
(2018) 11 BOM CK 0078

In the Bombay High Court

Case No : Commercial Arbitration Application No.61 Of 2018

SAP India Private Limited

APPELLANT

Vs

Cox And Kings Limited

RESPONDENT

Date of Decision : 30-11-2018

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 11(6A), 11(8), 12(1)

Citation : (2018) 11 BOM CK 0078

Hon'ble Judges : G.S. Kulkarni, J

Bench : Single Bench

Advocate : Navroz Seervai, Ashish Kamat Farhad Sorabjee, Pratik Pawar, Shanaya Vyrus Irani, Siddhesh Pradhan, Rampal Singh Kohli

Final Decision : Disposed Off

Judgement

1. By this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act'), the applicant seeks appointment of an

arbitrator on behalf of the respondent to adjudicate the disputes between the parties which are stated to have arisen under the agreement dated 30

October 2015 termed as "Services General Terms and Conditions Agreement" for implementation of the SAP Hybris E-Commerce Solution

Software (for short 'the agreement').

2. The applicant's case as pleaded in the application is that the applicant is a wholly owned subsidiary of SAP SE GmbH incorporated under the

Companies Act, 1956 and is one of the world's largest and leading provider of business software solutions, with functions spread across sectors and

industries—private and public sectors, municipalities, utilities, infrastructure and transport. It is stated that the applicant supports more than 9000

customers in the Indian subcontinent, and has over 7500 employees spread

across three development centres in India. It is stated that six out of seven Maharatna companies and eleven out of seventeen navratna companies are run on applicant's software. It is stated that the applicant's customers outreach include running applications daily to issue more than 80 lacs tickets, managing 125 airports and securing 28 lacs square nautical miles of airspace, handling 1.2 crore tons of cargo annually, providing electricity to more than 4 crores citizens of India, operating 18 out 20 main refineries in India. It is stated that the applicant provides implementation services of such SAP proprietary software only.

3. The applicant's case is that the respondent was interested in building a global travel solution for its different business entities had earlier approached three different vendors but had failed. The respondent being a long standing and a satisfied customer of the applicant in the past, entered into discussions with the applicant from mid of 2015, wherein the applicant offered the "SAP Hybris" software based on the understanding/requirements as provided by the respondent. It is stated that the respondent conducted a proper and thorough diligence and after being fully satisfied, requested the applicant to send a commercial proposal.

4. Accordingly an agreement and the Order Form 1 was entered between the applicant and the respondent inter alia for services (as described in Order Form 1) and for implementation of applicant's SAP Hybris E-Commerce Solution Software ("Project") which was licensed to the respondent by the applicant under the SAP Software End-User License Agreement effective from 14 December 2010 (License Agreement) read with Software License and Support Agreement Software Order Form 3 effective from 30 October 2015.

5. The applicant has averred that prior to entering into the agreement and the Order Form 1 for the purposes of the Project, the applicant was provided with a bird's eye view (in form of a few presentations) of the respondent's expectations from the project. The business requirement documents were shared with the applicant only after commencement of work on the project. It was understood between the parties that the agreement and the Order Form 1 were executed on a 'Time and Material Basis' (instead of a fixed fee), the respondent was contractually obligated to pay the applicant on the basis of time spent by the applicant's team on the

project where the timelines and the cost for the services was provided only on an estimate basis. The applicant also proceeded to invest huge resources and time towards implementation of the said project.

6. The applicant stated that in or about August,2016, the respondent started alleging that timelines in respect of the project were not being adhered by the applicant and alleged that the applicant and its top management misrepresented to the respondent that the said software was 90% compatible to the requirements of the respondent. The respondent however failed to mention that the alleged delay in operationalizing the software which in fact according to the applicant was attributable to the respondent as set out in paragraph 9 of the application.

7. The applicant state that the disputes had arisen between the parties as the respondent started making allegations against the applicant and its representatives. The representatives of the applicant had several meetings and discussions with the respondent in an attempt to try and resolve the disputes and differences between the parties in the amicable manner. The applicant also provided six weeks solution reÂdesign of the operations area.

