

IN THE HIGH COURT AT CALCUTTA
Criminal Revisional Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 348 of 2024

Ingram Micro India Pvt. Ltd.

Vs.

Duckback Information Systems Pvt. Ltd. & Anr.

For the Petitioner : Mr. Milon Mukherjee, ld. Sr. Adv.
Mr. Siddharth Kumar.

For the Respondents : Mr. Ayan Bhattacharya, ld. Sr. Adv.
Ms. Sriparna Das,
Mr. Hare Krishna Halder,
Mr. Koushik Bhattacharya.

Hearing concluded on : 20.01.2025

Judgment on : 28.01.2025

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding arising out of case no. CS 27633 of 2023, pending before the learned Metropolitan Magistrate, 19th Court, Calcutta, under Sections 120B/409/418/420/465/467/468/471 of the Indian Penal Code.
2. **The allegations in the written complaint against the petitioner company herein is as follows:-**

“.....The accused no. 2 is a company within the meaning of the companies Act, 1956 having its registered office at the address as mentioned in the cause title.

The management of the complainant company appointed the accused no. 1 as Management Accountant of the complainant company w.e.f. 02.06.1997. Subsequently she was made the Accounts Executive and she used to handle the entire finance and accounts department of the complainant company. She was also a Bank Signatory of the complainant company.

In order to enable the accused no. 1 to perform her job smoothly and efficiently, the accused no. 1 was provided with company's letter-heads, company's seal, official files, official stationary, classified documents, party ledgers, company's balance sheets, IT Files, bank statements, accounting softwares etc. She was also disclosed/divulged with various official communications, correspondences, customer information, various trade secrets, technical know-how, business data and confidential information which forms part of the exclusive property of the complainant company and which the said accused person is/was not likely to disclose to third party or use for her personal work and/or misuse the same as per her terms of employment.

As part of her duty, the accused no. 1 used to prepare and maintain the accounts of the complainant company, deduct TDS from the invoices, prepare TDS certificates as per the prevalent prescribed Rules of Income Tax Department, fulfill other statutory compliances for and on behalf of the complainant company independently.

In passage of time the complainant company gave huge business to the accused no. 2 and had been maintaining a current/running account with the accused no. 2. The complainant company had been regularly servicing the said current account until the year 2012 when the business of the complainant company suffered huge loss and the complainant company started going through financial constrains.

In such circumstances, the complainant company suddenly received a purported letter of demand dated October 31, 2012 from the accused no. 2 whereby a disputed sum of money was claimed by the accused no. 2 on account of purported supply of materials and it was also falsely claimed in the said letter that at the complainant company had deducted TDS amounting to

Rs.48,65,306/- in favour of the accused no. 2 towards acknowledgment of such alleged debt.

The complainant company did not deduct an amount of Rs.48,65,306/- towards TDS in favour of the accused no. 2 far less issuing TDS certificate of such amount in favour of the accused no. 2.

It is further stated that after a gap of more than 8 years on or about July 18, 2022 the complainant company came to learn that the accused no. 2 had obtained an **ex parte Arbitral Award dated March 04, 2014** against the complainant company. The Arbitral Award dated March 04, 2014 passed by Sri. Sali M. Shah along with certain accompaniments including three purported TDS Certificates, the details of which are furnished herein below:-

TDS Certificate No.	Dated	Amount	Signed BY
FYKRDY	26.11.2011	6,37,437/-	Abhishek Bose
	27.12.2011	24,01,716/-	Abhishek Bose
	25.04.2012	18,26,153/-	Abhishek Bose

The complainant's case is that TDS certificate is false and fake documents manufactured by the accused no. 1 (employee of the complainant) in collusion and connivance with the accused no. 1 as the as the accused no. 2 used the said forged and fake document as genuine.

The complainant has denied the signature of Abhishek Bose appearing in the signature being one of the Directors of the complainant company. The seal of the company was also fake and stated to be counterfeit and, hence, the case....”

3. Parties have filed their notes of argument.

4. From the materials on record, the following is evident:-

- (i)** The parties admittedly had a business relationship.
- (ii)** The accused no. 2 company/claimant/petitioner herein had an amount due from the complainant.

- (iii) As seen from the Arbitral award it appears that payments was made by the complainant by way of cheque which it appears was dishonoured.
5. The remedy for cheque being dishonoured is to be prayed for by the petitioner herein under the appropriate provisions of law.
 6. Admittedly payment was made by complainant/company to the petitioner/company.
 7. The Supreme Court in ***M/s US Technologies International Pvt. Ltd. vs The Commissioner of Income Tax, Civil Appeal No. 7934 of 2011 with Civil Appeal Nos. 1258-1260 of 2019, on 10.04.2023,*** held:-

“7. Heard learned counsel appearing on behalf of the respective parties at length.

7.1 The short question which is posed for the consideration of this Court is in case of belated remittance of the TDS after deducting the TDS whether such an assessee is liable to pay penalty under Section 271C of the Act, 1961?

7.2 The question which is also posed for the consideration of this Court is what is the meaning and scope of the words “fails to deduct” occurring in Section 271C(1)(a) and whether an assessee who caused delay in remittance of TDS deducted by him, can be said a person who “fails to deduct TDS”?

7.3 In order to appreciate the rival contentions and to answer the aforesaid questions, it is necessary to have analysis of Statutory provisions.

