THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO. 140 OF 2020
WITH
COMMERCIAL ARBITRATION APPLICATION NO. 1 OF 2021
WITH
COMMERCIAL ARBITRATION APPLICATION NO. 2 OF 2021
WITH
COMMERCIAL ARBITRATION APPLICATION NO. 3 OF 2021

BSI-JDN Joint Venture & Ors. ... **Applicants**

Versus

The Board of Trustees of the
Jawaharlal Nehru Port Trust ... **Respondent**

Mr. Naresh Thacker with Mr. Alok Jain, Mr. Samarth Saxena and Ms. Sharmin Kapadia i/b. Economic Laws Practice, Advocate for the Applicants.

Mr. Omprakash Jha a/w. Ms. Shivani Kumbhojkar i/b. The Law Point, Advocate for the Respondent/JNPT.

C0RAM : G. S. KULKARNI, J.

DATE : 9TH JUNE 2022

JUDGMENT:

1. These are four applications filed under Section 11 of the Arbitration and Conciliation Act,1996 (for short '**the Act**') whereby the applicants have prayed for appointment of an arbitral tribunal to adjudicate the disputes and differences which have arisen between the parties under the contract dated 28 April 2017 titled as "Deepening and Widening of Mumbai Harbour Channel and JN Port Channel (Phase-II)".

2. The contract in question in each of these petitions was awarded by the respondent to the applicant following the usual tender procedure a public body would follow. The applicants had mobilized and thereafter have performed and fully executed the contractual work which came to be completed in the month of February-March, 2019. Such completion is stated to be much before the prescribed time limit as set out and agreed between the parties. Under Clause 48.1 of the General Conditions of Contract, the contractor (petitioner no. 1) was required to issue a notice of completion and by following the procedure as agreed. A 'Taking Over Certificate (TOC)' was to be issued by the designated Engineer with the approval of the Respondent within 21 days from the notice of completion. It is the case of the applicants that accordingly a completion notice under such clause was issued by the applicant when the Engineer had recorded and certified the invoices of the applicant. It is however the case of the applicant that in respect of certain invoices, the respondent has withheld the approval of the Engineer, and a TOC to be issued. According to the applicants, the respondent was in breach of its contractual obligations.

3. The applicants contend that consequently the applicants requested the respondent to issue a TOC. The respondent by its letter dated 15 March

2019 addressed to the applicant recorded that issuance of TOC is under its examination, for ascertaining compliances in accordance with the contract. There was correspondence between the parties on such issues and ultimately on 25 March 2019 the Engineer issued Interim Payment Certificate (IPC) for payments amounting to Rs.100.72 crores by the respondent to the applicant. Such payment, as per the contractual terms, was required to be made within 21 days of the such certificate being issued by the Engineer. However, the same was not issued. The applicants contend that correspondence ensued between the parties on the amounts due and payable to the applicants. The applicants contend that the disputes between the parties have arisen in relation to non-payment of Interim Payment Certificate Nos.12, 13, 14; for failure to accord approval to the Engineer for issuance of Taking Over Certificate (TOC); for direct losses and the Claims JNPT01 to JNPT08.

4. The case of the applicants is that a pre-arbitral mechanism namely that the applicants being required to approach the engineer, was duly satisfied. The applicants state that the engineer has already undertaken certification of the amounts payable as noted above. Thus, according to the applicants, disputes and differences have arisen between the parties under the said agreement dated 28 April 2017. The applicants contend that

despite a request being made by the applicants for referring the disputes for adjudication by appointing an arbitral tribunal, such request was not accepted by the respondent. In such context, the Court's attention is drawn to the letter dated 20 November 2019 in regard to the certification of the claim of the applicants by the engineer and the invocation notice dated 5 December 2019. The applicants have set out details of 26 letters as addressed by the applicants to the respondent pointing out the entitlement of the applicant to receive the amounts due and payable by the respondents. The applicants contend that despite such correspondence on the issue, the requests as made by the applicants for reference of the disputes to arbitration was not accepted by the respondent.

5. It is contended by the applicant that the respondent in reply to the applicants' letters, by its letters dated 6 December 2019, 1 June 2020 and 24 August 2020 raised an ostensible objection to the effect that the applicants had not resorted to Clause 67.2 of the agreement, whereunder, an amicable resolution of the disputes was to be attempted before a reference of the disputes to arbitration, could be made as per the agreed pre-arbitral mechanism. Such letter in fact notes that in compliance of Clause 67.2 of the agreement the respondent intended to amicably resolve the disputes, more particularly when the claims made by the applicants

were claims as made in August,2019, which were made almost one year prior to such letter being addressed to the applicant. The applicants contend that the request as made by the applicants for an amicable settlement as per Clause 67.2, it did not fructify, and more particularly, as also seen from the case of the respondents as now presented in these proceedings being discussed hereafter.

6. Finally, the applicant addressed to the respondent a consolidated notice dated 27 July 2020 invoking the arbitration agreement and subject matter of the disputes and differences in relation to these Section 11 applications. The respondent, however, did not accept the request of the applicants to appoint an arbitral tribunal. Hence, the present applications came to be filed. The respondents have filed reply affidavits in these four proceedings. The contents of these affidavits are similar. As to what is set out in the reply affidavits is quite intriguing.