This was ignored by the respondent and the respondent made unreasonable demand for refund of all the monies paid by it to the applicant and full

refund and payment of all consequential losses and started escalating the matter. It is stated that further in November,2016, the respondent purportedly

terminated the agreement which according to the applicant is not as per the terms of the agreement, on the ground of alleged delay on the part of the

applicant in completion of the project. The respondent also refused to make payment to the applicant towards invoices amounting to Rs.17 crores for

the work done by the applicant during the period April,2016 to July 2016. Timesheets in respect of the said claim as made by the applicant for the said

period, were in fact approved by the respondent.

8. On the above backdrop of disputes having been arisen, the applicant by its notice issued to the respondent dated 29 October 2017 invoked a

reference of the disputes to arbitration as per clause 15.7 of the agreement interalia in relation to the wrongful termination of the agreement and

recovery of principal claim amount of Rs.17,00,00,000/Â? alongwith additional interests and costs under the agreement.

9. The respondent replied to the notice of the applicant by its letter dated 29

November 2017 interalia alleging fraud and misrepresentation which according to the applicant was with an intent to avoid reference of the disputes with the applicant to arbitration. The applicant thereafter by its Advocate's letter dated 14 December 2017 refuted the allegations made by the respondent and according to the applicant recorded the true and correct facts of the matter. The applicant also informed the respondent that the applicant had appointed Mr. Justice V.C. Daga (Retd) on its behalf to act as an arbitrator and called upon the respondent to appoint an arbitrator on their behalf. This letter of the applicant's Advocate was replied by the respondent by its letter dated 12 January 2018 reiterating its contentions as raised in its letter dated 29 November 2017 whereby the respondent refused to comply with the requisitions of the applicant. The applicant contends that accordingly the respondent failed to appoint an arbitrator on its behalf. It is on the above backdrop the present application has been filed on 14 February 2018 seeking appointment of the respondent arbitrator.

10. A detailed affidavit in reply dated 23 March 2018 of Mr. Himanshu Khare, authorized representative of the respondent is placed on record. The case of the respondent as set out in the reply is interalia of the agreement being void, ab initio and procured by the applicant through serious fraud and misrepresentation. It is the respondent's case that the respondent was deceitfully induced to part with a huge sum of about Rs.45 crores by the applicant. It is further its case that a criminal complaint has been filed by the respondent against the applicant on 4 August, 2017 for commission of offences of misappropriation, criminal breach of trust, cheating and fabricating false evidence. At the same time the respondent has not denied that the respondent earlier entered into agreement dated 12 December 2010 with the applicant. In paragraph 8(k) of the affidavit the respondent has stated that the applicant has willfully and fraudulently induced the respondent to enter into a 'Software License & Support Agreement' dated 30 October 2015. The case of fraud according to the respondent is spelt out in paragraph 8(o) of the reply affidavit. It is further stated that a criminal complaint being filed by the respondent, the police authorities have accordingly filed FIR on 19 October 2017. A perusal of the affidavit in its entirety clearly indicates that the case of the respondent to oppose this application is of a fraud as played by the applicant against the respondent not only inducing to

enter into the agreement but even further actions taken in the execution of the contract.

11. There are two more affidavits filed on behalf of the respondent, opposing this application which are on the same lines to urge a case of a fraud as

played by the applicant. There is a further affidavit dated 22 March 2018 filed by Mr.Vinayak Raut, Chief Technology Officer of the respondent

which interalia supported the contentions in the affidavit of Mr.Himanshu Khare. Mr.Vinayak Raut has stated that he has participated in the meetings

and negotiations held between the applicant and the respondent from the beginning till the contract was rescinded and it is on the basis of his personal

knowledge he is deposing. The sum and substance of the affidavit is that the case of the respondent is that the applicant had admitted of the

representation made by them that the Hybris Solution is 90% in sync and caters to the software requirement of the respondent, was not correct. In

paragraph 6 of the affidavit Mr.Vinayak Raut has stated as under:Â?

6. I say that it becomes clear from the meeting held on 14th November,2016, 15th November,2016 and 21st March,2017 that the Applicant admitted

the representations made by them that the Hybris Solution is 90% in sync and caters to the software requirement of the Respondent was not correct

and it was found that the fitment of the Hybris Solution visÂ?Â?vis the Business Requirement Developments of Respondents was at significantly low

level, then what was represented.Â??

There is another affidavit filed on behalf of Mr.Himanshu Khare dated 26 September 2018.Â? The affidavit interalia contends that in view of criminal

complaint filed by the respondent, the case of fraud makes the arbitration agreement invalid. It is submitted that technical and complicated evidence

ought not to have referred to the arbitration. A reference is made to the various issues in the investigation to point out nonÂ?arbitrability of the dispute.