7.4 The relevant provisions are as under:-

“Section 201(1A) of the Act

Without prejudice to the provisions of subsection (1), if any such person, principal officer or company as is referred to in that subsection does not deduct the whole or any part of the

tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest, —

(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one and one half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid, and such interest shall be paid before furnishing the statement in accordance with the provisions of sub section (3) of Section 200:]

Section 271C of the Act

271C. Penalty for failure to deduct tax at source.

(1) If any person fails to—

(a) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIIB; or

(b) pay the whole or any part of the tax as required by or under,—

(i) subsection (2) of Section 115O; or

(ii) the second proviso to Section 194B; then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.]

(2) Any penalty imposable under sub section (1) shall be imposed by the Joint Commissioner.

Section 273B of the Act

273B. Penalty not to be imposed in certain cases.—

Notwithstanding anything contained in the provisions of clause (b) of subsection (1) of Section 271, Section 271A 4203[Section 271 AA], Section 271B 4204[Section 271 BA], 4205[Section 271 BB, 4206[Section 271C, Section 271 CA], Section 271D, Section 271 E, 4207[Section 271F,] 4208[Section 271FA 4209], 4210[Section 271FAB, Section 271FB, Section 271G, Section 271GA, 4211[Section 271 GB,]]] 4212[Section 271 H,] 4213[Section 271I,] 4214[Section 271J,] clause (c) or clause (d) of sub section (1) or subsection (2) of Section 272A, subsection (1) of Section 272 AA] or 4215[Section 272B or] 4216[subsection (1) or subsection (1A)

of Section 272BB] or subsection (1) of Section 272BBB or] clause (b) of subsection (1) or clause (b) or clause (c) of subsection (2) of Section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.

Section 276B of the Act

276B. Failure to pay tax to the credit of Central Government under Chapter XIID or XVIIB.—If a person fails to pay to the credit of the Central Government,—

(a) the tax deducted at source by him as required by or under the provisions of Chapter XVIIB; or

(b) the tax payable by him, as required by or under,—

(i) subsection (2) of Section 115O; or

(ii) the second proviso to Section 194B, he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.”

7.5 At the outset, it is required to be noted that all these cases are with respect to the belated remittance of the TDS though deducted by the assessee and therefore, Section 271C(1)(a) shall be applicable. At the cost of repetition, it is observed that it is a case of belated remittance of the TDS though deducted by the assessee and not a case of non-deduction of TDS at all.

7.6 As per Section 271C(1)(a), if any person fails to deduct the whole or any part of the tax as required by or under the provisions of Chapter XVIIB then such a person shall be liable to pay by way of penalty a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid. So far as failure to pay the whole or any part of the tax is concerned, the same would be with respect to Section 271C(1)(b) which is not the case here. Therefore, Section 271C(1)(a) shall be applicable in case of a failure on the part of the concerned person/assessee to **“deduct”** the whole of any part of the tax as required by or under the provisions of Chapter XVIIB. The words used in Section 271C(1)(a) are very clear and the relevant words used are “fails to deduct.” It does not speak about belated remittance of the TDS. As per settled position of law, the penal provisions are required to be construed strictly and literally. As per the cardinal principle of interpretation of

statute and more particularly, the penal provision, the penal provisions are required to be read as they are. Nothing is to be added or nothing is to be taken out of the penal provision. Therefore, on plain reading of Section 271C of the Act, 1961, there shall not be penalty leviable on belated remittance of the TDS after the same is deducted by the assessee. Section 271C of the Income Tax Act is quite categoric. Its scope and extent of application is discernible from the provision itself, in unambiguous terms. When the non deduction of the whole or any part of the tax, as required by or under the various instances/provisions of Chapter XVIIIB would invite penalty under Clause 271C(1)(a); only a limited text, involving sub-section (2) of Section 115O or covered by the second proviso to Section 194B alone would constitute an instance where penalty can be imposed in terms of Section 271C(1)(b) of the Act, namely, on nonpayment. It is not for the Court to read something more into it, contrary to the intent and legislative wisdom.

7.7 At this stage, it is required to be noted that wherever the Parliament wanted to have the consequences of nonpayment and/or belated remittance/payment of the TDS, the Parliament/Legislature has provided the same like in Section 201(1A) and Section 276B of the Act.

7.8 Section 201(1A) provides that in case a tax has been deducted at source but the same is subsequently remitted may be belatedly or after some days, such a person is liable to pay the interest as provided under Section 201(1A) of the Act. The levy of interest under Section 201(1A) thus can be said to be compensatory in nature on belated remittance of the TDS after deducting the same. Therefore, consequences of non payment/belated remittance/payment of the TDS are specifically provided under Section 201(1A).

7.9 Similarly, Section 276B talks about the prosecution on failure to pay the TDS after deducting the same. At this stage, it is required to be noted that Section 271C has been amended subsequently in the year 1997 providing Sections 271C(1)(a) and 271C(1)(b). As observed hereinabove, fails to pay the whole or any part of the tax would be falling under Section 271C(1)(b) and the word used between 271C(1)(a) and 271C(1)(b) is "or". At this stage, it is required to be noted that Section 276B provides for prosecution in case of failure to "pay" tax to the credit of Central Government. The word "pay" is missing in Section 271C(1)(a).