7. At the outset, it needs to be stated that the reply affidavit is quite cryptic, it is bereft of any disclosure of appropriate/relevant correspondence. There is no substantive opposition on the part of the respondent for appointment of an arbitral tribunal. In paragraph 3 of the reply affidavit a faint desire and not of any relevance has been made to oppose the applications on merits of the disputes. Curiously in paragraph 4

of the reply affidavit a plea has been taken that on the basis of some investigation being carried out by the Central Vigilance Commission and thereafter the same being handed over to the Central Bureau of Investigation, on the issuance and award of the contract in question, the present case falls under the category of 'fraud/involvement of corrupt practices'. It is contended that as an investigation is being conducted by the CBI pertaining to the contract, the respondents have received instructions regarding non payment, as also for such reason, the permission to the engineer for issuing a TOC (Taking Over Certificate) was withheld by the respondent. The reply affidavit also states that the respondents is not aware about the enquiry resorted by CVC and the investigation being conducted by the CBI is kept confidential. The respondent has stated in the affidavit that it has merely complied with the requirements of the letters dated 28 July 2020, 3 September 2020 and 24 December 2020 issued by the Ministry of Port, Shipping and Waterways, Vigilance Section, in withholding payments to the applicants. It is thus, the case of the respondent that the disputes between the parties are not arbitrable as the disputes squarely fall within the exception as carved out in the decisions of the Supreme Court qua cases involving fraud, which according to the respondent, are held to be non-arbitrable. It is necessary to note the relevant paragraphs of the affidavit of the respondent which read thus:-

"3. At the outset, I deny each and every allegation and insinuation made against the Respondent with respect to the merits of the alleged dispute in the present Application, save and except the facts which are expressly admitted herein. Nothing in the present Application ought to be deemed as admitted for non-traverse. I crave leave of this Hon'ble Court to file additional and further affidavits, if and when required. I also crave leave to produce other and further relevant documents before this Hon'ble Court, as and when required.

4. At the further outset, I say and submit that the present Application is not maintainable before this Hon'ble Court as the underlying alleged dispute is not arbitrable at the first instance, rendering this Application infructuous. I say that the subject matter of the alleged dispute/underlying contract is pending investigation before the Central Bureau of Investigation ("CBI") pursuant to the directions of the Central Vigilance Commission ("CVC") and the Ministry of Ports, Shipping & Waterways. The same falls under the category of 'fraud/involvement of corrupt practices' pending investigation with CBI. Hence the present Application is liable to be dismissed.

5. Without prejudice to the Respondent's contentions with respect to the subject matter of the alleged dispute, I say and submit that the present Application is not maintainable before this Hon'ble Court as the underlying alleged dispute is not arbitrable at the first instance, rendering this Application infructuous. I say that the subject matter of the alleged dispute/ underlying contract is pending investigation before the Central Bureau of Investigation ("**CBI**") pursuant to the directions of the Central Vigilance Commission ("**CVC**") and the Ministry of Ports, Shipping & Waterways (hereinafter referred to as **"the Ministry"**). The same falls under the category of 'fraud/involvement of corrupt practices' pending investigation with CBI. Hence, the present Application is liable to be dismissed.

6. The position that at present the investigation is being conducted by the CBI pertaining to the Contract and the Respondent has received instructions regarding non-payment and consequentially, the permission to the Engineer for issuing Taking Over Certificate was withheld, is in knowledge of the Applicant.

7. The Ministry has issued the letter dated 28-7-2020, 03-09-2020 and 24-12-2020 whereby the Respondent was informed that a decision was made with the approval of the Hon'ble Minister of State (I/C) for Shipping to constitute a separate four-member Inquiry Committee to conduct a detailed investigation into the reported irregularities in the Subject Contract. The Respondent was also informed that Inquiry Committee submitted its report on 20-04-2020 is confidential and hence, not available with the Respondent. As per the advice given by CVC, the said report dated 20-04-2020 has been

> forwarded to the **CBI** for criminal investigation. Hereto annexed and marked as "**Annexure-B"**, **"Annexure-C"** and **"Annexure-D"** are the Ministry's letter dated 28-7-2020, 03-09-2020 and 24-12-2020 respectively. It is further stated that the present case is pending with the CBI.
>
> 8. Pursuant to the direction issued by the Ministry of Ports, Shipping & Waterways to take action against the Contractor, the Respondent had issued a Show Cause Notice to the Contractor and its response has also been forwarded to the ministry of Ports, Shipping d& Waterways. The matter is still pending investigation.
>
> 9. Furthermore, it is submitted that the underlying alleged dispute falls squarely under the parameters set up by the Apex Court for 'fraud' exception to arbitrability of a dispute. Therefore, the remedy sought under the instant Application ought not to be given at this stage as the case of fraud pertaining to the Subject Contract on the part of the Applicants, which requires evidence and investigation, is still pending with the CBI till this date."
>
> **(emphasis added)**

8. Learned Counsel for the applicants would submit that it is quite surprising for the respondents to take such a plea when a contract was lawfully entered between the parties and thereafter, the contractual work was fully performed and completed to the satisfaction of the respondent, which legitimately entitled the applicants to receive all payments for the work performed. It is further submitted that peculiarly, neither the applicants nor the respondents are aware, as to the nature of investigation being undertaken by the Central Vigilance Commission and now stated to be by the CBI. In such context, learned Counsel for the applicants has drawn the Court's attention to a letter dated 28 July 2020 issued by the Under Secretary to the Government of India, Ministry of Shipping (for short

referred to as the "Ministry") to the Chairman of the respondent-Jawaharlal Nehru Port Trust (JNPT), to submit that the concern in such letters appears to be completely alien to the work performed by the applicants under the contract and the consequent entitlement of the applicants to receive payments thereunder. Such letter is required to be noted which reads thus:-

"C-13019/27/2019-Vig.
Government of India
Ministry of Shipping
Vigilance Section

Transport Bhawan
1, Parliament Street,
New Delhi – 110001
Dated : 28.07.2020

To,

The Chairman,
Jawaharlal Nehru Port Trust (JNPT),
Administrative Building Sheva,
Navi Mumbai – 400707.

Subject :- Contract for the deepening and widening of Mumbai Harbour Channel and the Jawaharlal Nehru Port Channel (Phase II).

