

(2020) 04 TEL CK 0001

In the Telangana High Court

Case No : Arbitration Application No. 5 Of 2013

M/s.M.B.S. Impex Private Limited & another

APPELLANT

Vs

Minerals and Metals Trading Corporation Limited,

RESPONDENT

Date of Decision : 29-04-2020

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 7, 7(4)(a), 7(5), 8, 11, 16

Indian Contract Act, 1873 — Section 10

Constitution Of India, 1950 — Article 12, 227

Citation : (2020) 04 TEL CK 0001

Hon'ble Judges : A. Rajasheker Reddy, J

Bench : Single Bench

Advocate : Dil Jit Singh Ahluwalia, P. Venu Gopal

Final Decision : Disposed Of

Judgement

1. Two companies i.e. M/s.MBS Impex Private Limited and M/s.MBS Jewellers Private Limited, both represented by its managing director, the applicant herein, filed this arbitration application under Section 11 of the Arbitration and Conciliation Act, 1996, (in short, "the Act") seeking nomination of an Arbitrator to resolve the disputes with the respondent-Minerals and Metals Trading Corporation Limited, which is a Government of India enterprise, (in short, "the respondent-company").

2. Section 7 of the Act prescribes what an arbitration agreement means and what constitutes an arbitration agreement. In that context, it is to be seen whether there exists an arbitration clause in the agreement, the dispute is alive between the parties and such dispute is in relation to the subject matter of the agreement; whether there is fraud to disentitle the relief sought in the arbitration application. To unravel these issues, it is necessary to note the relevant pleadings of the parties.

3. The facts stated are:-the 1st applicant is a private limited company incorporated in the year 2000 for the purpose of carrying out the business in

bullion trading and export of jewellery, likewise, the 2nd applicant is also a private limited company incorporated in the year 2005 for the purpose of doing business in bullion trading, sales of gold jewellery. That the respondent-company being a nominated agency of the Government of India, permitted to import gold metal from foreign suppliers and in the course of its pursuit to do business in bullion, offered to sell gold metal on outright sale as also on loan basis to jewellery exporters and the domestic users and devised a scheme. In pursuit thereof, the Dy. Manager (PM) of the respondent-company addressed

4. covering letter dated 25-11-2005 while enclosing the memorandum of understanding (MOU), dated 25-11-2005 to the applicant to sign the original and return the same to them and accordingly, the applicant signed the MOU and returned the original to the respondent-company by retaining a copy thereof. Thereafter, the business between the applicant and the respondent-company commenced and continued between 2005 to 2012 during which period, the applicant is stated to have done business of more than Rs.10,000 crores on an ongoing basis of purchasing gold on outright basis and also availing the gold on loan basis. That the applicant used to demand for statement of accounts vis-a-vis the delivery challans, final invoices and the bullion drill of gold rate, rupee values and other charges levied from time to time to reconcile accounts at his end. That in spite of repeated requests, the details of the accounts have not been furnished by the respondent-company. Therefore, the applicant sent notice dated 24-09-2012 for arbitration (in short, "1st arbitration notice") invoking the arbitration clause under MOU dated 25-11-2005. However, the parties mutually held good faith negotiations and in pursuance thereof, with consent, entered another MOU dated 05-10-2012 and at the request of the respondent-company, the applicant withdrew the 1st arbitration notice dated 24-09-2012. That the respondent-company, despite taking jewellery worth Rs.47 crores, post dated security cheques worth Rs.130 crores and equivalent worth of corporate guarantee in addition to the mortgage of prime landed property admeasuring Ac.5-00 gts as collateral security from applicant, again defaulted in resuming the supply of gold metal to the applicant thus violated the terms of the MOU dated 05-10-2012. Therefore, the applicant has once again invoked the arbitration clause in the MOU dated 25-11-2005 vide notice dated 15-11-2012 (in short, "2nd arbitration notice") which was received by the respondent-company on 30-11-2012, and despite receipt of notice, the respondent-company failed to consent on or before 30 days time i.e., by 30-12-2012 for resolving the dispute through arbitration. That the arbitration proceedings deemed to have commenced from the date of notice dated 15-11-2012 (2nd arbitration notice) issued by the applicant invoking the arbitration clause and received by the respondent-company on 30-11-2012. That the arbitration clause is subsisting and as the parties are governed by the Arbitration & Conciliation Act, 1996, the application deserves to be allowed.