8. Now so far as the reliance placed upon the CBDT's Circular No. 551 dated 23.01.1998 by learned ASG is concerned, at

the outset, it is required to be noted that the said circular as such favours the assessee. Circular No. 551 deals with the circumstances under which Section 271C was introduced in the Statute, for levy of penalty. Paragraph 16.5 of the above Circular reads as follows:

“16.5: Insertion of a new section 271C to provide for levy of penalty for failure to deduct tax at source under the old provisions of Chapter XXI of the Income Tax Act no penalty was provided for failure to deduct tax at source. This default, however, attracted prosecution under the provisions of Section 276B, which prescribed punishment for failure to deduct tax at source or after deducting failure to pay the same to the Government. It was decided that the first part of the default, i.e., failure to deduct tax at source should be made liable to levy of penalty, while the second part of the default, i.e., failure to pay the tax deducted at source to the Government which is a more serious offence, should continue to attract prosecution. The Amending Act, 1987 has accordingly inserted a new Section 271C to provide for imposition of penalty on any person who fails to deduct tax at source as required under the provisions of Chapter XVIIIB of the Act. The penalty is of a sum equal to the amount of tax which should have been deducted at source.

On fair reading of said CBDT's circular, it talks about the levy of penalty on failure to deduct tax at source. It also takes note of the fact that if there is any delay in remitting the tax, it will attract payment of interest under Section 201(1A) of the Act and because of the gravity of the mischief involved, it may involve prosecution proceedings as well, under Section 276B of the Act. If there is any omission to deduct the tax at source, it may lead to loss of Revenue and hence remedial measures have been provided by incorporating the provision to ensure that tax liability to the said extent would stand shifted to the shoulders of the party who failed to effect deduction, in the form of penalty. On deduction of tax, if there is delay in remitting the amount to Revenue, it has to be satisfied with interest as payable under Section 201(1A) of the Act, besides the liability to face the prosecution proceedings, if launched in appropriate cases, in terms of Section 276B of the Act.

Even the CBDT has taken note of the fact that no penalty is envisaged under Section 271C of the Income Tax Act for non deduction TDS and no penalty is envisaged under Section 271C for belated remittance/payment/deposit of the TDS.

8.1 Even otherwise, the words “fails to deduct” occurring in Section 271C(1)(a) cannot be read into “failure to deposit/pay the tax deducted.”

8.2 Therefore, on true interpretation of Section 271C, there shall not be any penalty leviable under Section 271C on mere delay in remittance of the TDS after deducting the same by the concerned assessee. As observed hereinabove, the consequences on non payment/belated remittance of the TDS would be under Section 201(1A) and Section 276B of the Act, 1961.”

8. The Income Tax Tribunal held:-

It is evidently clear that assessee received the rent income, and the Tenant (Deductor) has deducted TDS but has not deposited the TDS so deducted into the Central Government Account. Considering these facts, we note that issue under consideration is no longer res integra. The Hon'ble High Court of Gujarat in the case of Kartik Vijaysinh Sonavane held that where TDS has been deducted by employer of assessee, it will always been open for department to recover same from said employer and credit of same could not have been denied to assessee.

9. Thus it is the duty of the party making the payment, to deduct TDS and deposit the same with the income tax authority.

10. Accused no. 1 is an employee of the complainant company.

11. Accused no. 2 is the other company with which the complainant had a business relationship.

12. None of the persons who were in charge of overall and daily (day to day) affairs of the accused no. 2/ company have been impleaded as accuseds along with the said company.

13. The Hon'ble Supreme Court of India in *Himanshu -versus- B. Shivamurthy & Another, (2019) 3 SCC 797, on January 17, 2019,* has held:-

“In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

14. The Hon’ble Apex Court similarly in ***Aneeta Hada -versus- Godfather Travels And Tours Private Limited, (2012) 5 SCC 661***, held that ***“in view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.”***
15. The Supreme Court in ***Himanshu vs. B. Shivamurthy & Anr. (Supra)*** has further held:-

“11. In the present case, the record before the Court indicates that the cheque was drawn by the appellant for Lakshmi Cement and Ceramics Industries Ltd., as its Director. A notice of demand was served only on the appellant. The complaint was lodged only against the appellant without arraigning the company as an accused.

12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.”

16. The Supreme Court in **Shiv Kumar Jatia vs. State of NCT of Delhi, Criminal Appeal nos. 1263, 1264 and 1265-1267 of 2019**, held:-

*“27. The liability of the Directors/the controlling authorities of company, in a corporate criminal liability is elaborately considered by this Court in the case of **Sunil Bharti Mittal**. In the aforesaid case, while considering the circumstances when Director/person in charge of the affairs of the company can also be prosecuted, when the company is an accused person, this Court has held, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. At the same time it is observed that it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless **the Statute specifically provides for**. It is further held by this Court, an individual who has perpetrated the commission of an offence on behalf of the company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Further it is also held that an individual can be implicated in those cases where statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*

*29. By applying the ratio laid down by this Court in the case of **Sunil Bharti Mittal** it is clear that an individual either as a Director or a Managing Director or Chairman of the company can be made an accused, along with the company, only if there is sufficient material to prove his active role coupled with the criminal intent. Further the criminal intent alleged must have direct nexus with the accused. Further in the case of **Maksud Saiyed vs. State of Gujarat & Ors.** this Court has examined the vicarious liability of Directors for the charges levelled against the Company. In the aforesaid judgment this Court has held that, the Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company, when the accused is a Company. **It is held that vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the Statute.** It is further held that Statutes*

indisputably must provide fixing such vicarious liability. It is also held that, even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

