologies Pvt Ltd (for short 'Goqii') is engaged in the business of *inter alia*, providing life style Consultant Services through its proprietary mobile application and fitness tracker bank, backed by professionals, including fitness coach, dietitians, doctors, etc. which provide technology enabled personalized coaching services.

The respondent Sokrati Technologies Private Limited, is a Company which operates as a marketing company and offers acquisition, content, retention, and inventory based marketing services.

The applicant approached the respondent for providing certain online media services and pursuant to the discussions, and based on the representations made by the respondent, a Master Services Agreement dated 11/3/2021 (hereinafter referred to as 'MSA') was signed, which was followed by an Amendment Agreement dated 29/4/2022 (hereinafter referred to as 'Amendment Agreement')

Vide the agreements, Sokrati agreed to provide Goqii performance in media management and marketing services with an objective of achieving an improvement in conversion rate, reduction in overall cost of acquisition and ultimately, assisting it in upholding its brand reputation.

The services of Sokrati were engaged as an independent service provider/agent on mutually non-exclusive basis, and various terms and conditions, including the warranties, indemnities, Intellectual Property Rights, etc, were focused upon, along with the responsibility of the client and the agency being specifically set out.

It is the case of Goqii that pursuant to the execution of the MSA, it provided satisfactory services and complied with the obligations thereunder, and in return, the applicant diligently and without demur, made regular and timely payments in respect of the invoices raised for the services rendered.

It is the specific contention of the applicant that it paid a sum of Rs.5,53,26,690/- (Rupees Five Crore Fifty Three lakhs Twenty Six thousand Six hundred ninety) against the invoices raised, and for the further 10 invoices raised between 12/5/2022 to 7/10/2022, the applicant was in the process of initiating and making payments in respect of the same.

However, in or around September 2022, the Marketing Department of the applicant, from some prominent media articles gained knowledge that the respondent was engaged in duplicitous and fraudulent malpractices, where it was misrepresenting the quality of the services provided to the applicant, and were wrongfully raising invoices and this prompted the senior management of the respondent to engage the services of an external and independent auditor/consultant in November 2022, to investigate the quality of the services provided and the veracity of the claims made by the respondent Sokrati, under the MSA as well as the services rendered to it and accordingly, the task was accomplished.

As per the applicant, when the independent auditor/ consultant shared its report, it was shocked to receive the confirmation that there were considerable and significant discrepancies in the services provided by Sokarti under the MSA, and as regards the assurances and representations made by it in respect of the services and the Independent Audit Report (IAR) recorded and brought to light the wide ranging discrepancies and brazen corrupt and fraudulent practices on part of the respondent during the period April 2021 to 31/12/2022.

5 It is in the wake of this report, which indicated that the respondent had failed to discharge its obligations in a professional and ethical manner and was found to have the same lacking in it, and as a result, since the applicant was not able to achieve the desired outcome, as of the performance campaigns as designed under the MSA, it was rendered futile and inefficacious.

Stating that the applicant was completely unaware of the illegal and fraudulent measures adopted by Sokrati to adhere to it's obligations under the MSA, the applicant bonafidely had acknowledged the receipt of the invoices raised, and was in the process of making the payments and it is on account of this reason, when the demand notice was received from the respondent for making further payments under the invoices, the applicant refused to make the payment on account of the gross deficiency of service and non-compliance of the terms of MSA and on the contrary, staked a claim of refund of Rs.5,53,26,690/- which was paid by it against the invoices raised by Sokrati.

6 In the wake of the governing clause in form of clause 18.12 of the MSA, which contemplated reference of all disputes under the Agreement to arbitration, by a Sole Arbitrator to be mutually appointed by the parties, the applicant invoked

arbitration.