Sir,

I am directed to inform that a four-member Committee constituted by this Ministry to Investigate Irregularities in the work 'Deepening and widening of Mumbai Harbour Channel and the JNPT Channel – Phase-II', has reported corruption and malpractices in the tendering/implementation of the project. Accordingly, the report of the Committee has been forwarded by this Ministry to the Central Vigilance Commission with the recommendation for criminal investigation in the matter.

2. In view of the above, it is requested that suitable action under the Contract Agreement and Integrity Pact signed with the BSI – JDN, joint venture for the above mentioned work may please be taken.

3. This issues with approval of the competent authority.

Yours faithfully,
Signed/-
(P. K. Sahoo)
Under Secretary to the Govt. of India,
Tele/Fax: 23313943."

9. Learned Counsel for the applicants would submit that the contents of the letter are absolutely vague and make allegations which are in regard to the tendering process and its implementation. It is his submission that admittedly the tendering process was undertaken by the respondents, with which, the applicants were certainly not concerned except for the fact that the applicant participated in the open tender and they were lawfully awarded the contract in question, which was never questioned by the respondent or by any of the other bidders. Learned Counsel for the applicant would submit that a complaint was entertained by the Ministry/Government of India after the applicant had completed the contractual work and after interim payments were received, and at the time final payments were to be made to the applicant on the applicant fully performing the contractual obligations. Learned Counsel for the applicants has submitted that on such alien considerations, there cannot be any nullification of the contractual rights of the parties when as per the terms and conditions of the contract the applicants had fully performed and completed the contractual work to the satisfaction of the respondent. It is submitted that the respondents themselves are not aware about the nature of inquiry and/or in regard to the alleged involvement of its officers. It is the applicant's submission that almost for three years, no action has been taken by any investigating authority and no notice of such action or

investigation is received by the applicants. Learned Counsel for the applicants would contend that on these considerations which are completely alien to the discharge and performance of its contractual obligations, the respondent cannot financially choke the applicant by denying its legitimate payments and now denying reference of the disputes to arbitration. It is thus submitted that in these circumstances, the prayers as made by the applicant in these applications, for the disputes to be referred to arbitration, cannot be turned down, merely because there is a purported investigation either by the CVC or by the CBI as contended by the respondents.

10. Relevant to the said defence as raised by the respondent, there are two other letters namely dated 3 September 2020 and 24 December 2020 addressed by the Director of Ministry of Shipping and the Under Secretary to the Ministry of Port, Shipping and Waterways, to the Chairman of the respondent, the contents of which are required to be noted which read thus:-

"C-13019/27/2019-Vig.
Government of India
Ministry of Shipping
Vigilance Section

Transport Bhawan
1, Parliament Street,
New Delhi – 110001
Dated : 03.09.2020

To,

The Chairman,
Jawaharlal Nehru Port Trust,
Mumbai.

Subject :- Implementation of Capital Dredging Project Ph-II undertaken by the JNPT & MbPT channels.

The undersigned is directed to say that a Joint Committee was constituted by this Ministry to conduct a preliminary enquiry into the Capital Dredging Project of Deepening and Widening of Mumbai Harbour Channel and Jawaharlal Nehru Port Trust (JNPT). The Joint Committee submitted its preliminary report on 04.01.2019. This report revealed deficiencies in the tendering process as well as irregularities in the implementation of the project requiring further detailed investigation. Accordingly, it was decided with the approval of the Hon'ble Minister of State (I/C) for shipping to constitute a separate four member inquiry Committee to conduct a detailed investigation into the reported irregularities in the Capital Dredging Project of Deepening and Widening of Mumbai Harbour Channel and Jawaharlal Nehru Port Trust (JNPT) Channel.

2. The inquiry Committee submitted its report on 20.04.2020. This was referred to CVC and on their advice, the Ministry has forwarded the report to CBI for further investigation.

3. Among other misconducts, the inquiry report has brought out that M/s. Boskalis Smit India Ltd. did not disclose any of their earlier transgressions of contract in Mauritius Argentina and Jamaica (Copies of relevant documents are enclosed) This suppression of facts in violation of the Integrity Pact of the RFP. enabled them to be qualified for participation in the tender.

4. This is for your information and necessary action.

Yours faithfully,
Signed/-
(T. Jayaseelan)
Director
Tel: 23710836.

11. The respondent had not placed on record the letter dated 21 October 2021 addressed by the Chairman of the respondent to the Ministry. The respondent was hence, called upon to place the said letter on record, accordingly, a copy of which was tendered by the learned Counsel for the respondent. A perusal of such letter clearly shows that there is no whisper of any allegation as made by the respondent against the applicants, much

less in regard to any fraud on the part of the applicants either in tendering process or in implementation of the contract. The respondent's Chairman has merely requested guidance of the Ministry to defend the present proceedings. The respondent's letter dated 21 October 2020 reads thus:-

> "PPD/M-II/C-Drg.-Phase-II/Arbitration/2020/1199
> 21st October 2020
>
> The Secretary to the Govt. of India,
> Ministry of Shipping,
> Port wing, Transport Bhavan,
> 1, Parliament Street,
> New Delhi – 110001
>
> Sub: **Deepening and Widening of Mumbai Harbour Channel and JN Port Channel –Phase – II.**
>
> Ref: This office letter No.PPD/M/CAP.DREDG-05/ Investigation/ 2020/1136 dated 5th October 2020 (Copy enclosed)
>
> Dear Sir,
>
> This is in continuation of this office letter dated letter 5/10/2020 wherein Ministry of Shipping is requested to guide in the matter for an action to be initiated against the Dredging Contractor i.e. M/s. BSI-JDN, Joint Venture and also take a stand on defending nonpayment of outstanding payment for work done of Rs.194.64 Crores & release of Performance Bank Guarantee for the Phase II work amounting to Rs.196,31,77,650/- which is expiring on 31/10/2020. The reply in this regard is awaited from MoS.
>
> 2. Now, this office has received Arbitration Petition filed in Hon'ble Bombay High Court from M/s. Economic Laws Practice (ELP), Advocate for M/s. BSI-JDN JV vide their letter No. ELP/2020-21/INST/AJ/39 dated 28th September 2020 has submitted Commercial Arbitration No.3588.2020 having 3 parts containing total number of pages of 630, letter No. ELP/2020-21/INST/AJ/40 dated 28th September 2020 Commercial Arbitration No.3586/2020 having 3 parts containing 692 pages and letter No. ELP/2020-21/INST/AJ/41 dated 28th September 2020 Commercial Arbitration application No. 3587/2020 having 3 parts containing 628 pages, which has been invoked in the Hon'ble Bombay High Court Judicature has prayed in their Arbitration Application as under:
>
> (i) Nominate / appoint an Arbitrator on behalf of Respondent (JNPT) for deciding disputes between the Applicant No.1 (BSI-JDN JV and