30. *In the judgment of this Court in the case of **Sharad Kumar Sanghi vs. Sangita Rane** while examining the allegations made against the Managing Director of a Company, in which, company was not made a party, this Court has held that when the allegations made against the Managing Director are vague in nature, same can be the ground for quashing the proceedings under Section 482 of Cr.P.C. In the case on hand principally the allegations are made against the first accused-company which runs Hotel Hyatt Regency. At the same time, the Managing Director of such company who is accused no.2 is a party by making vague allegations that he was attending all the meetings of the company and various decisions were being taken under his signatures. Applying the ratio laid down in the aforesaid cases, it is clear that principally the allegations are made only against the company and other staff members who are in charge of day to day affairs of the company. In absence of specific allegations against the Managing Director of the company and having regard to nature of allegations made which are vague in nature, we are of the view that it is a fit case for quashing the proceedings, so far as the Managing Director is concerned.”*

17. In **Dayle De’ Souza vs Government of India Through Deputy Chief Labour Commissioner (C) and Anr., in Criminal Appeal No. of 2021 (arising out of SLP (CRL.) No. 3913 of 2020), decided on October 29, 2021**, the Supreme Court held:-

“24. *In **Sharad Kumar Sanghi v. Sangita Rane, (2015) 12 SCC 781** this Court observed that:-*

“11. In the case at hand as the complainant's initial statement would reflect, the allegations are against the Company, the Company has not been made a party and, therefore, the allegations are restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the

allegations are against the Company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened under certain statutes. It has been so held by a three-Judge Bench in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. in the context of the Negotiable Instruments Act, 1881.

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13. When the company has not been arraigned as an accused, such an order could not have been passed. We have said so for the sake of completeness. In the ultimate analysis, we are of the considered opinion that the High Court should have been well advised to quash the criminal proceedings initiated against the appellant and that having not been done, the order is sensitively vulnerable and accordingly we set aside the same and quash the criminal proceedings initiated by the respondent against the appellant.”

25. *This position was again clarified and reiterated by this Court in **Himanshu v. B. Shivamurthy and Another, (2019) 3 SCC 797**. The relevant portion of the judgment reads thus:*

“6. The judgment of the High Court has been questioned on two grounds. The learned counsel appearing on behalf of the appellant submits that firstly, the appellant could not be prosecuted without the company being named as an accused. The cheque was issued by the company and was signed by the appellant as its Director. Secondly, it was urged that the observation of the High Court that the company can now be proceeded against in the complaint is misconceived. The learned counsel submitted that the offence under Section 138 is complete only upon the issuance of a notice of demand and the failure of payment within the prescribed period. In absence of compliance with the requirements of Section 138, it is asserted, the direction of the High Court that the company could be impleaded/arraigned at this stage is erroneous.

7. The first submission on behalf of the appellant is no longer res integra. A decision of a three-Judge Bench of this Court in Aneeta Hada v. Godfather Travels & Tours (P) Ltd. governs the area of dispute. The issue which fell for consideration was whether an authorised

signatory of a company would be liable for prosecution under Section 138 of the Negotiable Instruments Act, 1881 without the company being arraigned as an accused. The three-Judge Bench held thus: (SCC p. 688, para 58)

“58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.”

In similar terms, the Court further held: (SCC p. 688, para 59)

“59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself.”

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12. The provisions of Section 141 postulate that if the person committing an offence under Section 138 is a company, every person, who at the time when the offence was committed was in charge of or was responsible to the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

13. In the absence of the company being arraigned as an accused, a complaint against the appellant was therefore not maintainable. The appellant had signed the cheque as a Director of the company and for and on its behalf. Moreover, in the absence of a notice of

demand being served on the company and without compliance with the proviso to Section 138, the High Court was in error in holding that the company could now be arraigned as an accused.”

26. Applying the same proposition of law as laid down in **Aneeta Hada** (supra), this Court in **Hindustan Unilever Limited v. State of Madhya Pradesh, (2020) 10 SCC 751** applying *pari materia* provision in Prevention of Food Adulteration Act, 1954, held that:

“23. Clause (a) of sub-section (1) of Section 17 of the Act makes the person nominated to be in charge of and responsible to the company for the conduct of business and the company shall be guilty of the offences under clause (b) of sub-section (1) of Section 17 of the Act. Therefore, there is no material distinction between Section 141 of the NI Act and Section 17 of the Act which makes the company as well as the nominated person to be held guilty of the offences and/or liable to be proceeded and punished accordingly. Clauses (a) and (b) are not in the alternative but conjoint. Therefore, in the absence of the company, the nominated person cannot be convicted or vice versa. Since the Company was not convicted by the trial court, we find that the finding of the High Court to revisit the judgment will be unfair to the appellant-nominated person who has been facing trial for more than last 30 years. Therefore, the order of remand to the trial court to fill up the lacuna is not a fair option exercised by the High Court as the failure of the trial court to convict the Company renders the entire conviction of the nominated person as unsustainable.”

27. In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar. However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.”

