

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO. 21 OF 2025

Om Swayambhu Siddhivinayak

...Appellant

**Versus**

Harischandra Dinkar Gaikwad  
and Ors.

...Respondents

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**Mr. Dinesh D. Tiwari** a/w. *Pulkeshi Gaikwad, Antony Parel and E. Siddiqui i/b Dinesh Tiwari and Associates, for Appellant.*

**Dr. Uday Warunjikar, Senior Advocate** a/w. *Sumit S. Kate, for Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Date : November 4, 2025

Oral Judgment :

**Context and Factual Background:**

1. This is an Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (“***the Act***”) challenging an order dated March 11, 2025 (“***Impugned Order***”) rejecting an application filed by the Appellant under Section 8 of the Act. The disputes and differences between the parties relate to transactions between them arising out of a Development Agreement, dated May 3, 2011 (“***Development Agreement***”) and a further Supplemental Agreement dated May 25, 2021 (“***Supplemental Agreement***”).

2. The Appellant, Om Swayambhu Siddhivinayak (“*Developer*”) had agreed under the Development Agreement to provide a certain specified area of developed property to the Respondents, who are the owners of the land on which the development was to take place (“*Owners*”). The Owners have filed Special Civil Suit No. 157 of 2024 before the 4<sup>th</sup> Joint Civil Judge, Senior Division, Kalyan, *inter alia*, seeking specific performance of the provision of certain saleable area to the Owners (in the quantum of 8,937 sq.ft and 4927 sq.ft.), and a cancellation of the Supplemental Agreement.

3. It is the case of the Appellant that Clause 30 of the Development Agreement, which contains the arbitration clause, is an expansive clause and all disputes and differences between the parties in connection with the development contracted in that Development Agreement are amenable to arbitration, and therefore, no Civil Court could take cognizance of any dispute between the parties in connection with the Development Agreement.

4. A detailed reading of the Impugned Order would show that the Learned District Court was swayed by only one factor, namely, that Supplemental Agreement did not contain any arbitration clause and the Development Agreement alone contains an arbitration clause. In

paragraph 4 of the Impugned Order, it is recorded by the Learned Judge that the suit is for cancellation of the Development Agreement as well as the Supplemental Agreement. The Learned Judge was persuaded to rule that in the absence of an arbitration clause in the subsequent agreement and considering the nature of the dispute, the arbitrator is not competent and empowered to decide the disputes between the parties. Therefore, the Learned Judge refused to refer the parties to arbitration and has continued to deal with the suit himself.

**Contentions of the Parties:**

5. Dr. Warunjikar, Learned Senior Advocate on behalf of the Respondents seeks to defend the Impugned Order on the premise that the parties had a layered and a structured approach of dispute resolution divided between Clause 13 of the Development Agreement, and Clause 30 of the Development Agreement. According to him, Clause 30 of the Development Agreement deals with all disputes and differences connected to the development contracted in the Development Agreement, but Clause 13 deals with the provision of the developed area in terms of Clauses 1 and 2, for which, the parties had agreed that they would approach a Court for a declaration which would be binding on the parties. Dr. Warunjikar would also contend that the

Suit seeks a declaration that the Supplemental Agreement is a product of fraud and that arbitral tribunals cannot adjudicate serious allegations of fraud.

6. Mr. Dinesh Tiwari, Learned Advocate on behalf of the Appellant would submit that even a plain reading of the prayers in the Suit would demonstrate that the relief sought is of specific performance of the Development Agreement, which is subject matter of the arbitration agreement. As regards the distinction between Clause 13 and Clause 30, Mr. Tiwari would contend that the specific performance sought by the Respondents is for delivery of a developed area that is at variance with the area set out in Clauses 1 and 2 of the Development Agreement. Therefore, he would submit, that the scope of jurisdiction under Clause 13, even accepting the contentions on behalf of the Respondents, would take the plaint outside the scope of Clause 13, and therefore, within the scope of Clause 30.