12. Mr.Kohli, learned Counsel for the respondent though refused to argue the matter on merits despite the said three affidavits of the respondent on

record has made some submissions that the conduct of the applicant is fraudulent and submitted that criminal proceedings in that regard are already

pending as also a forensic report is called for.

13. I have perused the application, the affidavits as filed on behalf of the respondent. It appears from the record that the application was listed before

the Court from time to time.

14. It is not in dispute that the parties have entered into a "Services General Terms and Conditions Agreement" dated 30 October 2015. Clause

15.7 of the said agreement is the arbitration clause which reads thus:

"15.7. Dispute Resolution. In the event of any dispute of difference arising out of the subject matter of this Agreement, the Parties shall undertake

to resolve such disputes amicably. If disputes and differences cannot be settled amicably then such disputes shall be referred to bench of three

arbitrators, where each party will nominate one arbitrator and the two arbitrators shall appoint a third arbitrator. Arbitration award shall be binding on

both parties. The arbitration shall be held in Mumbai and each party will bear the expenses of their appointed arbitrator. The expense of the third

arbitrator shall be shared by the parties. The arbitration process will be governed by the Arbitration & Conciliation Act, 1996."

15. It is also not in dispute that the applicant by its letter dated 29 October 2017 invoked the arbitration clause and had nominated Mr. Justice

V.D. Daga (Retd) as an Arbitrator on behalf of the applicant and had called upon the respondent to appoint its arbitrator in accordance with the

provisions of the Act.

16. The applicant's letter dated 29 October 2017 was replied by the respondent by its letter dated 29 November 2017. In the said letter the respondent

clearly stated as under:

"It is true that there existed an agreement dated 30th October, 2015 between the parties which contained the arbitration clause. However,

according to us, we were induced by the Directors, Officers and Employees of SAP India Private Limited and SAP SE GmbH with fraudulent intent

by making false representation to enter into that agreement and an amount of approximately Rs. 46 crores was paid by us to SAP India Private

Limited under the said agreements which SAP India Pvt. Ltd. And SAP SE GmbH deceitfully, by making false representation, induced us to

execute." (emphasis supplied)

In the said letter it was also recorded by the respondent that on 4 August 2017 a criminal complaint was filed by the respondent against the officers of

the applicant at MRA Marg Police Station, Mumbai and the investigation was transferred to the Economic Offences Wing. The respondent also

recorded that the entire dispute is therefore complicated and arises from criminal conduct of the applicant and its officers and that the agreement

dated 30 October 2015 which contained arbitration clause, is invalid and inoperative and as there are allegations of fraud, the disputes are not arbitrable.

17. The said letter of the respondent dated 29 November 2017 was replied by the Advocates of the applicant by a letter dated 14 December 2017

denying all the allegations. The applicant stated that the allegations against the applicant inter alia of fraud and misrepresentation are baseless and

unwarranted and no more than a premeditated and a deliberate attempt to avoid delay in reference of dispute between the applicant and the

respondent to arbitration. The applicant sets out all the facts which, according to the applicant, clearly demonstrate liability of the respondent to pay the

applicant. It was stated that the dispute was clearly a contractual dispute and only to resile from the agreement, the respondent had resorted to

unwarranted action of resorting to untenable criminal proceedings. In paragraphs 4 to 7 the applicant recorded as under:—

“4. Our client states that the criminal proceedings referred to in the letter are nothing but an opportunistic afterthought, and the allegations of inter

alia, fraud and misrepresentation are a poorly disguised endeavour to provide an unsustainable and ill-advised criminal colour to the present

commercial matter. Admittedly, the Criminal proceedings were initiated by you, after you “terminated” the Agreement (although not in terms of

the Agreement) and the same is therefore entirely irrelevant and extraneous to the dispute. Even assuming whilst denying that the same has any

substance, the criminal proceedings merely constitute a poorly disguised abuse of process to attempt to intimidate and browbeat our client, an attempt

that is condemned to failure. Despite being fully aware that the present dispute is contractual in nature, you have sought to make unsubstantiated

allegations against our client only with an intent to resile from your agreement to submit the disputes arising out of the said Agreement to arbitration.

The pendency of the criminal proceedings mentioned do not in any way embargo the initiation of arbitral proceedings.