18. In **Susela Padmavathy Amma vs M/S Bharti Airtel Limited**, in **Criminal Appeal Nos. of 2024 (arising out of SLP (Criminal) No. 12390-12391 of 2022)**, decided on 15.03.2024, the Supreme Court held:-

“7. In the case of *State of Haryana vs. Brij Lal Mittal and others*, this Court observed thus:

“8. Nonetheless, we find that the impugned judgment of the High Court has got to be upheld for an altogether different reason. Admittedly, the three respondents were being prosecuted as directors of the manufacturers with the aid of Section 34(1) of the Act which reads as under:

“34. Offences by companies.—(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.”

It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in charge of the company and also responsible to the company for the conduct of its business.”

15. In the case of *Ashoke Mal Bafna (supra)*, this Court observed thus:

“9. To fasten vicarious liability under Section 141 of the Act on a person, the law is well settled by this Court in a catena of cases that the complainant should specifically show as to how and in what manner the accused was responsible. Simply because a

person is a Director of a defaulter Company, does not make him liable under the Act. Time and again, it has been asserted by this Court that only the person who was at the helm of affairs of the Company and in charge of and responsible for the conduct of the business at the time of commission of an offence will be liable for criminal action. (See Pooja Ravinder Devidasani v. State of Maharashtra [Pooja Ravinder Devidasani v. State of Maharashtra, (2014) 16 SCC 1 : (2015) 3 SCC (Civ) 384 : (2015) 3 SCC (Cri) 378 : AIR 2015 SC 675] .)

10. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company under Section 141 of the Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company.”

***16.** A similar view has been taken by this Court in the case of **Lalankumar Singh and others vs. State of Maharashtra** to which one of us (B.R. Gavai, J.) was a party.”*

- 19.** A company can be made an accused in a criminal case, but it is important to note that alongside the company, the individuals responsible for the alleged crime within the company, like directors or key decision-makers, must also be named as accused, as a company alone cannot have the necessary "mens rea" (guilty mind) to commit an offense, the liability is generally attributed to the individuals who acted on behalf of the company.

Legal entity:-

A company is considered a separate legal entity, which means it can be held liable for criminal acts committed in its name.

Vicarious liability:-

When a company is accused of a crime, the individuals responsible for the actions that led to the offense, usually those in senior management positions, can be held vicariously liable.

20. As such the prosecution of only the company as the sole accused (of the company) is prima facie bad in law.
21. **Admittedly, there is existence of an agreement between the parties** for the business transaction which **included an arbitration clause** and by invoking the said clause the reference was made to the Arbitrator by the petitioner herein who has been made the accused no. 2 in the proceedings before the trial Court.
22. **The complainant as respondent before the learned Arbitrator did not continue to attend the arbitration proceedings.** Subsequently, the learned Arbitrator considering the materials on record adjudicated the dispute by passing an **arbitral award dated 4th March, 2014.**
23. **The relevant findings of the learned Arbitrator is as follows :-**

*“.....23. Having considered all the correspondence and material on record and the Minutes of the Meetings as passed from time to time since the beginning of the arbitration proceedings, it is clear that save and except for the letter dated 23rd September 2013 addressed by **the Respondents to the Sole Arbitrator, there has been no response whatsoever by the Respondents. They have constantly remained absent despite notices given to them that the proceedings would be continued ex-parte if they did not remain present. In my view, having addressed the letter dated 23rd September 2013, the Respondents had no objection to the Arbitral Tribunal proceeding with the matter.** All that they sought was deferment of the date for reasons set out in the said letter. In fact, they had by that said letter, requested that all relevant papers pertaining to the arbitration proceedings be sent to them for their perusal so that they could go prepared for the hearing. Despite all papers and proceedings, pleadings being furnished to them subsequent to 23rd September 2013, **the Respondents have chosen to remain absent.** There is, in my view, no*

issue raised as to the jurisdiction of the Arbitrator to proceed with the arbitration proceedings.

24. It is clear from the documents, correspondence and material on record that the Respondents have admitted their liability. In fact, payments were made by cheques which came to be dishonoured and for which the notices in respect thereof were issued to the Respondents. It is altogether a different matter that the Claimants did not file or initiate any proceedings under Section 138 of the Negotiable Instruments Act, save and except for sending the notices as set out in the Statement of Claim.

25. The Claimants have proved the amounts as claimed, subject to the concessions made by them and as referred to in paragraphs 17 and 19 hereinabove. Accordingly, the claim is allowed as under:

(i) Prayer (a) of the Statement of Claim is granted with interest at the rate of 24% per annum on the unpaid amount after 30 days from the date of the invoice till the date of the Award and thereafter, at the rate of 9% per annum from the date of the Award till payment and/or realization.

(ii) Prayer (b) of the Statement of Claim is also allowed to the extent of Rs.46,97,020/-. It is clarified that the Claimants are not entitled to any interest on this amount of Rs.46,97,020/-.

(iii) The Claimants are entitled to the costs of the arbitral proceedings quantified at Rs. 1,50,000/-.

26. The Claimants are directed to make payment of the Arbitrator's fees quantified at Rs.25,000/-. The said payment shall be made on or before 18th March 2014.

27. The claimants shall also make payment, separately by cheque, towards stenographer's charges, cost of printing of the Award, venue charges for all meetings held, quantified at Rs.12,000/-. The aforesaid payment shall also be made on or before 18th March 2014.....”

24. An arbitral award, once finalized, is considered legally binding and has the effect of a court judgment, meaning the parties involved are obligated to comply with its terms, essentially acting as a final and conclusive resolution to the dispute submitted to arbitration, however, limited grounds exist to challenge an award in court if deemed to be against public policy or if procedural errors occurred during the arbitration process.