ORS) and Respondent pertaining to the Respondent's non-payment of Interim Payment Certificate (IPC) No. 12, 13 & 14 and failure to accord approval to the Engineer for issuance of Taking Over Certificate (TOC):

(ii) That a common arbitrator be appointed / nominated by the court on behalf of the Respondent in the Application as well as the two applications preferred by the Applicant No.1 under section 11 of the Act for disputes in respect of (a) IPC # 12 and #13 Arbitration Notice and (b) Direct Losses Arbitration Notice.

(iii) Allow the costs of the Application in favour of the Applicant No.1

(iv) Grant such other reliefs as this Hon'ble Court may deem fit.

3. The JNPT has to defend the case in the High Court and the grounds for non-payment needs to be justified. Ministry of Shipping is requested to guide in this matter for an action to be initiated to defend the Arbitration Petition in the Bombay High Court as the matter is under further investigation.
Thanking you,

Yours faithfully,
Signed/-
Chairman

Encl.: As above."

12. By a further letter dated 24 December 2020 the Ministry has informed the Chairman of the respondent of its stand in regard to the present proceedings. The said letter of the Ministry reads thus:-

"C-13019/27/2019-Vig.
Government of India
Ministry of Port, Shipping and Waterways
Vigilance Section

Transport Bhawan
1, Parliament Street,
New Delhi – 110001
Dated : 24.12.2020

To,

The Chairman,
Jawaharlal Nehru Port Trust,
Administrative Building Shava,
Navi Mumbai – 400707.

Subject :- Implementation of Capital Dredging Project Ph-II undertaken by the JNPT & MbPT channels.

> I am directed to refer to Chairman, JNPT's letter No. PD/M-II/C-Drg.-Phase-II/Arbitration/2020/1199 dated 21.10.2020 on the subject mentioned above and to say that **JNPT may Nominate/appoint an Arbitrator to defend the case in the Hon'ble High Court of Mumbai with due legal advice and keeping in view the directions given by this Ministry regarding non-payment and pending investigation by CBI.**
> 2. Assistance of this Ministry will be provided wherever required to justify the grounds for non-payment.
> 3. This issues with the approval of JS & CVO.
>
> Yours faithfully,
> Signed/-
> (P. K. Sahoo)
> Under Secretary to the Govt. of India,
> Tele/Fax: 23313943."
> (**emphasis supplied**)

13. Learned Counsel for the respondent referring to the reply affidavit and the above material has submitted that considering the communication as received from the Ministry the dispute is non-arbitral as it involves an investigation on fraud. He has accordingly submitted that the applications deserve to be dismissed.

Reasons and Conclusion

14. At the outset it needs to be observed that admittedly there is an arbitration agreement between the parties as contained in Sub-Clause 67.3 (as amended) which reads thus:-

> "**Sub-Clause 67.3 Arbitrations**
> Replace the text of the sub clause by:
> Any dispute in respect of which :
> (a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1 and
>
> (b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2,
>
> shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act,1996, or any statutory amendment thereof. The arbitral tribunal shall consist of 3 arbitrators, one each to be appointed by the Employer and the Contractor. The third Arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and

> shall act as Presiding Arbitrator.
>
> Neither party shall be limited in the proceedings before such arbitrator/s to the evidence of arguments put before the Engineer for the purpose of obtaining his said decision pursuant to Sub-Clause 67.1. No such decision shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator/s on any matter whatsoever relevant to the dispute.
>
> The Place of arbitration shall be Mumbai, India. The language of the arbitration shall be English."

15. The respondent has not disputed the arbitration agreement. Also it clearly appears that there was an appropriate invocation of the arbitration agreement by applicant's notice dated 27 July, 2020, as addressed to the respondent calling upon the respondent to appoint an arbitral tribunal to adjudicate the disputes and differences between the parties *interalia* in regard to the amounts due and payable to the applicant by the respondent, in view of completion of the contract in question, as also the payment of interest thereon subject matter of the present applications.

16. In so far as the requirement under Section 11 of the Act for the Court to consider appointment of an arbitral tribunal is concerned, the law is well settled. The Supreme Court in **Duro Felguera, S.A. v. Gangavaram Port Ltd. (2017)9 SCC 729** in the context of the Court's jurisdiction under Section 11 in appointing an arbitral tribunal has held, that the basic consideration for the Court would be to examine the existence of an arbitration agreement in

terms of what sub-clause (6A) of Section 11 would provide. The relevant observations of the Supreme are required to be noted, which read thus:-

> "18. … … … Now, as per sub-section (6A) of Section 11, the power of the Court has now been restricted only to see whether there exists an arbitration agreement. The amended provision in sub-section (7) of Section 11 provides that the order passed under Section 11(6) shall not be appealable and thus finality is attached to the order passed under this Section. The amended Section 11 reads as under:-
> … … …
> .. … …
> 22. On behalf of GPL, it was repeatedly urged that the works are intrinsically connected, inseparable, integrated, interlinked and that they are one composite contract and that they were split up only on the request and representations given by Duro Felguera and FGI. As discussed earlier, as per amended provision Section 11 (6A), the power of the Supreme Court or the High Court is only to examine the existence of an arbitration agreement. From the record, all that we could see are five separate Letters of Award; five separate Contracts; separate subject matters; separate and distinct work; each containing separate arbitration clause signed by the respective parties to the contract."