At this stage, it is also relevant to note that the respondent had issued a demand notice dated 22/2/2023, calling upon the applicant to make the payment of an amount of Rs.6,25,67,060.50 under Section 8 of the Insolvency and Bankruptcy Code (IBC), which was duly replied by the applicant through its Advocate, by pointing out the deficiency in the services provided under the MSA, and it was also indicated that there is an existing dispute between the parties concerning the deficiency in services provided by Sokrati, and the demand of outstanding dues, and in the light of Clause no. 18.12, it shall be resolved through Arbitration, by giving effect to the intention of the parties. Accordingly, arbitration was invoked vide its notice dated 4/3/2023 and the Sole Arbitrator was nominated.

It is in this background the application is filed seeking appointment of an Arbitrator, as the respondent has not conveyed its consensus to the nomination of the arbitrator.

7 The learned counsel Mr. Vishal Kanade has placed on record the report issued by the independent Auditor, citing that flagrant errors and discrepancies in the work done by the respondent for the applicant under MSA, and by relying upon the same, it is argued by him that merely to overshadow the same and coerce the applicant to pay alleged outstanding dues, the respondent has deliberately not responded to the notice invoking arbitration.

He would argue that the scope of this Court under sub-section (6) of Section 11 is very narrow and what can be looked into at this stage, is existence and validity of an arbitration agreement, and whether the dispute is arbitrable. According to him, it is a well settled position in law, post the 2015 Amendments, that the jurisdiction of the Court under sub-section 6 of Section 11 of the 1996 Act is limited to examine whether the arbitration agreement exist between the parties and "nothing more nothing less".

It is his contention that undertaking a long drawn review at the referral stage, would obstruct and cause delay, undermining the efficacy of arbitration as 'Dispute Resolution Mechanism' and in the present case, since there is no dispute that there exist a valid arbitration agreement between the parties and the subject matter of the claim not being non-arbitrable, on the arbitration having been invoked, this Court must make a reference, as the respondent has failed to respond to the notice invoking arbitration within a period of 30 days and as such, it has waived its right to raise any objection about the nomination of the arbitrator to arbitrate the disputes that have arisen between the parties.

8 Mr.Sarosh Bharucha, the counsel representing the respondent, do not dispute the existence of an arbitration clause in the Master Services Agreement, but he would canvass that the claim which is sought to be staked by the respondent is an 'ex-

facie meritless, frivolous and a dishonest claim', and this Court shall refrain itself from making over such a claim to arbitration.

He do not express any disagreement with the authoritative pronouncements, that the jurisdiction of the Court under Section 11 of the Arbitration and Conciliation Act, 1996, is primarily to find out whether there exists a written agreement between the parties for resolution of disputes and whether the agreed party has made out a prima facie arguable case, but Mr.Bharucha would submit that this would not deprive the Court exercising power u/s.11 to look beyond the bare existence of an arbitration agreement in certain situations; one such situation may be a dead wood, and by placing reliance of the Apex Court in *Vidya Drolia*, where it is held that to prevent wastage of public and private resources, the Court may conduct "prima facie review" at the stage of reference to weed out any frivolous or vexatious claim. My attention is drawn to the pertinent observations in BSNL Vs. Nortel Network (India) (P) Ltd[3] :

> *"46 The upshot of the judgment in Vidya Drolia is affirmation of the position of law expounded in Duro Felgeura and Mayavati Trading, which continue to hold the field. It must be understood clearly that Vidya Drolia has not surrected the pre-amendment position on the scope of power as held in SBP & Co. Vs. Patel Engg Ltd.*
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> *47 It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time barred, or that the dispute is non-arbitrable, that the Court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach upon what is essentially a matter to be determined by the tribunal.*

3 (2021) 5 SCC 738

> *53.2 In rare and exceptional cases, where the claims are ex facie time-barred and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference"*

9 However, he would lay his emphasis on the decision in case of NTPC Ltd (supra), and specifically on the paragraphs which I have reproduced in the headstart of the order, clearly providing a scope for the limited scrutiny, through the eye of the needle, which is found to be necessary and compelling. He would draw strength from the observations made, in paragraph no.28 of the Law Report, which reads as below:

> *"28 The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable. It has been termed as a legitimate interference by Courts to refuse references in order to prevent wastage of public and private resources. Further, as noted in Vidya Drolia, if this duty within the limited compass is not exercised, and the Court becomes too reluctant to intervene, it may undermine the effectiveness of both, arbitration and the Court. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen Arbitrator, as explained in DLF Home Developers Ltd. Vs. Rajapura Homes (P) Ltd."*

10 Inviting my attention to the factual aspect involved, Mr.Bharucha would submit that pursuant to the Master Services Agreement dated 11/3/2021 and the Amendment Agreement dated 29/4/202, extending the term of the MSA for further period of three years and revising the fees of the services, the petitioner continued to avail of the respondent's services and when it raised 10 invoices from 12/5/2022 to 7/10/2022, for the services rendered under the MSA, despite efficient services

provided, the petitioner deliberately failed to make timely and complete payments towards the invoices.

Various reminders for the outstanding dues were forwarded and the email communications to that effect being forwarded, were duly acknowledged by the petitioner. It also proposed a repayment plan/schedule through its email dated 26/10/2022, 9/11/2022 and 22/12/2022, which is construed to be an admission of acceptance of debt.

Despite this, the petitioner failed to adhere to the payment plans.

11 Another significant aspect on which Mr.Bharucha would lay his emphasis is, that the petitioner while availing the services from the respondent, did not even once raise a dispute regards the quality of services provided and in fact, after accepting its obligation, reassured the respondent on multiple occasions that the dues would be paid in full, but despite repeated follow-ups, at its end, the petitioner failed to make the payment of Rs.5,88,22,911.20, along with the interest @ 18% p.a. for delayed payment from the date of accrual of the debt till its actual payment.

This constrained the respondent to issue a demand notice dated 22/2/2023 for the default of admitted dues in accordance with the Insolvency and Bankruptcy Code, 2016, demanding the outstanding dues of Rs.6,25,67,061/- (including the principal amount) and the interest.

As a response to the demand notice, for the first time, on 4/3/2023, according to Mr.Bharucha, the respondent raised the meritless contention with respect to the deficiency in services rendered by the respondent on the basis of an independent Auditor's report, which was never shared with it nor it is annexed to the petition.

As per Mr.Bharucha, this is nothing but an attempt on the part of the applicant to evade its duly acknowledged obligation of making the payment of outstanding dues to circumvent its payment and rather the applicant chose to invoke arbitration clause no.18.12 of the MSA.

12 The contention advanced on behalf of Sokrati is, there is no dispute existing with respect, either to the services provided by the respondent, or as regards the outstanding dues raised prior to the issuance of the demand notice dated 22/2/2023, and he would submit that raising such frivolous dispute with respect to deficiency in service at a belated stage, is nothing but an after-thought to avoid the liability of payment and it is in form of a defence raised in order to avoid payment under the MSA. Mr.Bharucha is critical of the malafide intention of the petitioner to avoid its liability to pay the outstanding dues and to avoid the Insolvency proceedings under the IBC 2016, by pointing out that there is an existing dispute between the parties.

13 I have perused the various clauses in the MSA along with the commercial term sheet annexed thereto, constituting the

binding agreement between the parties. The Amendment Agreement is indicative that the arrangement, which came into force with the execution of the MSA is extended for further period of three years, to take effect from 1/1/2022 and to remain in operation till 31/12/2022, with certain minor changes; also indicating with clarity that, all other terms and conditions of the Principal Agreement (MSA) shall remain unaltered and continue to bind the parties.

Upon rendering of the services, Sokrati raised invoices for the work done and these invoices are placed on record along with the affidavit-in-reply of the respondent.