Finality:-

An arbitral award is generally considered final and binding on the parties involved, unless successfully challenged in court under specific circumstances.

Enforceability:-

Similar to a court judgment, an arbitral award can be enforced through legal means if a party fails to comply with its terms.

Res Judicata:-

The principle of "res judicata" applies to arbitral awards, meaning that once a dispute is settled through arbitration, the same parties cannot raise the same issues in a subsequent legal proceeding.

25. Limited Review:-

While courts can review an arbitral award, they typically have a restricted scope to intervene and will only overturn an award on very limited grounds like manifest errors of law or procedural irregularities.

26. In *A. Ayyasamy Vs A. Paramasivam & Ors.*, AIR 2016 SC 4675, decided on 4th October, 2016, the Supreme Court held:-

*“The two courts below have preferred to adopt the dicta laid down in N. Radhakrishnan while dismissing the application of the appellant under Section 8 of the Act holding that as there are serious allegations as to fraud and malpractices committed by the appellant in respect of the finances of the partnership firm and the case does not warrant to be tried and decided by the arbitrator and a civil court would be more competent which has the requisite means to decide such complicated matter. **In this backdrop, it would be appropriate to revisit the law on this aspect before adverting to the question as to whether the approach of the High Court was correct in following the judgment in N. Radhakrishnan in the instant case.**”*

In this behalf, we have to begin our discussion with the pertinent observation that insofar as the Arbitration and Conciliation Act, 1996 is concerned, it does not make any specific provision excluding any category of disputes terming them to be non-arbitrable. Number of pronouncements have been rendered laying down the scope of judicial intervention, in cases where there is an arbitration clause, with clear and unambiguous message that in such an event judicial intervention would be very limited and minimal. However, the Act contains provisions for challenging the arbitral awards. These provisions are Section 34 and Section 48 of the Act. Section 34(2)(b) and Section 48(2) of the Act, inter alia, provide that an arbitral award may be set aside if the Court finds that the 'subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.' Even when such a provision is interpreted, what is to be shown is that there is a law which makes subject matter of a dispute incapable of settlement by arbitration. The aforesaid position in law has been culled out from the combined readings of Sections 5, 16 and 34 of the Act. When arbitration proceedings are triggered by one of the parties because of the existence of an arbitration agreement between them, Section 5 of the Act, by a non-obstante clause, provides a clear message that there should not be any judicial intervention at that stage scuttling the arbitration proceedings. Even if the other party has objection to initiation of such arbitration proceedings on the ground that there is no arbitration agreement or validity of the arbitration clause or the competence of

the Arbitral Tribunal is challenged, Section 16, in clear terms, stipulates that such objections are to be raised before the Arbitral Tribunal itself which is to decide, in the first instance, whether there is any substance in questioning the validity of the arbitration proceedings on any of the aforesaid grounds. It follows that the party is not allowed to rush to the Court for an adjudication. Even after the Arbitral Tribunal rules on its jurisdiction and decides that arbitration clause is valid or the Arbitral Tribunal is legally constituted, the aggrieved party has to wait till the final award is pronounced and only at that stage the aggrieved party is allowed to raise such objection before the Court in proceedings under Section 34 of the Act while challenging the arbitral award. The aforesaid scheme of the Act is succinctly brought out in the following discussion by this Court in Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.[3]:

“3. There cannot be any dispute that in the absence of any arbitration clause in the agreement, no dispute could be referred for arbitration to an Arbitral Tribunal. But, bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.

4. A bare reading of Section 16 makes it explicitly clear that the Arbitral Tribunal has the power to rule on its own jurisdiction even when any objection with respect to existence or validity of the arbitration agreement is raised, and a conjoint reading of sub-sections (2), (4) and (6) of Section 16 would make it clear that such a decision would be amenable to be assailed within the ambit of Section 34 of the Act.

5. In this view of the matter, we see no infirmity in the impugned order so as to be interfered with by this Court. The petitioner, who is a party to the arbitral proceedings may raise the question of jurisdiction of the arbitrator as well as the objection on the ground of non-existence of any arbitration agreement in the so-called dispute in question, and on such an objection

being raised, the arbitrator would do well in disposing of the same as a preliminary issue so that it may not be necessary to go into the entire gamut of arbitration proceedings.” Aforesaid is the position when Arbitral Tribunal is constituted at the instance of one of the parties and other party takes up the position that such proceedings are not valid in law.

What would be the position in case a suit is filed by the plaintiff and in the said suit the defendant files an application under Section 8 of the Act questioning the maintainability of the suit on the ground that parties had agreed to settle the disputes through the means of arbitration having regard to the existence of an arbitration agreement between them?

Obviously, in such a case, the Court is to pronounce upon arbitrability or non-arbitrability of the disputes.

In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration clause in the partnership deed. However, the question is as to whether the dispute raised by the respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable[4]:

- (i) patent, trademarks and copyright;*
- (ii) anti-trust/competition laws;*
- (iii) insolvency/winding up;*
- (iv) bribery/corruption;*
- (v) fraud;*
- (vi) criminal matters.*

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

'Fraud' is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines 'fraud' as a concealment or false representation through a statement or conduct that injures another who relies on it[5]. However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from arbitration and decision thereof necessary by the civil court.

In Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak[6], serious allegations of fraud were held by the Court to be a sufficient ground for not making a reference to arbitration. Reliance in that regard was placed by the Court on a decision of the Chancery Division in Russell v. Russell[7]. That was a case where a notice for the dissolution of a partnership was issued by one of the partners, upon which the other partner brought an action alleging various charges of fraud, and sought a declaration that the notice of dissolution was void. The partner who was charged with fraud sought reference of the disputes to arbitration. The Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. But where the objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved.

The aforesaid judgment was followed by this Court in N. Radhakrishnan while considering the matter under the present Act. In that case, the respondent had instituted a suit against the appellant, upon which the appellant filed an application under Section 8 of the Act. The applicant made serious allegations against the respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator,

and ought to be settled by the Court, through detailed evidence led by both parties.

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.

As noted above, in Swiss Timing Ltd. case, single Judge of this Court while dealing with the same issue in an application under Section 11 of the Act treated the judgment in N. Radhakrishnan as per incuriam by referring to the other judgments in the case of P. Anand Gajapathi Raju v. P.V.G. Raju[8] and Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums[9]. Two reasons were given in support which can be found in para 21 of the judgment which makes the following reading:

“21. This judgment was not even brought to the note of the Court in N. Radhakrishnan's case. In my opinion, judgment in N. Radhakrishnan's case is per incuriam on two grounds; Firstly, the judgment in Hindustan Petroleum Corpn. Ltd., though referred has not been distinguished but at the same time is not followed also. The judgment in P. Anand Gajapathi Raju & Ors. Was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provision contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in N. Radhakrishnan does

not lay down the correct law and cannot be relied upon.” We shall revert to the question of *per incuriam* at a later stage. At this juncture, we may point out that the issue has been revisited by another Division Bench of this Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Limited and others*[10]. In this case, one of the questions that had arisen for determination was, in the context of Section 8 of the Act, as to whether the subject matter of the suit was 'arbitrable' i.e. capable of being adjudicated by a private forum (Arbitral Tribunal). In this context, the Court carried out detailed discussion on the term 'arbitrability' by pointing out three facets thereof, viz.:

- 1) whether the disputes are capable of adjudication and settlement by arbitration?
- 2) whether the disputes are covered by the arbitration agreement?
- 3) whether the parties have referred the disputes to arbitration?

As we are concerned with the first facet of the arbitrability of dispute, on this aspect the Court pointed out that in those cases where the subject matter falls exclusively within the domain of public fora, viz. the Courts, such disputes would be non-arbitrable and cannot be decided by the Arbitral Tribunal but by the Courts alone. The justification and rationale given for adjudicating such disputes through the process of Courts, i.e. public fora, and not by Arbitral Tribunals, which is a private forum, is given by the court in the following manner:

“35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary

implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.” The Law Commission has taken note of

the fact that there is divergence of views between the different High Courts where two views have been expressed, one is in favor of the civil court having jurisdiction in cases of serious fraud and the other view encompasses that even in cases of serious fraud, the Arbitral Tribunal will rule on its own jurisdiction. It may be pertinent here to reproduce the observations of the Law Commission as contained in paragraphs 50 & 51 of the 246th Law Commission Report, which are as under:

“50. The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in *Bharat Rasiklal v. Gautam Rasiklal*, (2012) 2 SCC 144 that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable.

In this context, a 2 judge bench of the Supreme Court, while adjudicating on an application under section 8 of the Act, in *Radhakrishnan v. Maestro Engineers*, 2010 1 SCC 72 held that an issue of fraud is not arbitrable. This decision was ostensibly based on the decision of the three judge bench of the Supreme Court in *Abdul Qadir v. Madhav Prabhakar*, AIR 1962 SC 406. However, the said 3 judge bench decision (which was based on the finding in *Russel v. Russel* [1880 14 Ch.D 471]) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following *Radhakrishnan*, it appears that issues of fraud are not arbitrable.

51. A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable (*Seelivory Properties and Hotels Private Ltd v. Nusli Neville Wadia*, 2011 (2) Arb LR 479 (Bom); *CS Ravishankar v. CK Ravishankar*, 2011 (6) Kar LJ 417). The Supreme Court in *Meguin GMBH v. Nandan Petrochem Ltd.*, 2007 (5) R.A.J 239 (SC), in the context of an application filed under section 11 has gone ahead and appointed

an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in *Swiss Timing Ltd v. Organising Committee*, Arb. Pet. No. 34/2013 dated 28.05.2014, in a similar case of exercising jurisdiction under section 11, held that the judgment in *Radhakrishnan* is per incuriam and, therefore, not good law.” A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognized 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. **It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, we are of the opinion it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.**

*Before we apply the aforesaid test to the facts of the present case, a word on the observations in *Swiss Timing Ltd.*'s case to the effect that judgment of *N. Radhakrishnan* was per incuriam, is warranted. In fact, we do not have to labour on this aspect as this task is already undertaken by this Court in *State of West Bengal & Ors. v. Associated Contractors*[11]. It has been clarified in the aforesaid case that *Swiss Timings Ltd.* was a judgment rendered while dealing with Section 11(6) of the Act and Section 11 essentially confers power on the Chief Judge of India or the Chief Justice of the High Court as a designate to appoint an arbitrator, which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. This power of appointment of an arbitrator under Section 11 by the Court, notwithstanding the fact that it has been held in *SBP & Co. v. Patel Engineering Ltd. & Anr.*[12] as a judicial power, cannot be deemed to have precedential value and, therefore, it cannot be deemed to have overruled the proposition of law laid down in *N.Radhakrishnan*.*

In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud

simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. 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 for a, 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.