4. That the respondent-company to improve the unbecoming acts and counterfeit accounts, chosen to give the clock of criminality to the lawful demand of the

applicant in invoking the arbitration clause. That the respondent-company with an ill-motive of maligning the image and reputation of the applicant and with a further motive to suppress all its wrong and excessive collections of amounts under the guise that the applicant has not fixed the rupee value, lodged a complaint to the Central Bureau of Investigation (CBI) which in turn registered a case in RC No.1(A) of 2013.

5. Counter affidavit is filed by the General Manager of the respondent-company wherein inter-alia it is stated that the arbitration application filed on the basis of MOU dated 25-11-2005, has not been signed by the authorized officer of the respondent-company. That in the covering letter dated 25-11-2005 addressed by the respondent to the applicant clearly stated that the MOU "to be entered into" and since the said MOU has not been signed by the respondent, there is no written agreement between the applicant and the respondent. That there is no original contract, much less a concluded contract on the lines of the MOU dated 25-11-2005 and as such there exists no agreement for reference to the Arbitrator. That the alleged covering letter dated 25-11-2005 does not emanate from a competent officer and is not signed and sealed by an authorized officer and in fact no such letter has been addressed to the applicant. That the claim against the applicant and their liability to pay the respondent-company arises in relation to transactions for the period 2010-11 and 2011-12 which was undertaken under the Buyers' Credit Scheme (in short "the scheme"). Hence, the claims by the respondent against the applicant do not relate to the period of the MOU dated 25-11-2005, since the said scheme was introduced at the end of 2007. That the alleged MOU dated 25-11-2005 is null and void, in-operative and in-capable of being performed as the applicant had withdrawn the letter dated 24-09-2012 invoking the arbitration clause under MOU dated 25-11-2005 and entered into an MOU dated 05-10-2012 and settled the liability. That there is no arbitration agreement in the MOU dated 05-10-2012, and as per Clause 10 of the MOU dated 05-10-2012, the applicant has withdrawn the notice dated 24-09-2012 (1st arbitration notice) and having done so, cannot now issue another notice of arbitration dated 15-11-2012, merely with a view to file the application under Section 11 of the Act, the application is wholly misconceived and baseless. That the respondent-company did not reply to the notice dated 15-11-2011 for the reasons that there is no valid and concluded agreement.

6. It is also stated that the applicant is guilty of fraud, manipulation of accounts and records of the respondent-company. That the applicant, in connivance with certain officers of the respondent-company caused huge loss to company and as such the company has filed a criminal complaint with the Central Bureau of Investigation (CBI) and the same was registered as FIR No.1(A)/2013, dated 03-01-2012 and after filing charge sheet numbered as CC No.7 of 2015 pending on the file of Prl. Special Judge, for CBI cases at Hyderabad. That some of the officials of the company who were involved in the fraud have already been placed under suspension.

Additional counter affidavit is filed, with the permission of the Court, by the respondent-company represented by its Chief General Manager, wherein inter-alia it is stated that in suit OS No.903 of 2013, (re-numbered as COS No.19 of 2016), the applicant filed IA Nos.3100 of 2013 (filed by MBS Impex Pvt. Ltd.) and 3420 of 2013 (filed by MBS Jewellers Pvt. Ltd., under Section 8 of the Act seeking to refer the parties to arbitration in the light of Clause 12 of the MOU, dated 25-11-2005 but the said IAs were dismissed by the trial Court vide common order dated 19-11-2015. The common order dated 19-11-2015 dismissing the IAs has not been challenged by the applicant and since no appeal has been filed against the said order, it become final and binding on the applicant.