14 Email communications annexed with the reply would bring up the persuasion at the end of the respondent, as regards the payment under invoices and on 22/11/2022, response come from the applicant in the following words :-

> *"I am positive that we are committed to sticking with our plan that we have shared for the payments due and for the other payments that aren't due and will be due shortly. I will share the plan, a while once this payment start to flow."*

Once again, on 12/3/2022, the complete details (pay outs with the invoice numbers and dates) are shared, expecting a revert back. Once again, the negotiation on the payment terms began, but did not reach finality, which constrained the respondent to issue a notice for recovery of outstanding amount on 7/1/2023, where the notice is asked to clear the outstanding dues to the Company at the earliest, and no later than 20/1/2023, which is accompanied with the details of the outstanding statement and the mail correspondences exchanged.

Further, on 22/2/2023, another demand notice is addressed to the applicant, demanding payment of unpaid operational dues under IBC, 2016 with Rule 5 of the IBC Application to adjudicating Authority (Rules) 2016 and it make reference to the invoices, which remained completely unpaid and the notice therefore called upon to pay the principal amount along with the interest amount of Rs.37,44,149.28, and it offered the details of the unpaid operational debt with the relevant information.

On 4/3/2023, a reply is received, to the demand notice demanding payment of alleged unpaid operational debt in the wake of the MSA dated 11/3/2021, and for the first time, a stand is adopted that in the light of the knowledge gained from prominent media articles about the malpractices adopted by Sokrati, and since its holding Company i.e. Dentsu International Ltd, was involved in serious irregularities and malpractices in its line of work, Goqii was constrained to investigate the same in great detail, through an independent auditor/consultant in November 2022, who investigated the quality of services provided and veracity of the claims made by Sokrati.

It is also disclosed that the independent auditor shared its report in February 2023 and it is then, noticed that there are considerable and significant discrepancies in the services provided to it, and reference is made to the said report and the observations made therein, and it is in this background, the demand for payment of the invoices raised, is refused on the ground of gross deficiency of service and non-compliance of the terms of MSA and on the contrary, a refund of Rs.5,53,26,690/-, the payment made under the earlier invoices is sought.

This received response on behalf of Sokrati accusing Goqii of reckless and irresponsible act in raising incorrect, misconceived, libelous and defamatory accusations without verifying its basis. The malafide and mischievous intentions are highlighted in the response, as a deliberate act to evade clearing of the outstanding dues, payable.

15 Mr.Kanade has filed a rejoinder and has placed on record certain email exchanges, but none of the emails make any grievance about the deficiency of services rendered by Sokrati and rather these communications is only an evidence of a dialogue between the parties, without being referred to any deficiency of service.

Along with the rejoinder, the Audit Report obtained under the caption, 'Digital Advertising Platforms Performance Analysis' as on 10/2/2023, is also placed on record.

16 When the report is carefully perused, it becomes evident that the agency was hired by Goqii Technologies to conduct an audit on the performance of Digital Marketing Campaigns across various digital advertising platforms, which

were planned and executed by the Digital Marketing Agency – Sokrati, and the report therefore analysed the performance during the period of F.Y. 2021-2022 and it clearly indicate that the objective of the audit, was to assess the effectiveness of the campaigns and identify any concerning trends that warrant further investigation.

The analysis of the agency was based on the data and information provided by Goqii and the data of the executed media campaigns and supplemented with industry bench marks. The summary of the report captured as below:

> *"<u>Executive Summary</u>*
> *We observed a significant increase in investment towards Facebook marketing during Q-2-Q4 FY21-FY22, which resulted in exponential growth in monthly spends. However, there was no corresponding increase in revenue generated, and the return on investment (ROI) was poor. The cost per transaction (CPT) also rose steadily over time, which is not sustainable in the long run.*
> *Our analysis of Google's platform during Q1-FY 21 and subsequent quarters revealed a similar pattern of poor performance and inconsistent metrics, which could be due eto an automated algorithm that seeks to maximize ad revenue without consideration for the quality of campaign performance.*
> *Overall, we recommend that GOQii focuses on identifying the key factors that are driving poor ROI, and develop a comprehensive marketing plan that addresses these issues. This could include improving targeting strategies and leveraging the right marketing channels to reach the target audience."*

17 The report make it clear that the expert analysed the Performance of Goqii, Digital Advertising Strategy on Facebook, Google and other platforms and it also conducted thorough review of the company's marketing and advertising plans and strategies during this period.