Mr.Justice Kurian Joseph (as His Lordship then was) in His Lordship's concurring judgment has observed as under:-

> "47. What is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as "the 2015 Amendment") with particular reference to Section 11(6) and the newly added Section 11(6A) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act") is the crucial question arising for consideration in this case.
>
> 48. Section 11(6A) added by the 2015 Amendment, reads as follows:
>
> > "11(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement." (Emphasis Supplied)
>
> **From a reading of Section 11(6A), the intention of the legislature is crystal clear i.e. the Court should and need only look into one aspect the existence of an arbitration agreement. What are the**

> **factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement.**"
>
> (emphasis supplied)

Thus the primary requirement for the Court to appoint an arbitral tribunal is to examine the existence of an arbitration agreement. However, what would be the factors which ought to weigh with the Court in giving effect to an arbitration agreement in appointing an arbitral tribunal, is the issue which would fall for consideration in the present context.

17. In such context, it needs to be stated that the respondent is not contending that this is not a case of non-existence of an arbitration agreement. Hence, once the parties have agreed to an arbitration mechanism for redressal of the disputes which may arise under the contract in question, the law would ordinarily mandate the reference of the disputes to be made to an arbitral tribunal, in the event a party to an arbitration agreement has not consented or agreed to the reference of the dispute to arbitration after receipt of the invocation notice.

18. The only opposition the respondent has put up for the reference of the disputes to arbitration, is on the basis of the Ministry's letters (supra),

that this is a case which involves fraud, and hence, a reference of the disputes to arbitration would not be available to the applicant. As noted above, the contention that this is a case of fraud is on the basis of the alleged investigation being resorted by the Ministry and now the investigation is stated to be with the Central Bureau of Investigation which according to the respondent is in relation to the contract in question.

19. It is thus required to be examined as to whether mere allegation of an investigation, the details of which are not before the Court nor the respondent being aware of such investigation, can be any impediment for the Court to refer the disputes to arbitration, in exercise of its jurisdiction under Section 11 of the Act. More so, by categorizing the case to be a case falling within the parameters of non-arbitrability, so as to label it as a case excluded from reference to arbitration.

20. In my opinion, mere allegation of a fraud put up as a defence by the respondent, on the basis of letters dated 28 July 2020 and 3 September 2020 of the Ministry of Shipping as noted above, certainly would not make the present case to be categorized 'not to be referred to arbitration', for the reasons which can be discussed hereafter.

21. It needs to be borne in mind, as to what is the nature of the fraud, which is being alleged by the respondent, so as to assert a plea of non-

arbitrability. Such contention as raised on behalf of the respondent appears to be of quite surprising being not its own plea. Such a plea is taken being guided by the Ministry as can be seen from the Ministry's letter dated 28 July 2020 and the letter dated 3 September 2020. A perusal of such letters indicate that the allegations against the applicants on the basis of the report of the four member enquiry Committee, is to the effect that the applicants did not disclose its earlier transgression of contracts in Mauritius, Argentina and Jamaica, which according to the Ministry of Shipping, stated to be suppression of facts in violation of the Integrity Pact of the Request for Proposal (RFP), which enabled them to be qualified for participation in the tender.

22. However, the subsequent letter dated 24 December 2020 of the Under Secretary of Ministry of Shipping as addressed to the Chairman of the respondent which is in response to the letter dated 21 October 2020 states that the respondent "*may nominate/appoint an arbitrator to defend the case in this Court.*" Although such letter is already extracted in paragraph 12 above, however, the relevant portion can again be renoted hereunder:-

> "JNPT may Nominate/appoint an Arbitrator to defend the case in the Hon'ble High Court of Mumbai with due legal advice and keeping in view the directions given by this Ministry regarding non-payment and pending investigation by CBI."

23. There is no communication of the Ministry that the disputes be not referred to arbitration. In any event, it may be observed that the Ministry although may have a parental control on the affairs of respondent No.1-Port Trust, which is governed by the provisions of the Major Port Trusts Act,1963, however, it cannot be overlooked that the present dispute is purely a contractual dispute between the applicants and the respondent to which the Ministry is not a party to such contract.

24. Thus, the nature of the disputes as arisen under the contract in question necessarily are disputes *inter se* between these contracting parties which are required to be adjudicated in a manner as agreed between the parties under the contract. A third party (the Ministry as in the present case) cannot step into the contractual shoes of the respondent, so as to control the disputes which are integral and intrinsic to the contract and more particularly when it stands fully performed. Another facet, of which the Court cannot lose sight is that the respondent being a contractual party, is *per se* not averse and/or has not denied reference of disputes to arbitration, except for the fact that the respondent has expressed reservation to refer the disputes to arbitration, in view of the above referred letters issued by the Ministry to the Chairman of the respondent. In such situation, the Court cannot be oblivious to the commercial interest of the

parties which are firmly embedded in the contract in question and significantly when the contractual work has been performed in the spirit of the contract. If that be so, then, necessarily non-payment of the amounts for the works performed is the issue and purely civil, which cannot be kept away from reference to arbitration. All contentions of the respondent which are permissible in law including of any alleged fraud, which may touch the contractual dispute can very well be raised by the respondent before the arbitral tribunal.

25. Now so far as the contents of the letters of the Ministry of Shipping are concerned, it only refers to an ongoing investigation and in the award of contract and an alleged non disclosure by the applicants in the matter of award of the contract. However, it is not the case of the respondent either in any correspondence prior to such letters being addressed by the Ministry that there was any issue and/or illegality which had occurred in the award of the contract in question to the applicants. In fact, not only the contract was awarded but it has been fully performed by the applicants and for which invoices were raised. In such situation, in my opinion, it cannot be open for the respondent to contend that the case in hand is a case which would fall under the category of being “not arbitrable” on the ground of any fraud, merely referring to the letters of the Ministry of Shipping, and only

for the reason that the investigation was taken up at the behest of the Ministry by CVC and now by the CBI.