viii) That even without admitting the existence of the MOU dated 25-11-2005, the MOU dated 25-11-2005 has been novated and the parties acted according to the novated terms of the MOU dated 05-10-2012 and as such the arbitration clause in MOU dated 25-11-2005 stands extinguished by the substituted MOU dated 05-10-2012 which has been reduced into writing and signed by both the parties. That the MOU dated 05-10-2012 does not provide for arbitration and as such the application filed by the applicant is neither maintainable in law nor on the facts of the case, and therefore, the arbitration application is liable to be dismissed.

ix) Reply affidavit is filed by the applicant. It is stated that the suit filed by the respondent-company for recovery of amounts manifestly is an attempt to escape the arbitration clause in the MOU dated 25-11-2005. That the option of arbitration has to receive primacy over other remedies as the provisions of the Act does not contain any restriction or any limitation to refer the matter for arbitration. The other averments made in the reply affidavit relates to business transaction of gold supplies between the parties and details of KPMG report and hence need not be reproduced for the purpose of this application.

10 The respondent-company filed rejoinder to the reply affidavit filed by the applicant. There is nothing further added relevant in the rejoinder except stating that the respondent-company has never deviated from the established legal principles and that the MOU dated 25-11-2005 was never prepared by the respondent-company and the MOU dated 25-11-2005 cannot be intended to be acted upon as a contract agreement, as it was never emanated from the competent authority, much less from the respondent-company and, therefore, the application is liable to be dismissed.

11. Heard Sri Dil Jit Singh Ahluwalia, the learned counsel appearing for the applicant and Sri P. Venu Gopal, learned senior counsel & Sri Manu, learned counsel for the respondent.

12. It is strenuously argued by learned counsel appearing for the applicant that all the objections of the respondent as to the validity of the arbitration agreement including arbitrability of the dispute are all within the exclusive domain of the Arbitrator to be decided under Section 16 of the Act. That

arbitration agreement in writing, need not necessarily be signed by the parties and that it is sufficient if the terms are reduced to writing and acceptable proof that the parties thereto acted upon in pursuance thereof. That there is no novation of the MOU, dated 25-11-2005 by the 2nd MOU, dated 05-10-2012 as it only indicates the liability and does not touch upon the terms of business as agreed in the MOU, dated 25-11-2005. That on dismissal of the application filed under Section 8 of the Act by the trial Court, the applicant has filed written statement subject to the outcome of the instant application and therefore the order refusing to refer the matter for arbitration is not binding on him. It is lastly contended that mere allegation of fraud is not a ground to nullify the effect of arbitration agreement between the parties and no longer an obstruction to arbitration proceedings. In support of his contentions,

decisions in CARAVEL SHIPPING SERVICES PRIVATE LIMITED vs. PREMIER SEA FOODS EXIM PRIVATE LIMITED (2018 (0) Supreme (SC) 1169, GOVIND RUBBER LIMITED vs. LOUIS DERYFUS COMMODITIES ASIA (2014) 13 SCC 477) , & A. AYYASAMY vs. A. PARAMASIVAM (2016) 10 SCC 386) are relied on.

xiii) Learned senior counsel appearing for the respondent, on the other hand, submitted that the MOU, dated 25-11-2005 does not satisfy the requirement of Section 7 of the Act as it is not signed by the authorized officer of the respondent-company, and signing of both the parties is sine qua-non for constituting a valid and enforceable arbitration agreement. That even otherwise, the applicant has novated/superseded the MOU, dated 25-11-2005 with the 2nd MOU, dated 05-10-2012 which was signed by both the parties and as a consequence, the applicant also withdrew the 1st arbitration notice invoking arbitration clause in the alleged MOU, dated 25-11-2005. That the Arbitrator cannot decide intricate and complicated questions in respect of falsification of accounts on unearthing fraud as there are serious allegations of cheating, forgery, criminal breach of trust and fabrication of documents by the applicant committed for the unlawful benefit of his companies. That trial Court in suit instituted by the respondent-company dismissed the applications filed by the applicant seeking to refer the matter to arbitration and the findings arrived at by the civil Court are based on appreciation of evidence adduced by the parties and, therefore, re-examination of the same issue amounts to res-judicata. In support of his contentions, the decisions in M/S.SUDARAM FINANCE LIMMITED vs. M/ S.NEPC INDIA LIMITED AIR 1988 SC 1737, VIMAL KISHOR SHAH vs. JAYESH DINESH SHAH 2016 (5) ALD 152 (SC) , YOUNG ACHIEVERS vs. IMS LEARNING RESOURCES PRIVATE LIMITED (2013) 10 SCC 535 , N. RADHAKRISHNAN vs. MAESTRO ENGINEERS (2010) 1 SCC 72 , M/S.LARSEN & TOUBRO LIMITED vs. M/ s.MOHAN LAL HARBANS LAL BHAYANA 2014 AIR SCW 1884 & ZENITH DRUGS & ALLIED AGENCIES PRIVATE LIMITED vs. M/S.NICHOLAS PIRAMALA INDIA LIMITED AIR 2019 SC 3785 are relied on.