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."

27. In *Indu Engineering & Textiles Ltd. vs Delhi Development*

***Authority*, AIR 2001 SC 2668, decided on 11 July, 2001, the**

Supreme Court held:-

".....The scope for interference by the court with an award passed by the arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short 'the Act') provides in somewhat mandatory

terms that an award shall not be set aside except on one or more of the grounds enumerated in the provision. The three grounds set out in the Section are :

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;*
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;*
- (c) that an award has been improperly procured or is otherwise invalid.*

Interpreting the statutory provision Courts have laid stress on the limitations on exercise of jurisdiction by the Court for setting aside or interfering with an award in umpteen cases. Some of the well recognised grounds on which interference is permissible are :

- 1) Violation of principle of natural justice in passing the award;*
- 2) Error apparent on the face of the award;*
- 3) The arbitrator has ignored or deliberately violated a clause in the agreement prohibiting dispute of the nature entertained;*
- 4) The award on the face of it is based on a proposition of law which is erroneous, etc. In U.P.Hotels and Others vs. U.P.State Electricity Board, (1989) 1 SCC 359, this Court in paras 17& 18 observed as follows:*

"17. It appears that the main question that arises is : whether the decision of this Court in Indian Aluminium co.vs. Kerala State Electricity Board (1975) 2 SCC 414 case was properly understood and appreciated by the learned Umpire and whether he properly applied the agreement between the parties in the light of the aforesaid decision. It was contended that the question whether the sums payable under clause 9 included discounts. On the aforesaid basis it was contended that there was an error of law and such error was manifest on the face of the award. Even assuming, however, that there was an error of law in arriving at a conclusion, such an error is not an error which is amenable to correction even in a

reasoned award under the law. Reference may be made to the observations of this Court in *Coimbatore District P.T.Samgam v. Bala Subramania Foundry* (1987) 3 SCC 723, where it was reiterated that an award can only be set aside if there is an error on its face. Further, it is an error of law and not mistake of fact committed by the arbitrator which is justiciable in the application before the court. Where the alleged mistakes or errors, if any, of which grievances were made were mistakes of facts if at all, and did not amount to error of law apparent on the face of the record, the objections were not sustainable and the award could not be set aside. See also the observations of this Court in *Delhi Municipal Corpn. Vs. M/s.Jagan Nath Ashok Kumar*, (1987) 4 SCC 497, where this Court reiterated that reasonableness of the reasons given by an arbitrator in making his award cannot be challenged. In that case before this Court, there was no evidence of violation of any principle of natural justice, and in this case also there is no violation of the principles of natural justice. It may be possible that on the same evidence some court might have arrived at some different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of an arbitrator. Also see the observations in *Halsbury's Laws of England*, 4th edn., Vol.2, at pages 334 and 335, para 624, where it was reiterated that an arbitrator's award may be set aside for error of law appearing on the face of it, though that jurisdiction is not lightly to be exercised. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

18. It was contended by Mr.F.S.Nariman, counsel for the appellant, that a specific question of law being a question of construction had been referred to the

Umpire and, hence, his decision, right or wrong, had to be accepted. In view of Clause 18, it was submitted that in this case a specific reference had been made on the interpretation of the agreement between the parties, hence, the parties were bound by the decision of the Umpire. Our attention was drawn to the observations of this Court in M/s.Hindustan Tea Co. v. M/s.K.Sashikant & Co., 1986 Supp SCC 506, where this Court held that under the law, the arbitrator is made the final arbiter of the dispute between the parties, referred to him. The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts. Where the award which was a reasoned one was challenged on the ground that the arbitrator had acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."....."

- 28. In the present case the arbitral award has been passed on 4th March, 2014.**
- 29.** The complainant having initially participated in the arbitral proceeding has initiated the present criminal proceeding on 29th March, 2023.
- 30.** The arbitral award was granted in favour of the petitioner company herein on the basis of documents and evidence before the learned arbitrator.
- 31. There is no whisper of the said arbitral proceedings nor its award in the petition of complaint.**
- 32. The complainant having suffered an arbitral award, initiated the criminal proceedings after 9 long years, which prima facie appears to be malafide and motivated.**
- 33.** Having admitted, making payment by way of cheque to the petitioner herein (later dishonoured), the income tax rules requires mandatory deduction of TDS by the complainant.

- 34.** Thus considering the said facts and circumstances the materials on record prima facie do not contain the ingredients required to constitute the offences alleged and as such, continuation of the said proceeding in the present case shall be an abuse of the process of law/court.
- 35. CRR 348 of 2024 is allowed.**
- 36.** The proceeding arising out of case no. CS 27633 of 2023, pending before the learned Metropolitan Magistrate, 19th Court, Calcutta, under Sections 120B/409/418/420/465/467/468/471 of the Indian Penal Code, **is hereby quashed in respect of the petitioner Ingram Micro India Pvt. Ltd.**
- 37.** All connected applications, if any, stand disposed of.
- 38.** There will be no order as to costs.
- 39.** Interim order, if any, stands vacated.
- 40.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 41.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)