7. It is also seen that prayer 11(a) in the plaint seeks a declaration that the Supplemental Agreement is a product of fraud, and therefore, should be cancelled as not being binding on the parties.

**Analysis and Findings:**

8. Having heard Learned Advocates for both the parties at

length and having examined the material on record with the benefit of their assistance, I am constrained to find that the Impugned Order is not sustainable.

9. At the threshold, the provisions of Section 8 of the Act must be noticed. It is settled law that under section 8(1) of the Act, a judicial authority before which an action is brought in a matter, which is subject matter of an arbitration agreement, *shall* (if a party to the arbitration agreement, or any person claiming through or under it, applies) refer the parties to arbitration, unless it is found that *prima facie*, no valid arbitration agreement exists.

10. A plain reading of Section 8(1) of the Act would indicate that the judicial authority before whom a proceeding is brought is required to refer the parties to arbitration, unless such authority comes to a *prima facie* finding that no valid arbitration agreement exists. The scope of review by the Section 8 Court is restricted to examining the subject matter of the proceedings before it, compare it with the subject matter of the arbitration agreement and unless it comes to a *prima facie* view that no valid arbitration agreement exists, it is required to refer the parties to arbitration.

11. Once it is found that an arbitration agreement exists in respect of the same subject matter as that of the proceedings before the Section 8 Court, the correct forum to deal with all matters is the arbitral forum. If the Section 8 Court *prima facie* finds that the existence itself is in doubt, the Court would not need to refer the dispute to arbitration.

12. The Impugned Order is conspicuously silent on the analysis on any of these facets. It summarily states that the Supplemental Agreement does not contain an arbitration clause. This appears to be the sole ground on which the Section 8 application has been rejected. Indeed, the Impugned Order also refers to the “nature” of the issues involved but does not allude to whether the allegation of fraud would, in the facts of the case, bring the matter outside the jurisdiction of an arbitral tribunal. While the reasons provided in the Impugned Order are sketchy and primarily limited to the Supplemental Agreement not having had an arbitration clause, it is well settled that an appeal is a continuation of the proceedings, and therefore, despite the absence of reasons in the Impugned Order, I have examined the material on record in the same manner as the Section 8 Court ought to have examined, considering that Section 37 is an appellate provision.

13. It is now well stated that the Section 8 Court must only

restrict its examination to examining the subject matter of the proceedings before it and compare it with the subject matter of the arbitration agreement. Once subject matter commonality is established, if the Section 8 Court is *prima facie* of the view that a valid arbitration agreement exists, it is obliged to refer the parties to arbitration. If the Section 8 Court comes to a *prima facie* view that a valid arbitration agreement does not exist, the Section 8 Court may then proceed to deal with the proceedings before it.

14. Having examined the Development Agreement, in my opinion, Clause 30 is expansive in its terms and all disputes and differences in connection with the Development Agreement, would fall within the ambit of the arbitrable disputes between the parties. The Section 8 Court has indeed come to the view that an arbitration agreement exists in the Development Agreement. There is not a whisper in the Impugned Order about the distinction between Clause 13 and Clause 30 of the Development Agreement that is now being sought to be made in these proceedings.

15. The reliance by Dr. Warunjikar upon Clause 13 appeared attractive at first blush. Despite this distinction not even finding mention in the Impugned Order, I have given it careful consideration.

Clause 13 refers to delivery of saleable area under Clause 1 and Clause 2 to be referred to a “*nyayalay*” (Court) while Clause 30 refers to dispute resolution by “*lavaad*” (arbitration). The Development Agreement is in Marathi. The use of the word “*nyayalay*” and not “*nyayadhikaran*” (tribunal) would perhaps be suggestive of the parties perhaps intending to go to a Court in relation to Clause 1 and Clause 2. However, I am unable to be persuaded by this theory for multiple reasons.

16. *First*, there is no carve-out in either Clause 30 or in Clause 13, for exclusion of disputes under Clauses 1 and 2 from the arbitration agreement, for Clause 13 to be read strictly as a provision for exclusion from arbitration. A commercial contract must be read with commercial commonsense, and it is indicative that when read harmoniously, the reference to resolution under Clause 13 need not be exclusively meant for a Court as contradistinguished from an arbitral tribunal. The reference could well be to the dispute resolution forum.