14. In view of the rival contentions and pleadings of parties, the issues that arise for consideration in this application are:-

- 1) whether the MOU dated 25-11-2005 constitutes an agreement containing an arbitration clause within the meaning of Section 7 of the Act; if so,
- 2) whether there was novation of the MOU dated 25-11-2005 with 2nd MOU dated 05-10-2012;
- 3) whether the allegation of fraud is so serious and intricate to decide not to refer the matter to arbitration; &
- 4) whether the application is maintainable in the light of the order of the civil Court refusing to refer the matter for arbitration under Section 8 of the Act and the same is hit by the principles of res-judicata.

Issue (i) whether the MOU dated 25-11-2005 constitutes an agreement containing an arbitration clause within the meaning of Section 7 of the Act :

15 Section 2 (1) (b) of the Act defines "arbitration agreement" means an agreement referred to in Section 7. Section 2 (1) (h) defines "party" means a party to an arbitration agreement. Section 7 provides what an arbitration agreement means, its essential conditions to be a valid agreement, reads as follows:-

"7. Arbitration agreement. -

- i) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
- ii) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- iii) An arbitration agreement shall be in writing.
- iv) An arbitration agreement is in writing if it is contained in-
 - (a) a document signed by the parties;
 - (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
 - (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
- v) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract." (emphasis supplied)

16. Relevant to the case are sub-Sections (3) and (4) of Section 7 of the Act. While Section 7 (3) mandates that an arbitration agreement shall be in writing, Section 7 (4), clauses (a), (b) & (c) prescribes how a written agreement should

be. A reading of clauses (a) to (c) it is understood that a document signed by the parties, an agreement by exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement have been held to be an agreement in writing. Under sub-Section (5) there is no prescription of form of agreement, but what is required is reference in a contract to a document of arbitration clause and the reference is such as to make that arbitration clause part of the contract. To constitute an arbitration agreement, at first, there should be an agreement, consensus ad idem i.e. meeting of minds. An arbitration agreement like all other contracts must satisfy all the essential requirements of Section 10 of the Indian Contract Act, 1873, i.e. the parties to the arbitration agreement must be competent to enter into a contract and the agreement should be made by free consent of the parties.

17. In the instant case, while it is the case of the applicant that MOU dated 25-11-2005 was validly executed at the instance of the respondent enclosed vide letter dated 25-11-2005, the case of the respondent-company is one of denial and stated that the said MOU has not emanated from their office much less signed by an authorized official of the company. The copy of the MOU dated 25-11-2005 filed by the applicant along with the application, contains only the signature of the applicant and there is no signature of any official of the respondent-company.

R In CARAVEL SHIPPING (1 supra) the Supreme Court has held that the only pre-requisite for an arbitration agreement is that it should be in writing and the fact that the same is not signed by parties does not make it invalid.