26. In any event, even assuming that there is some illegality in the award of the contract and as seen from the nature of the letters of the Ministry, it allegedly involves the respondent as also the applicant, such complexion of the case, in my opinion, would not categorize the present dispute to be a case involving any arbitral adjudication on fraud, so as to be kept out of the purview of the arbitration. It can seen from the record that before the Ministry, it is merely an investigation of a criminality, which even on its completion, would not lead to any civil dispute under the contract. Hence, there cannot be any impediment for reference of the disputes between the parties to arbitration. If any issue in such investigation or any criminal action being taken thereunder arises, touching the arbitral adjudication, it can certainly be placed before the arbitral tribunal at the relevant time and an appropriate plea as permissible in law can be raised.

27. The position in law on non-arbitrability of disputes on the ground of fraud can be considered.

28. In **A Ayyasamy Vs. A.Paramasivam & Ors.**[1] Mr.Justice A.K.Sikri (as His

1 (2016)10 SCC 386

Lordship then was) speaking for the Bench has observed that the Arbitration and Conciliation Act does not make any provision to exclude any category of disputes treating them as non-arbitrable. It is observed that the Courts have however held that certain kinds of disputes may not be capable of adjudication through the means of arbitration, like disputes arising out of 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. The Court has also noted such categories of disputes that are generally treated as non-arbitrable namely patent, trademarks and copyright, anti-trust/ competition laws, insolvency /winding up, bribery/ corruption, fraud and criminal matters. It is thus observed that fraud is one of the categories spelled out by the decisions where the disputes would be considered as non-arbitrable. It is in this context, His Lordship in paragraph 18 has observed that 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. The relevant observations in the decision are required to be noted which read thus:-

> "18. 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."

In the supplementing judgment authored by Dr.Justice D.Y.Chandrachud, it has been observed that the allegations of criminal wrongdoing or of statutory violation would not detract the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement. It was emphasized that as a matter of first principle in the case of **N.Radhakrishnan vs. Moestro Engineers**[2], the Supreme Court had not held that mere allegations of fraud would exclude arbitrability. It was observed that the burden must lie heavily on a party which avoid compliance with the obligation assumed by it to submit disputes to arbitration to establish that the dispute is not arbitrable under the law for the time being in force. The observations of His Lordship in the present context as contained in paragraphs 32, 43, 45.2 and 56 are relevant which read thus:-

> "32. The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes – civil or commercial – from arbitrability. Intrinsic legislative material is in fact to the contrary. Section 8 contains a mandate that where an action is brought before a judicial authority in a matter which is the subject of an arbitration

2 (2010)1 SCC 72) [overruled in **Vidya Drolia and others vs. Durga Trading Corporation (2021)2 SCC 1)]**

agreement, parties shall be referred by it to arbitration, if a party to or a person claiming through a party to the arbitration agreement applies not later than the date of submitting the first statement on the substance of the dispute. The only exception is where the authority finds prima facie that there is no valid arbitration agreement. Section 8 contains a positive mandate and obligates the judicial authority to refer parties to arbitration in terms of the arbitration agreement. While dispensing with the element of judicial discretion, the statute imposes an affirmative obligation on every judicial authority to hold down parties to the terms of the agreement entered into between them to refer disputes to arbitration. Article 8 of the UNCITRAL Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the Act of 1996 has made a departure which is indicative of the wide reach and ambit of the statutory mandate. Section 8 uses the expansive expression "judicial authority" rather than "court" and the words "unless it finds that the agreement is null and void, inoperative and incapable of being performed" do not find place in Section 8.

…. …. …

43. Hence, allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement.

…. … ..

45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. Parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. Parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

…. … …

53. The Arbitration and Conciliation Act, 1996, should in my view be interpreted so as to bring in line the principles underlying its interpretation in a manner that is consistent with prevailing approaches in the common law world. Jurisprudence in India must evolve towards strengthening the institutional efficacy of arbitration. Deference to a forum chosen by parties as a complete remedy for

> resolving all their claims is but part of that evolution. Minimising the intervention of courts is again a recognition of the same principle.
>
> 56. The legal position has been succinctly summarized in International Commercial Arbitration by Gary B Born[31] thus:
> "…..under most national arbitration regimes, claims that the parties' underlying contract (as distinguished from the parties' arbitration clause) was fraudulently induced have generally been held not to compromise the substantive validity of an arbitration clause included in the contract. **The fact that one party may have fraudulently misrepresented the quality of its goods, services, or balance sheet generally does nothing to impeach the parties' agreed dispute resolution mechanism. As a consequence, only fraud or fraudulent inducement directed at the agreement to arbitrate will, as a substantive matter, impeach that agreement.** These circumstances seldom arise: as a practical matter, it is relatively unusual that a party will seek to procure an agreement to arbitrate by fraud, even in those cases where it may have committed fraud in connection with the underlying commercial contract"."
>
> (emphasis added)

29. The Supreme Court in **Avitel Post Studioz Ltd. & Ors. vs. HSBC PI Holdings (Mauritius) Ltd.**[3], referring to the decision in Ayyaswamy (supra) has held that serious allegations of fraud arise only if either of the two tests laid down are satisfied, namely when it can be said that the arbitration clause or agreement itself cannot be said to exist, in a clear case in which the Court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all; and the second test can be said to have been met, in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court

3 (2021) 4 SCC 713

in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain. The Court also referring to **Afcons Infrastructure Ltd. & Anr Vs. Cherian Varkey Construction Co. (P) Ltd. & Ors.**[4] and the decision in **Booz Allen and Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.**[5] observed that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc., which can be the subject matter of such proceeding under section 17 of the Contract Act, and/or the tort of deceit. The mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so. The relevant observations of the Supreme Court are required to be noted which read thus:

> "34. In a recent judgment reported as Rashid Raza vs. Sadaf Akhtar, (2019) 8 SCC 710, this Court referred to Sikri, J.'s judgment in Ayyasamy (supra) and then held:
>
> > "4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."
>
> 35. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a

4 (2010)8 SCC 24
5 (2011)5 SCC 532

> clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.
>
> 43. In the light of the aforesaid judgments, paragraph 27(vi) of Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 and paragraph 36(i) of Booz Allen (supra), must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so."