17. *Second, indeed*, the prayer in the Suit is for delivery of saleable areas that is far removed in size from the contracted terms of what is to be delivered under Clauses 1 and 2 of the Development Agreement. Clause 13 deals with the obligations owed in terms of Clauses 1 and 2 of the Development Agreement. Seen in this light, it is

not inexorable for Clause 13 to be interpreted as rendering the Court to be an exclusive forum for resolution of disputes under Clause 1 and Clause 2.

18. *Third*, the contention that the parties had agreed to resolve all development-related disputes by arbitration and to resolve the consideration for the development i.e. the delivery of saleable area to the Respondents outside the scope of arbitration does not sound reasonable or commonsensical. If the parties have multiple reciprocal promises that form consideration in a contract, and they desired to keep one type of dispute out of arbitration, they would have used exclusionary language, which they have not.

19. *Fourth*, the Supplemental Agreement records satisfaction of the flow of consideration under the Development Agreement, which is disputed by the Respondents (the plaintiffs in the Suit) and they seek a declaration that the Supplemental Agreement is not enforceable. The prayer about the Supplemental Agreement is essentially a prayer about the flow of consideration under the Development Agreement, and therefore the Supplemental Agreement need not be out of the scope of the subject matter of the arbitration agreement contained in the Development Agreement. The absence of exclusionary language, and

indeed the variance in the area to be delivered when one compares Clauses 1 and 2 with the reliefs sought in the Suit, in my opinion, the fine distinction sought to be drawn between Clause 13 and Clause 30 gets eroded.

20. *Finally*, since specific performance of the Development Agreement is sought, even leaving aside the variation in the quantum of the saleable area claimed by the Respondents in the Suit with the entitlements under Clauses 1 and 2, the dispute squarely relates to the terms and conditions of the Development Agreement, which is subject matter of Clause 30, which is a conventional and expansive arbitration clause without any exclusions in its language. Therefore, in my opinion, the subject matter of the Suit is covered by the subject matter of the arbitration agreement.

21. The Learned Judge has indeed found that an arbitration agreement exists in the Development Agreement. However, he has focused on the absence of an arbitration clause in the Supplemental Agreement. Since that instrument purported to record the discharge of consideration under the Development Agreement, arguably, it did not need a separate arbitration clause, when Clause 30 of the Development Agreement squarely deals with disputes relating to that instrument and

discharge of consideration would fall within its scope. The Supplemental Agreement, which seeks to record that the consideration under the Development Agreement stands discharged, is an adjectival element of the substance of the Development Agreement.

**Fraud Contention and Case Law Analysed:**

22. The judgement of the Supreme Court in the case of ***Sushma Shivkumar Daga***<sup>1</sup> is squarely on point and the following extracts lend themselves for application in the facts of this case :

*14. The basic purpose for bringing an amendment in Section 8 (as well as Section 11 of the Arbitration Act) was to minimise the scope of judicial authority in matters of arbitration, except on the ground where prima facie, no valid arbitration agreement exists.*

*24. After the 2015 amendment, primarily the court only has to see whether a valid arbitration agreement exists. Additionally, the clear non-arbitrability of cases, such as where a party to the agreement is statutorily protected, such as a consumer "has also to be seen by the Court" (Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd., (2011) 5 SCC 532). Short of the narrow field stated above, the scope of judicial scrutiny at the stage of Section 11(6) or Section 8 is extremely limited.*

*25. Objections will nevertheless be raised both on Section 8 and Section 11 applications. These objections can be genuine, such as where there is no arbitration clause or where the matter is itself*

<sup>1</sup> *Sushma Shivkumar Daga Vs. Madhurkumar Ramkrishnaji Bajaj & Ors.* – 2023 SCC OnLine SC 1683

*non-arbitrable, but often these objections could be only to wriggle out of the statutory commitment of parties to a defined process of redressal mechanism.*