Facts of the case:- M/s.Caravel Shipping Services Private Limited (appellant) and M/s.Premier Sea Foods Exim Private Limited (respondent) were parties to document styled as "Multimodal Transport Document/Bill of Lading" dated 25-10-2008 (BOL). The very opening clause of the BOL specified that "In accepting this Bill of Lading the Merchant expressly agrees to be bound by all the terms, conditions, clauses and exceptions on both sides of the Bill of Lading whether typed, printed or otherwise". Further, clause 25 of the BOL, which was a printed condition annexed thereto, contained the arbitration clause. The respondent had filed a suit before the Sub-Judge's Court, Kochi, to recover a sum of Rs.26,53,593/- in which suit the BOL was expressly stated to be a part of cause of action. In the said suit, an interlocutory application was filed by the appellant under Section 8 of the Arbitration and Conciliation Act, 1996 (Act) on the ground that as arbitration clause was included in the printed terms annexed to the BOL, and the suit was not maintainable and it is a case for reference to arbitration. The trial Court dismissed the said application. Aggrieved thereby, the appellant approached the Kerala High Court under Article 227 of the Constitution of India. The High Court having observed that the arbitration clause being in a printed form annexed to the BOL, there being no intention to arbitrate and nothing to show that Clause 25 of BOL was brought to the notice of the respondent, dismissed the petition. The review filed was also dismissed and

ultimately the matter went to the Supreme Court.

Arguments: It was argued by the appellant's counsel that the printed conditions of the BOL were expressly referred to in the BOL and accordingly both parties were bound by the same; that in accordance with Section 7(5) of the Act read with the decision in *M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited*, (2009) 7 SCC 696, as there was an arbitration clause in BOL and the arbitration clause was in writing and the reference was such that the arbitration clause formed part of the contract the IA filed under Section 8 of the Act ought to have been allowed. Per contra, it was argued by the respondent's counsel that Section 7(4) (a) of the Act required an arbitration agreement to be in a document that is signed by the parties; and that since the BOL was not signed by the respondent, it was not bound by the arbitration clause contained in that document.

Finding: The Supreme Court ruled that the BOL specified that the term "merchant" expressly agreed to be bound by all the terms and conditions, clauses and exceptions on both sides of the BOL whether typed, printed or otherwise; that perusal of clause 25 of the BOL showed that the respondent had expressly agreed to be bound by the arbitration clause, despite the fact that it was a printed condition annexed to the BOL; that the respondent had relied upon the unsigned BOL as part of the cause of action in the suit filed by it arose out of the same BOL, the respondent cannot blow hot and cold and argue that for the purpose of the suit it will rely upon the BOL, but for the purpose of arbitration cannot contend that the requirement of the Act is that the arbitration agreement should be signed. The decision in *Jugal Kishore Rameshwardas vs Mrs.Goolbai Hormusji*, (AIR 1955 SC 812) discussed and held that an arbitration agreement needs to be in writing though it need not be signed and such principle is also contained in Section 7(3) of the Act. That Section 7(4) of the Act should not be construed to mean that in all cases, an arbitration agreement needs to be signed. The only pre-requisite is that it should be in writing and Section 7(5) of the Act read with *M.R. Engineers'* case implied that the reference in the BOL is such so as to make the arbitration clause part of the contract between the parties and accordingly the appeal was allowed and the judgment of the High Court set aside.

S. The respondent's counsel seeks to contend that *CARAVEL SHIPPING* (1 supra) relied upon the ratio in *Jugal Kishore Rameshwardas's* case, for deriving strength for the proposition that an arbitration agreement needs to be in writing though it need not be signed, but *Jugal Kishore Rameshwardas's* case was rendered under the 1940 Act, which has been repealed. He relied on *M/s.SUNDARAM FINANCE LIMITED* (4 supra) for the proposition that the Arbitration and Conciliation Act (Act 26 of 1996) is very different from Arbitration and Conciliation Act, 1940, and the provisions of Act 1996 have to be construed uninfluenced by principles underlined in repealed Act 1940. In *VIMAL KISHOR SHAH* (5 supra), the Supreme Court was hearing an appeal against an order of the High Court of Bombay appointing an arbitrator to hear disputes arising out of a family trust

deed. The arbitration agreement in that deed provided for arbitration of any disputes between trustees; trustees and beneficiaries; and beneficiaries. The Supreme Court held that a trust deed cannot be construed as an agreement let alone an arbitration agreement within the meaning of Section 7 of the Act, as trust deeds are not signed by the beneficiaries and, thus, beneficiaries under a trust deed, containing an arbitration clause, cannot be regarded as a "party" to the arbitration agreement and disputes arising out of trust deeds are non-arbitrable under the Act. But the facts of this case are distinguishable and not applicable to the facts of the present case.