30. In a three Judge Bench decision of the Supreme Court in **Vidya Drolia and others vs. Durga Trading Corporation**[6] (supra), Mr.Justice Sanjiv Khanna in His Lordship's majority judgment elucidated and summerized the legal position, observing that complexity is not sufficient to ward off arbitration and that the language of Sections 8 and 11 Arbitration Act are peremptory in nature. It is observed that the Arbitration Act has been enacted to promote arbitration as a transparent, fair, and just alternative to Court adjudication, and that, the public policy is to encourage and strengthen arbitration to resolve and settle economic, commercial and civil disputes. It is further observed that the party autonomy is now being put on

6 (2021)2 SCC 1)

a high pedestal, hence, the Act mandates that the parties to a valid arbitration agreement must abide by the consensual and agreed mode of dispute resolution. It is observed that the Courts must show due respect to arbitration agreements. The Court has propounded a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable, as set out in paragraph 76. The relevant observations of the Court in paragraphs 71, 72, 73, 76, 77 and 78 are required to be noted, which read thus:

> "71. Complexity is not sufficient to ward off arbitration. In terms of the mandate of Section 89 of the Civil Procedure Code and the object and purpose behind the Arbitration Act and the mandatory language of Sections 8 and 11, the mutually agreed arbitration clauses must be enforced. The language of Section 8 and 11 of the Arbitration Act are peremptory in nature. The Arbitration Act has been enacted to promote arbitration as a transparent, fair and just alternative to court adjudication. Public policy is to encourage and strengthen arbitration to resolve and settle economic, commercial and civil disputes. Amendments from time to time have addressed the issues and corrected the inadequacies and flaws in the arbitration procedure. It is for the stakeholders, including the arbitrators, the assure that the arbitration is as impartial, just, and fair as court adjudication……..
>
> 72. Recently, the Supreme Court of Canada in *TELUS Communications Inc.* v. *Avraham Wellman*[46], while conceding that arbitration as a method of dispute resolution was met with "overt hostility" for a long time on public policy grounds as it ousts jurisdiction of courts, observed that the new legislation, the Arbitration Act of 1991, marks a departure as it encourages parties to adopt arbitration in commercial and other matters. By putting party autonomy on a high pedestal, the Act mandates that the parties to a valid arbitration agreement must abide by the consensual and agreed mode of dispute resolution. The courts must show due respect to arbitration agreements particularly in commercial settings by staying the court proceedings, unless the legislative language is to the contrary. The principles of party autonomy goes hand in hand with the principle of limited court intervention, this being the fundamental principle underlying modern arbitration law. Party autonomy is weaker in non-negotiated "take it or leave it" contracts and, therefore,

the legislature can through statutes shield the weakest and vulnerable contracting parties like consumers. This is not so in negotiated agreements or even in adhesion contracts having an arbitration clause in commercial settings. Virtues of commercial and civil arbitration have been recognized and accepted and the courts even encourage the use of arbitration.

73. A recent judgment of this Court in *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*[47] has examined the law on invocation of "fraud exception" in great detail and holds that *N. Radhakrishnan*[39] as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in para 34 of the judgment in *Avitel Post Studioz Ltd.*[47], which quotes observations in *Rashid Raza* v. *Sadaf Akhtar*[48] : (*Rashid Raza case*[48], SCCp. 712, para 4)

> *"4.* The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: *(1)* does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."

to observe in *Avitel Post Studioz Ltd.*[47] : (SCC 35)

> "*35. …* it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all. The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or mala fide conduct, thus, necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof but questions arising in the public law domain."

.. ..

76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1 (*1*) When cause of action and subject-matter of the dispute relates to action in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.
76.2 (*2*) When cause of action and subject-matter of the dispute affects third-party rights; have *erga omnes* effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable.
76.3 (*3*) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.
76.4 (*4*) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).
76.5 These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.
76.6 However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.*[7] : (SCC p. 669, para 35)

> "*35.* … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which can not be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v. *Leeman*[50]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (*Soilleux* v. *Herbst*[51], *Wilson* v. *Wilson*[52] and *Cahill* v. *Cahill*[53])."

77. Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralized forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trade marks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the

> dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable.
> ---------- ------
>
> 78. in view of the aforesaid discussions, we overrule the ratio in *N. Radhakrishnan*[39] inter alia observing that allegations of fraud can (*sic* cannot) be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in *HDFC Bank Ltd.*[38] which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."