In the observations and recommendations, the report deal with the Facebook marketing, Google marketing and have noticed that the return on investment has been very low and the cause for the same is also identified in the report, by stating that if the transactions are dropping and the cost per transaction is increasing, and, hence, it is not a sustainable model for long run.

As regards the observation in google marketing, the report noticed a significant amount of fluctuation in the performance and metrics of the campaigns on these platforms and clearly report as under :-

> *"This trend indicates that there must be an algorithm at play i.e. pushing the spend higher while causing a drop in campaign performance. This manipulation could be due to agencies, AI systems or some other type of automated algorithm build by the agency that seeks to maximise, add revenue without consideration for quality of campaign performance."*

18 The report also suggest that the spends, revenue, transactions and CPT were all over the place, indicating lack of stability and consistency. At the end, the report expresses concern over the digital advertising platforms, authenticity and transparency, which is expected to be further explored.

Though Mr.Kanade has relied upon the conclusion of the report, when it identified significant areas of concern with the media plan, including, but not limited to certain aspects and it recommended further detailed investigation across all the media campaigns by Sokrati, the reading of the report do not, in my view, intend to convey what the applicant has alleged while responding to the demand notice, that Sokrati is engaged in duplicitous and fraudulent malpractices by wrongfully raising invoices in respect of the same. The assertion in the reply to the demand notice that the independent audit report has recorded and brought to light the wide ranging discrepancies and brazen corrupt and fraudulent practices adopted during April 2021 to 31/12/2022.

Despite repeatedly asked to point out, Mr.Kanade has failed to point out, this conclusion in the report.

19 It can be well understood that upon the further investigation, being directed to be carried out as indicated in the report, if it is concluded that the services were not rendered at all or they were deficient and the invoices do not deserve to be cleared, the demand of the money due and payable could have been resisted, but without any justification, by projecting the report of the independent auditor to be its shield to avoid the payment, the attempt on part of the applicant can only be described as 'dishonest'.

A manifestly dishonest claim or a contest, which is sought to be raised to a lawful demand of the money due and payable under the MSA, particularly, when, while availing the services, at no point of time, any deficiency in services is pointed out, but only by way of defence to the invoices raised, an independent agency's report is being projected, as a support to canvass the deficiency in service, by attributing fraudulent acts to the respondent which, in fact, is not the finding of the independent auditor.

Nonetheless, it is open for the applicant to follow the pursuit of detail investigation across all the media campaigns by Sokrati. as suggested in the report, however, without doing so, in order to avoid its liability for the claims under the invoices, the assertion of an arbitrable dispute, is an attempt to defeat the proceedings, which may be instituted on behalf of Sokrati before the Company Law Tribunal under the IBC.

Drawing guidance from the observations of the Apex Court in case of NTPC Ltd (supra) that the limited scrutiny through the eye of the needle is necessary and compelling, as it is the duty of the referral code to protect the parties from being forced to arbitrate, when the matter is demonstrably non-arbitrable, I am convinced that an attempt is made to create a dispute when there exist none at this stage. It is not just for the sake of invoking the arbitration clause, because the agreement between the parties provide so, the parties shall resort to arbitration, premised on the basis of a purported dispute, which in fact, do not exist.

For the aforesaid reason, I am not inclined to consider the request of appointing an Arbitrator in exercise of power conferred on this Court, merely because the arbitration has been invoked by the applicant and it intend to take a non-existent dispute for arbitration.

Being unconvinced with the submissions of Mr.Kanade, the application seeking appointment of Arbitrator is dismissed being found without any merit and substance.

(SMT. BHARATI DANGRE, J.)