(20) Section 7(3) of the Act provides that the arbitration agreement shall be in writing, which is a mandatory requirement. Under Section 7(4), an arbitration agreement is in writing if it is contained in---a document signed by all the parties. But a perusal of clauses (b) and (c) of Section 7(4) would show that a written document which may not be signed by the parties even then it can be arbitration agreement. Section 7 (4) (b) provides that an arbitration agreement can be culled out from an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, is also the ratio laid down in GOVIND RUBBER LIMITED, (2 supra).

(21) De-hors the ratio in Jugal Kishore Rameshwardas's case which was rendered under the repealed Act 1940, a composite reading of Section 7 (4), clauses (a) to (c), wherein the legislative intent is manifestly to be pro-arbitration coupled with the law laid down in CARAVEL SHIPPING (1 supra) and GOVIND RUBBER LIMITED (2 supra) emanate that in all cases an arbitration agreement need not be signed by both the parties. It is the case of the respondent that they had business transactions with the applicant, which is evident from a perusal of the charge sheet filed in the criminal case as also the report of M/s.KPMG, appointed to conduct a forensic audit of the accounts at the regional office at Hyderabad. The respondent-company, being an instrumentality of the State within the meaning of Article 12 of the Constitution, ought not to have transacted without following the due procedure contained under law, as contracts between public sector undertakings and third parties should be approved and signed on behalf of the undertaking or the Government with its seal by duly competent officer. (see U.P.RAJKIYA NIRMAN NIGAM LTD. vs. INDURE PVT. LTD. AIR 1996 SC 1373). Admittedly, the respondent-company and the applicant transacted business for long a time in large volumes, but the respondent- company did not come forward with any material, the basis on which the company has transacted, except denying the execution of the MOU dated 25-11-2005. In this context, it is difficult to digest and believe that the respondent-company conducted business without there being any agreement. In fact the transactions carried out based on the MOU dated 25-11-2005 since there was consensus ad idem i.e. meeting of minds, existence of MOU is inferred in view of MOU dated 05-10-2012, according which the applicant withdrawn the 1st arbitration notice issued and all the claims settled by the parties. The respondent itself claims the MOU dated 25-11-2005 is novated by MOU dated 05-10-2012 and the said aspect of novation is discussed

in issue no.(ii).

Issue (ii) whether there was novation of the MOU dated 25- 11-2005 with 2nd MOU dated 05-10-2012 :

V. It is an undisputed fact that the respondent-company commenced and continued its business transactions with the applicant from the year 2005 and according to the applicant, they have done business of more than Rs.10,000 crores on an ongoing basis of purchasing gold on outright basis and also availing the gold on loan basis. It is not the case of the respondent-company that they have not transacted bullion business i.e. supply of gold to the applicant-company. It is also an undisputed fact that vide letter dated 24-09-2012 the applicant had sent notice of 1st arbitration and pursuant thereto, the parties engaged in good faith negotiations and both parties consented to enter into 2nd MOU dated 05-10-2012 and with due diligence fixed the total final liability of the applicant to be at Rs.181.39 crores as on 31-03-2012, the preamble and clause 2 of the said 2nd MOU reads as follows:-

"AND WHEREAS as on 03-10-2012, on the invitation of the FIRST PARTY (respondent-company), the SECOND PARTY (applicant) participated in the good faith negotiations in which the FIRST PARTY acknowledged that the SECOND PARTY has shown its bona-fide by taking on the liability of Rs.181.39 crore, part from interest liability, thereon, as intimated by the FIRST PARTY, without prejudice...."