31. In a recent decision in **N. N. Global Mercantile Pvt. Ltd. vs. Indo Unique Flame Ltd.**[7] a three Judge Bench of the Supreme Court approving the view as taken in the **Avitel Post Studioz Ltd. & Ors.** (supra), in the context of fraud, has held that allegations of fraud are not arbitrable is wholly an archaic view, which has become obsolete and deserves to be discarded. It is however, observed that the criminal aspect of fraud, forgery or fabrication, which would be visited with criminal sanctions can be adjudicated only by Court of law as it may result in a conviction which is in the realm of public law. The Court referring to the decision in **A Ayyasamy (supra)**, **Ameet Lalchand Shah & Ors. v. Rishabh Enterprises & Anr.**[8], **Deccan Paper Mills v. Regency Mahavir**[9], **Avitel Post Studioz Ltd. & Ors.** (supra),

7 (2021) 4 SCC 739
8 (2018) 15 SCC 678
9 (2020) SCCOnLine SC 655

Vidya Drolia & Others (supra), in paragraph 40 of the decision has observed that all civil or commercial disputes, either contractual or non-contractual, which can be adjudicated upon by a civil court, in principle, can be adjudicated and resolved through arbitration, unless it is excluded either expressly by statute, or by necessary implication. The Court observed that the Arbitration and Conciliation Act, 1996 does not exclude any category of disputes as being non arbitrable. It was observed that the civil aspect of fraud was considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement or the fraud goes to the validity of the underlying contract and impeaches the arbitration clause itself. It was also observed that the civil aspect of fraud can be adjudicated by an arbitral tribunal. The Court in paragraph 42, 45 and 50 observed thus:

> "42. The broad categories of disputes which are considered to be non-arbitrable are penal offences which are visited with criminal sanction; offences pertaining to bribery/corruption; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody and guardianship matters, which pertain to the status of a person; testamentary matters which pertain to disputes relating to the validity of a will, grant of probate, letters of administration, succession, which pertain to the status of a person, and are adjudicated by civil courts.
>
> 45. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisdiction jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the

> substantive contract is "*expressly declared to be void"* under Section 10[52] of Contract Act, 1872 where the agreement is entered into by a minor (without following the procedure prescribed under the Guardians and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.
>
> 50. The ground on which fraud was held to be non-arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, Arbitral Tribunal are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law."

32. On general principles, a useful reference can also be made to a decision of the Supreme Court in **Indian Oil Corporation Vs NEPC India Ltd. & Ors.**[10] wherein in the context of quashing of the criminal proceedings, the Court was considering an issue on a contractual dispute, which had arisen between the parties. The Court observed that a given set of facts may make out purely a civil wrong, or purely a criminal offence, or a civil wrong as also a criminal offence. It was observed that a commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. It was observed that as the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is

10 (2006)6 SCC 736

available or has been availed, is not by itself a ground to quash the criminal proceedings. The Court also observed that there is growing tendency in business circles to convert purely civil disputes into criminal cases. It is thus clear that even if there is a contractual dispute between the parties, which is purely civil in nature, any element thereunder attracting criminal consequences under the same set of facts, would stand independent of a civil adjudication.

33. Thus, adverting to the principles of law laid down in the decisions of the Supreme Court as discussed above, in the facts of the present case, a reference of the disputes to arbitration certainly cannot be denied. The primary reasons being: that indisputedly there is an arbitration agreement between the parties; there is an invocation of the arbitration agreement in a manner known to law; that the respondent who is a party to the contract, in no manner whatsoever has alleged any fraud against the applicants either in the award of the contract or in the execution of the contract or in relation to the claim of the applicants on the invoices which are partly certified by the engineer; this is a case where the respondent has merely recorded a third party intervention namely of the Ministry, who also for a long time has remained inconclusive/silent on the involvement of any of the contractual parties in any criminal acts touching the award of the contract to the

applicant.

34. Thus, in my opinion, the present case in no manner can be labelled as non-arbitrable so as to deny reference to arbitration, applying the settled principles of law as noted above, which would guide the Courts in rejecting a reference to arbitration. It would not lie in the mouth of the respondents to lable this case as non-arbitrable merley on account of some investigations, which according to the respondents, are pending since 2019. The contractual obligations cannot be disowned on such premise. Moreover, the record indicates that when the very first invocation letter(s) were addressed by the applicants to the respondent, the respondent was not even aware of any investigation by the CVC and was concerned only in relation to the agreed pre-arbitral mechanism. In my opinion, there cannot be such prolonged uncertainty on a finality to be brought about in resolution of commercial disputes and in the spirit of the contract as agreed between the parties. This, more particularly, on such considerations which do not touch the contractual work performed by the applicants and in regard to which payments are the subject matter of the applicants claim.

35. As a sequel to the above discussion, in my opinion, there is no impediment whatsoever for this Court to exercise jurisdiction under Section

11 of the Act and make a reference of the disputes to arbitration by appointing an arbitral tribunal as agreed between the parties. In the arbitration agreement as amended (supra), the parties have agreed that the disputes be settled by arbitration in accordance with the Arbitration and Conciliation Act,1996, by constituting an arbitral tribunal which shall consist of three arbitrators, each of the parties to nominate its arbitrator, and the arbitrators so nominated would appoint a presiding arbitrator.

36. Accordingly, the present applications are disposed of by the following order:-

ORDER

(i) The applicants have nominated QC Judith Gill (20 Essex Street) as their nominee arbitrator.

(ii) This Court appoints Mr.Justice Kurian Joseph, Former Judge of the Supreme Court, as a nominee arbitrator for the respondent.

(iii) The nominee arbitrators to appoint a Presiding Officer so as to constitute an arbitral tribunal.

(iv) The learned members of the arbitral tribunal, fifteen days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the Prothonotary & Senior Master

of this Court, to be placed on record of this application with a copy to be forwarded to both the parties.

(v) At the first instance, the parties shall appear before the arbitral tribunal within one month from today on a date which may be mutually fixed by the arbitral tribunal.

(vi) All contentions of the parties on merits of the matter are expressly kept open.

37. Learned Counsel for the parties inform that all the four arbitration proceedings can be held before the arbitral tribunal as constituted by this order.

38. Disposed of in the above terms. No costs.

39. Office to forward a copy of this order to the learned members Arbitrator on the following address:

Mr.Justice Kurian Joseph,
Former Judge of the Supreme Court of India,
D-1/40, Ground Floor, "Vasant Vihar",
New Delhi 110 057
Phone No.0011 26150999
Email: justicekurianjoseph@outlook.com

(G. S. KULKARNI, J.)