5. Your thinly disguised attempt to adopt these proceedings and give the purported dispute a colour that would allegedly fit into the findings of the

Hon'ble Supreme Court, is both misleading and an attempt to abuse the law laid down by the Hon'ble Supreme Court.

6. Your attempt to stymie the arbitration mechanism for resolution of the disputes in relation to the Agreement has caused, and continues to cause, serious harm to our client. Our client reserves its right to seek such reliefs as may be appropriate in this regard.

7. Your attempt to adopt post facto and unrelated criminal proceedings to avail of the Supreme Court judgments is unfortunate. Your

termination of the Agreement (although not in terms of the Agreement) was several months prior to your adopting criminal proceedings.

Assuming whilst denying that there is any merit in these criminal proceedings, the attempt to use the Supreme Court judgments is a cynical abuse and misinterpretation of those judgments.

18. The applicant's advocate's letter dated 14 December 2017 was replied by the respondent's advocate's letter dated 12 January 2018, inter alia

recording that on 4 August 2017 the respondent filed a criminal complaint on the charges of fraud, misrepresentation, cheating and criminal

conspiracy. It is stated that the nature of the case with its surrounding facts and circumstances rendered the matter non-arbitrable and attracted

criminal action and the agreement was rightly terminated by the respondent. It was further stated that the respondent was deceitfully induced to make

payment of Rs.46 crores to SAP India Pvt.Ltd. And SAP SE GmbH under the agreement.

19. For the purpose of this application, the scope of inquiry would be limited as per the provisions of sub-section (6A) of Section 11 of the Act as

inserted by the Amendment Act 3 of 2016 (with effect from 23 October 2015) which would be confined to the existence of an arbitration agreement

between the parties. As noted above in the letter dated 29 November 2017 of the respondent, the respondent has clearly admitted that there

existed agreement dated 30th October 2017 between the parties which contained arbitration clause. There is also a valid invocation of a reference

to arbitration in terms of the contract by the applicant by its letter dated 29 October 2017 and 14 December 2017, whereby the applicant has appointed

its nominee to act as arbitrator, and called upon the respondent to appoint its nominee. There is a clear failure on the part of the respondent to appoint

its nominee arbitrator.

A three Judge bench of the Supreme Court in *Wexford Financial Inc. Panama Vs. Bharat Heavy Electricals Ltd.* (2016) 8 SCC 26 7 in

paragraph 9 observed thus:—

“.. There is, in that view, no gainsaying that the present petition under Sections 11(5) and 11(12) shall have to be allowed with appropriate

directions, particularly when this Court is concerned primarily with the question whether an arbitration agreement exists between the parties and if so

whether the disputes falling within the scope of the agreement have arisen for determination.”

In *TRF Limited vs. Energo Engineering Projects Limited* (2017) 8 SCC 37 7, three Judge bench of the Supreme Court while examining Section

11(6A) held as under:—

42. We are referring to the same as learned counsel for the parties have argued at length with regard to the disclosure made by the arbitrator and that

has also been referred to by the designated Judge. In this context, we may profitably refer to sub-section (6A) of Section 11 of the Act which 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.”

43. The purpose of referring to the said provision is that the amended law requires the Court to confine the examination of the existence of an

arbitration agreement notwithstanding any judgment of the Supreme Court or the High Court while considering an application under Section 11(6) of

the Act. As the impugned order would indicate, the learned Judge has opined that there had been no failure of procedure, for there was a request for

appointment of an arbitrator and an arbitrator has been appointed. It is apt to state here that the present factual score projects a different picture

altogether and we have to carefully analyse the same.”

22. In *Duro Felguera, S.A. Vs. Gangavaram Port Ltd.* (2017) 9 SCC 72 9 the Supreme Court examining the provisions of Section 11(6A) of

the Act, has observed thus:Â?

â??18. The language in Section 11(6) of the Act ""the Chief Justice or any person or institution designated by him"" has been substituted by ""Supreme

Court or as the case may be the High Court or any person or institution designated by such Court"". Now, as per subÂ 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 subÂsection (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:Â? â?! â?! â?! .. â?! â?!

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.â??

In the concurring judgment of Mr.Justice Kurian Joseph, His Lordship in paragraphs 47 and 48 observed thus:Â?

â??47. What is the effect of the change introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as â??the

2015 Amendmentâ?) 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 â??the 1996 Actâ?) is the crucial question arising for consideration in this case.