"2. That the FIRST PARTY acknowledges and confirms without prejudice that it has, with due diligence fixed the total final liability of the SECOND PARTY to be Rs.181.39 crores as on 31-03-2012, and the FIRST PARTY is hereby stopped from altering this liability any further. Interest thereon shall accrue from 01-04-2012 as per applicable rate of interest and the SECOND PARTY accepts the same." (emphasis added) pursuant thereto, the applicant withdrew the 1st arbitration notice, which is at clause 10, reads as follows:-

"10. That in view of the above, on the request of the FIRST PARTY, the SECOND PARTY hereby withdraws letter dated 24-9-2012 invoking the arbitration proceedings, without prejudice."

(23) This pointedly goes to show that the respondent acted upon the MOU dated 25-11-2005. If really the MOU dated 25-11-2005 was not acted upon, or as contended by the respondent-company it never ever emanated from its office muchless signed by the authorised officer of the company, there was no useful purpose for the respondent to enter into 2nd MOU dated 05-10-2012 and there was no necessity for it to request the applicant to withdraw the 1st arbitration notice. In fact under the 2nd MOU dated 05-10-2012 both the applicant and respondent finally settled the matter and the applicant accepted the liability to the tune of Rs.181.39 crores. The withdrawal of the 1st arbitration notice dated 24-09-2012 and the signing of the MOU dated 05-10-2012 fixing the full final total liability, is nothing short of novation and final settlement of the accounts by

the parties. It has come on record that the applicant even defaulted the terms of the conditions and failed to pay the liability of Rs.181.39 crores could be fresh dispute between the parties which is subject matter of 2nd MOU dated 05-10-2012, where there is no arbitration clause. Inasmuch as there was full and final settlement between the parties in respect of the claims under the 1st MOU dated 25-11-2005, there is no live dispute or arbitral claim which survives for reference to arbitration.

(x) In *YOUNG ACHIEVERS* (6 supra) it was held that an arbitration clause in an agreement cannot survive when the original agreement itself is superseded/novated by another agreement and if agreement containing arbitration clause is superseded/novated, then the subsequent agreement will prevail and all the clauses in the original agreement (along with the arbitration clause) will perish and does not survive. In *LARSEN & TOUBRO* (8 supra) same ratio is laid down that arbitration agreement stands modified by the supplementary agreement when the terms of the supplementary agreement changed the entire edifice of the principal arbitration agreement, there could be no arbitration between the parties for the claims raised by the appellant and the application filed for such a relief would thus be misconceived.

Issue (iii) & (iv) whether the allegation of fraud is so serious and intricate to decide not to refer the matter to arbitration & whether the application is maintainable in the light of the order of the civil Court refusing to refer the matter for arbitration under Section 8 of the Act and the same is hit by principles of res-judicata.

(25) The allegation of fraud and intricate issues thereof it is to seen that even according to the respondent-company, the CBI after preliminary enquiry, have arrested the applicant including the then finance manager of the respondent-company for the offences of criminal conspiracy, criminal breach of trust, cheating, using forged documents, falsification of accounts. Parties to the fraud are not only the applicant but also the officials of the respondent-company. It has come on record that fraud is in relation to the exact details of the gold deliveries and falsification of accounts as the then deputy general manager (finance) and the then senior manager finance of the respondent-company with intent to defraud the respondent- company have altered, destroyed and falsified the books of account, and the electronic record which compelled to engage M/s.KPMG for a forensic audit. The decisions in *N. RADHAKRISHNAN* (7 supra), *A.AYYASAMY* (3 supra) & *ZENITH DRUGS* (9 supra), the Supreme Court has laid down law that Court may refuse reference to arbitration; where the Court finds very serious allegations of fraud that make a virtual case of criminal offence; where the allegations of fraud area so complicated that it becomes essential that such complex issues can be decided only by civil Court on appreciation of voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits. But in the same decision (per Hon'ble Chandrachud, J supplementing) observed

that the statutory scheme does not make any specific provision excluding any category of disputes terming them as non-arbitrable and mere allegation of fraud is not sufficient to detract parties from the obligations to submit their disputes to arbitration and heavy burden lies on party to establish that dispute is not arbitrable under law and Court or judicial authority is obliged to carefully sift through the materials for the purpose of determining whether said defence is merely a pretext to avoid arbitration.