29. *The third objection is regarding fraud. The plea of fraud raised by the appellants in their objection to the Section 8 application has never been substantiated. Except for making a bald allegation of fraud there is nothing else.* This Court has consistently held that *a plea of fraud must be serious in nature in order to oust the jurisdiction of an arbitrator.* In *Rashid Raza v. Sadaf Akhtar ((2019) 8 SCC 710)*, this Court laid down two conditions which must be satisfied before the Court can refuse to refer the matter to the arbitrator, a forum consciously decided by parties in an agreement. *The first is whether the plea permeates the entire contract and above all, the arbitration agreement, rendering it void or secondly, whether the allegation of fraud touches upon the internal affairs of the parties inter se having no implication in the public domain.* The allegations must have some implication in public domain to oust the jurisdiction of an arbitrator, if an allegation of fraud exists strictly between the parties concerned, the same will not be termed to be as a serious nature of fraud and hence would not be barred for arbitration.

*[Emphasis Supplied]*

23. The aforesaid case also has a bearing on the element of fraud pressed into service by Dr. Warunjikar. To begin with the Impugned Order makes no analysis of the law on the point. The plaint alleges that the Supplemental Agreement is of product of fraud and signatures of the Plaintiffs had been taken on blank paper, with the content being set out

in the signed pages subsequently. I am also mindful that the reliefs sought in the Suit include cancellation of the Supplemental Agreement.

24. It is now settled law that bilateral disputes of fraud are not necessarily outside the scope of arbitration. The law on arbitral tribunals being empowered to deal with allegations of fraud has been distilled and articulated in very clear terms, moving away from the position obtaining from *N. Radhakrishnan*<sup>2</sup>, where the Supreme Court had taken a view that where fraud was alleged in the books of accounts and records of a partnership firm, it fell in the domain of the Courts, whereby repelling a Section 8 Application was held to be right.

25. However, the law since moved on from that position. The principle that rights *in rem* cannot be adjudicated by arbitration, which is essentially a forum privately created by parties enjoying mutual rights and obligations *in personam* has been applied to fraud. Therefore, where there is a fraud against society at large (*in rem*) as opposed to fraud within the scope of implementing the contract or inducing a contract, which contract contains an arbitration clause, the issue of fraud would indeed be arbitrable.

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<sup>2</sup> *Radhakrishnan v. Maestro Engineers – (2010) 1 SCC 72*

26. In *Ayyasamy*<sup>3</sup>, the Supreme Court held that the mere allegation of fraud would not dispel arbitrability. It is only in cases where it is found that allegations are very serious that the Section 8 Court may ignore the arbitration agreement and continue with the proceedings. Even the existence of the arbitration agreement itself having been obtained by fraud was kept within the ambit of potential non-arbitrability.

27. However, after *Ayyasamy*, the law has been emphatically summarised and set out by a three-judge bench of the Supreme Court in *Deccan*<sup>4</sup>, repelling the case for not being referred to arbitration where it was argued that an arbitral tribunal could not be called upon to cancel three written instruments, and that when there is a serious allegation of fraud, the arbitrator's jurisdiction gets ousted. The following extract is noteworthy:-

6. We have, in our judgment in *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.* 10, laid down the law on invocation of the "fraud exception" in some detail, which reasoning we adopt and follow. The said judgment indicates that given the case law since *N. Radhakrishnan*, it is clear that *N. Radhakrishnan*, as a precedent, has no legs to stand on. If the subject-matter of an agreement between the parties falls within Section 17 of the Contract Act, 1872, or involves fraud in the performance of the contract, as has been held in the afore-