48. Section 11(6A) added by the 2015 Amendment, reads as follows:

â??11(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under subÂ section (4) or subÂsection (5)

or subÂsection (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration

agreement.â?? Â Â Â Â (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.

23. Adverting the above position in law it is clear that in exercise of its jurisdiction in adjudication of application under Section 11(6) of the Act, the enquiry of the Court would now be confined primarily to the question whether an arbitration agreement exists between the parties and if it is so exists whether the disputes are falling within the scope of the agreement have arisen for adjudication.

24. In so far as as the case of the Respondent that the dispute itself is not arbitrable as according to the Respondent it is a clear case of fraud for which criminal proceedings are initiated by the Respondent, in my opinion, cannot be accepted. This has two fold reasons, firstly, I am of the opinion that the record would indicate that it was too late in time after the execution of the contract which took place on 30 October 2015, for the respondent to contend that the applicant had played a fraud on the respondent to induce the respondent to enter into a contract. Further it clearly appears that the contract between the parties was sufficiently put into operation and executed. It is also not in dispute that substantial amounts under contract were paid by the Respondent to the applicant and there was a further claim of Rs.17 crores as made by the applicant from the respondent.

25. If it was really to be a case of fraud right from the inception as alleged by the respondent, it is difficult to accept as to how payments could be made by the Respondent to the applicant. From the perusal of the reply Affidavits and more particularly affidavit of Mr. Vinayak Raut, Chief Technological Officer and as to what he says in paragraph 6 as noted above in reality it prima facie appears to be a pure contractual dispute, although the defence/case of the Respondent is that it has initiated criminal proceedings against the applicant. This albeit the fact that there were long standing contractual relations between the parties.

26. Be that as it may, in a situation as in the present case when a party in a contract has alleged fraud, whether the Court would be prevented in the

facts of the case from referring the dispute to arbitration and what would be the principles to be followed is now well settled.

In *A. Ayyasamy vs. A. Paramasivam and others* 2016 (10) SCC 386. which is a decision of two Judge Bench of the Supreme Court, Dr. Justice A. K.

Sikri, speaking for the Court in paragraph 18 observed thus:Â?

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.â??Â Â Â Â Â Â Â Â Â Â (emphasis supplied)

In the supplementary judgment of Dr. Justice D.Y. Chandrachud, His Lordship has observed that 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. It was emphasized that as a matter of first principle in *N. Radhakrishnan vs. Maestro*

Engineers case (2010) 1 SCC 72, the Supreme Court had not held that mere allegation of fraud will exclude arbitrability. It is observed that the burden

must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not

arbitratble under the law for the time being in force. His Lordship in taking review of the law on the issue, in paragraphs 32, 43, 45.2 and 51 has

observed thus:

â??32. The Arbitration and Conciliation Act, 1996 does not in specific terms exclude any category of disputes â?" civil or commercial â?" 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 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. ¹³ ..

While affirming the judgment of the Court of Appeal, the House of Lords held:

¹³ In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from arbitrator's jurisdiction. As Longmore LJ remarked, at para 17:

if any businessmen did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so

....

15. If one adopts this approach, the language of clause 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute.

This principle should guide the approach when a defence of fraud is raised before a judicial authority to oppose a reference to arbitration. The

arbitration agreement between the parties stands distinct from the contract in which it is contained, as a matter of law and consequence. Even the

invalidity of the main agreement does not ipso jure result in the invalidity of the arbitration agreement. Parties having agreed to refer disputes to

arbitration, the plain meaning and effect of Section 8 must ensue.

56. The legal position has been succinctly summarized in International Commercial Arbitration by Gary B Born (2nd Edn. Vol. I. At p.846)

thus: At At At

At At At...under most national arbitration regimes, claims that the parties' underlying contract (as distinguished from the parties' arbitration

clause) was fraudulently induced have At generally been held not to compromise

the substantive validity of an arbitration clause included in the contract.