(26) It is no doubt true that fraud, financial malpractices and collusion are weighty allegations. But when the parties who enter into an agreement of commercial transaction 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, there is no reason why the allegations of fraud which can be adjudicated upon, in the course of a trial by a civil Court, get excluded from the ambit and purview of arbitration, particularly in cases where the constitution of an arbitral Tribunal consists of former Hon'ble Supreme Court and High Court Judges.

(aa) But, in this case, there are intricate and complicated question of fraud in respect of falsification/manipulation of accounts amounting to crores of rupees, which reportedly had the connivance of some of the officers of the respondent-company and those officers are placed under suspension. Charge sheet has been filed by the CBI on the basis of serious allegations of criminal conspiracy, criminal breach of trust (Sections 409), 420, 465 (punishment for forgery), 471 (using as genuine as forged document), 477-A (falsification of accounts) against the managing director of the applicant companies. The application filed by the applicant being managing director of the applicant companies to discharge him from the proceedings vide CrI.M.P. no.1976 of 2016 in CC No.7 of 2015 has also been dismissed by the Prl. Special Judge, for CBI cases, on 03-01-2018 holding that there is prima facie material against the applicant being the managing director of the companies. In the teeth of these serious fraud allegations, it is not a matter for resolution of disputes by way of arbitration by the arbitrary Tribunal. I am fortified in my view in the light of the rulings on the issue by the Hon'ble Supreme Court in A. AYYASAMY's case (3 supra) and ZENITH DRGUS ALLIED AGENCIES PVT. LTD. vs. M/S.NICHOLAS PIRAMALA INDIA LIMITED's case (9 supra).

(28) Likewise, the issue whether the finding of the trial Court in a petition under Section 8 of the Act refusing to refer the matter for arbitration acts as res-judicata and binds the applicant from seeking the relief under Section 11 of the Act, it is to be seen that the trial Court dismissed the petition filed by the applicant on the ground that criminal case is pending and there are serious allegations of fraud and falsification of accounts. The trial Court also dismissed the petition on the ground of non filing of the original agreement, and the copy which was filed into the Court contains only the signature of the applicant and that there is no concluded contract. Though the said findings will not come in the

way of deciding the petition under Section 11 of the Act, still the findings are binding on the applicant as he has not questioned the said order and it became final.

(29) The finding of the trial Court in Section 8 application does not amount to res-judicata and will have no bearing on this matter for the reason that the basis and claim in the suit filed by the respondent is not on the basis of the MOU dated 25-11-2005, but based on M/s.KPMG report and some of the parties in the suit are not parties to the MOU dated 25-11-2005 and they are totally strangers as far as MOU dated 25-11-2005. The MOU dated 25-11-2005 cannot be the basis of the suit claim as according to both parties themselves, the disputes arising thereunder are settled by way of MOU dated 05-10-2012.

(30) The learned counsel for the applicant contended that in the light of amendment and introduction of sub-Section (6A) of Section 11 of the Act, which came into force w.e.f. 23-10-2015, only existence of arbitration clause is to be considered in an application filed under Section 11 of the Act, but learned counsel for the respondent submitted that the said amendment is deleted. However, that aspect need not be gone into since the amendment of 2015 which came into force from 23-10-2015, by which time the arbitration proceedings in this case commenced on 24-09-2012 by issuance of 1st arbitration notice by the applicant, as such said amendment is not applicable to the facts of the case. Even otherwise, the applicant having participated in the suit proceedings initiated by the respondent-company, subjected himself to jurisdiction of the trial Court and filed written statement, cannot subsequently turn around and contend that the dispute be referred to arbitration. (see BOOZALLEN & HAMILTON INC vs. SBI HOME FINANCE LTD., (2011) 5 SCC 532)

(31) In the circumstances, there are no grounds in the arbitration application and it is accordingly dismissed. It is needless to mention that any observation made hereinabove are only for adjudication of this application and could not be construed as finding of facts in the cases pending between the parties. Miscellaneous applications if any pending in the arbitration application shall stand disposed of. No order as to costs.