IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO.8651 OF 2025
IN
ARBITRATION PETITION NO.120 OF 2019

Kalyan Dombivali Municipal Corporation ....Applicant

IN THE MATTER BETWEEN
S M Associates ....Petitioner
Verus
Kalyan Dombivali Municipal Corporation ....Respondent

Mr. Rajiv Narulla *a/w. Ms. Nidhi Loya i/b. Jhangiani, Narula & Associates, for Respondent.*

CORAM: SOMASEKHAR SUNDARESAN, J.

DATE : JANUARY 13, 2026

ORDER :

1. This Interim Application has been filed seeking a recall of the order of this Court dated April 24, 2025, by which the Learned Sole Arbitrator came to be appointed in exercise of jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 (***"the Act"***).

2. This Interim Application is treated as a Review Application and is taken up for final hearing by consent of the parties.

3. It is the case of Learned Counsel for the Applicant that the Petition had originally been filed as an application on the original side in which he had filed his Vakalatnama, but after the transfer of the

Application to the Appellate Side, the fact that he was on record was not carried into the system of the Appellate Side, and therefore, he missed the hearing and could not be represented.

4. That apart, the ground on which the review has been sought is that the party to which the project had been awarded is not a party to the original agreement, which contains the arbitration clause. Between the date of the award of the project and the date of the execution of the contract, the composition of the partnership firm underwent a change, and therefore, there is no binding arbitration clause between the Applicant and the original firm and therefore, it is claimed, the arbitration agreement does not exist for purposes of Section 11 of the Act. Therefore, the Applicant contends that in the absence of the privity of contract, the Petitioner being a *"backdoor entrant"* into the contract without consent and knowledge of the Applicant, the arbitration agreement does not exist.

5. Finally, the Applicant contends that the manner of execution of the contract presents a serious fraud being played on the Applicant, and that matters of serious fraud are not arbitrable. Learned Counsel for the Applicant would submit that while the contract was executed on August 31 2009, knowledge of the aforesaid fraud was obtained only in 2017, which has led to consequential action been taken against the original Petitioner. By the time the Applicant claims to have a

knowledge of the fraud, the underlying project has been substantially implemented and mixed questions of fact and law arise for consideration in the matter.

6. Therefore, the Applicant submits, the order appointing the arbitrator, deserves to be recalled.

7. In contrast, Learned Counsel for the original Petitioner (Respondent in this Application) would submit that the non-arbitrability of fraud pertains to fraud on society at large which is *in rem* and not an alleged fraud *in personam* between two parties. Learned Counsel for the Respondent also strongly denies the insinuation of fraud or that the Applicant is being taken for a ride by contending that the reconstitution was to the knowledge of the Applicant and the partnership deed had even been delivered under the letter dated July 28, 2009, rendering the allegation of fraud to be totally baseless.

8. Having heard the parties, it is clear that the contentions being raised by the Applicant does not relate to the existence of the arbitration clause, but to the alleged fraud in procuring the consent to the agreement which contains the arbitration clause. That apart, *prima facie* whether the partnership firm was reconstituted in the manner as it was or whether it was a fraud being mixed question of fact and law, which would need to be dealt with by a fact-finding body and not by the

Section 11 Court. It is now settled law that the blanket prohibition on arbitrability, whenever fraud is cited as an element that is not arbitrable, is not permissible.

9. Clearly, the law on arbitral tribunals being empowered to deal with allegation of fraud has been distilled and articulated in very clear terms since the earlier position obtaining from ***N. Radhakrishnan***[1] where the Supreme Court took the 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, to repel a Section 8 Application. 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.

10. 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. In ***Ayyasamy***[2], 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

1 N. Radhakrishnan vs. Maestro Engineers – (2010) 1 SCC 72
2 A. Ayyasamy vs. A. Paramasivam – (2016) 10 SCC 386

the arbitration agreement itself having been obtained by fraud was kept within the ambit of potential non-arbitrability. However, the law is emphatically summarised and set out by a three-judge bench of the Supreme Court in ***Deccan***[3], 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 aforesaid 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 un-***

3 Deccan Paper Mills Co. Ltd. Vs. Regency Mahavir Properties – (2021) 4 SCC 786 *derstood 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]

11. 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.

12. In any case, the Application is misconceived and was considered in view of the Applicant stating that had the Applicant remained present but for the glitch in the Court's system leading to his not having knowledge of the matter being listed, the Applicant was heard, after which it is found that no case is made out for recall of the order.

13. Needless to say, the Applicant would be at liberty to make submissions to the Learned Arbitral Tribunal on all facets of the matter including any element of fraud, whether on merits or on jurisdiction, subject to what is stated above.

14. The Interim Application is hereby ***finally disposed of.***

15. 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.]