<sup>3</sup> *Ayyasamy Vs. A. Paramasivam* – (2016) 10 SCC 386

<sup>4</sup> *Deccan Paper Mills Co. Ltd. Vs. Regency Mahavir Properties* – (2021) 4 SCC 786

said judgment, which would amount to deceit, being a civil wrong, the subject-matter of such agreement would certainly be arbitrable. Further, we have also held that **merely because a particular transaction may have criminal overtones as well, does not mean that its subject-matter becomes non-arbitrable.** We have no doubt that Shri Navare is right in his submission that there is no averment that the agreement dated 20-5-2006 and the deed of confirmation dated 13-7-2006 were not entered into at all, as a result of which the arbitration clause would be non-existent. **Further, it is equally clear that the suit is one that is inter partes with no "public overtones", as has been understood in paras 34 and 35 of Avitel, as a result of which this exception would clearly not apply to the facts of this case.**

[Emphasis Supplied]

28. This is an emphatic declaration of the law by a larger bench of the Supreme Court. Evidently, the Supreme Court has ruled that fraud in inducing a party into executing a contract as set out in Section 17 of the Indian Contract Act, 1872, or fraud in the performance of a contract, would be in the nature of a civil wrong and is eminently arbitrable. Merely on the ground that there are “criminal overtones” or because a party claims that there are “public overtones”, the dispute would not become non-arbitrable. **Deccan** has also dealt with the proposition that a prayer to declare an instrument illegal, a relief envisaged under Section 31 of the Specific Relief Act, 1963, would not be rendered non-arbitrable. Merely because Courts have the power to grant specific perform-

ance, it would not follow that the parties could not agree upon a privately chosen arbitral tribunal having the same power to grant such declaratory specific relief.

29. The Supreme Court held that the relief that is sought and granted in the form of declaring an instrument to be void, would end up being a relief *in personam* among the parties to that instrument and not a relief *in rem*. The following extracts from Paragraphs 21 and 22 would be appropriate:

*The principle behind the section is to protect a party or a person having a derivative title to property from such party from a prospective misuse of an instrument against him. A reading of Section 31(1) then shows that when a written instrument is adjudged void or voidable, the Court may then order it to be delivered up to the plaintiff and cancelled—in exactly the same way as a suit for rescission of a contract under Section 29. Thus far, it is clear that the action under Section 31(1) is strictly an action inter partes or by persons who obtained derivative title from the parties, and is thus in personam.*

22. Let us see whether Section 31(2) makes any difference to this position in law. *According to the judgment in Aliens Developers, the moment a registered instrument is cancelled, the effect being to remove it from a public register, the adjudicatory effect of the court would make it a judgment in rem. Further, only a competent court is empowered to send the cancellation decree to the officer concerned, to effect such cancellation and "note on the copy of the instrument contained in his books the fact of its cancellation". Both reasons are incor-*

*rect. An action that is started under Section 31(1) cannot be said to be in personam when an unregistered instrument is cancelled and in rem when a registered instrument is cancelled. The suit that is filed for cancellation cannot be in personam only for unregistered instruments by virtue of the fact that the decree for cancellation does not involve its being sent to the registration office — a ministerial action which is subsequent to the decree being passed.*

*[Emphasis Supplied]*

**Directions and Order:**

30. In these circumstances, this appeal is ***finally disposed of*** by allowing it, and quashing and setting aside the Impugned Order.

31. Dr. Warunjikar requests that this judgement be stayed for a period of four weeks to enable the Respondents to pursue their prospects in appeal. I do not think a case for a stay is made out in view of the reasons set out above, and the quality of reasoning in the Impugned Order.

32. However, since the Impugned Order is set aside and the parties are being referred to arbitration, the Respondents are given four weeks' time to consent to the identity of the arbitrator.

33. As a corollary, I also take note of the fact that an interim application has been heard by the Learned Judge. While this Appeal has

been heard today, orders have been reserved in the Interim Application. Since a determination of this Appeal answers a jurisdictional question, it is clarified that pursuant to this judgement, the Learned District Court is denuded of jurisdiction in view of the decision taken herein.

34. Therefore, the continuance of the Suit would be inappropriate, and since the subject matter of the Suit would need to be referred to arbitration, it is made clear that the Learned District Court ought not to pronounce its judgement reserved on the interim application considered by it.

35. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

**[ SOMASEKHAR SUNDARESAN, J.]**