Â 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.Â 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.Â Â Â Â Â Â Â (emphasis supplied)

28. In a recent decision in Ameet Lalchand Shah and others vs. Rishabh Enterprises 2018 SCC Online SC 487, Smt. Justice R. Bhanumti speaking for

the bench and referring to the decision in A. Ayyasamy (supra) in para 36 to 38 observed thus:

36. While concurring with Justice Sikri, Justice D. Y. Chandrachud pointed out that the duty of the Court is to impart a sense of business

efficacy to the commercial transactions pointed out that mere allegations of fraud were not sufficient to decline to refer the parties to arbitration. In

para (48) of Ayyasamy case, Justice D. Y. Chandrachud held as under :Â

48. The basic principle which must guide judicial decision making is that arbitration is essentially a voluntary assumption of an obligation by

contracting parties to resolve their disputes through a private tribunal. The intent of the parties is expressed in the terms of their agreement. Where

commercial entities and persons of business enter into such dealings, they do so with a knowledge of the efficacy of the arbitral process. The

commercial understanding is reflected in the terms of the agreement between the parties. The duty of the court is to impart to that commercial

understanding a sense of business efficacy.Â Â Â Â Â Â Â Â Â Â Â Â (Underlining added)

37. When we apply the aforesaid principles to the facts of the present case, as discussed earlier, both parties have consciously proceeded with the

commercial transactions to commission the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. The first respondent has proceeded to

procure the materials, entered into agreement with Juwi India for engineering,

installation and commissioning and the sale and purchase agreement with Astonfield, were all the conscious steps taken in the commercial understanding to commission the Solar Plant at Dongri, Raksa, District Jhansi, U.P. Even though Juwi India and Astonfield are not parties to the main agreement â?" Equipment Lease Agreement (14.03.2012), all the agreements/contracts contain clauses referring to the main agreement. It is the duty of the Court to impart the commercial understanding with a â??sense of business efficacyâ? and not by the mere averments made in the plaint. The High Court was not right in refusing to refer the parties on the ground of the allegations of fraud levelled in the plaint.

38. It is only where serious questions of fraud are involved, the arbitration can be refused. In this case, as contended by the appellants there were no serious allegations of fraud; the allegations levelled against Astonfield is that appellant no.1 â?" Ameet Lalchand Shah misrepresented by inducing the respondents to pay high er price for the purchase of the equipments. There is, of course, a criminal case registered against the appellants in FIR No.30 of 2015 dated 05.03.2015 before the Economic Offences Wing, Delhi. The appellant no.1 â?" Ameet Lalchand Shah has filed Criminal Writ Petition No.619 of 2016 before the High Court of Delhi for quashing the said FIR. The said writ petition is stated to be pending and therefore, we do not propose to express any views in this regard, lest, it would prejudice the parties. Suffice to say that the allegations cannot be said to be so serious to refuse to refer the parties to arbitration. In any event, the Arbitrator appointed can very well examine the allegations regarding fraud.â??

29. Applying the above well settled principles of law to the facts of the present case and to the plea of fraud and misrepresentation and pendency of the criminal proceedings as urged on behalf of the Respondent, I am not convinced that the respondent's case falls in such a category of exception that at the threshold a reference of the disputes between the parties to an arbitral tribunal should be denied by not accepting the applicant's plea to appoint an arbitral tribunal. In any case it always open to the arbitral tribunal to form an opinion on the merits of the issues, including arbitrariness of the disputes.

30. Both the parties are stated to be entities of repute in their respective fields of business. The commercial understanding of the parties is clearly

evident in the agreement dated 30th October, 2015. As observed by the Supreme Court the duty of the Court is to impart commercial understanding with a sense of business efficacy. This, more particularly when in the present case, it is quite clear from the record that agreement was acted upon, part consideration was paid by the Respondent to the applicant which is also a substantial amount of Rs.48 crores and when a balance claim of Rs.17 crores was made by the applicant, disputes have arisen, as also the contract came to be terminated and criminal complaints were initiated by the respondent. Thus the allegations of the respondent of a fraud or criminal act would not detract the jurisdiction of the arbitral tribunal to resolve disputes between the parties, which arise from a contractual relationship for which the parties have entered into the arbitration agreement. The arbitration agreements cannot be rendered nugatory, it needs to work and is required to be given its full effect, which is the very intention of the parties to have such agreement.

31. In the above circumstances, I am of the clear opinion that the arbitration application is required to be allowed. The applicant has already nominated Mr. Justice V.C. Daga (retired) as its nominee arbitrator. The respondent having not appointed an arbitrator, the Court would be required to appoint an arbitrator. Accordingly the following order:Â?

(I) Mr. Justice V.C. Daga (retired) former Judge of this Court is proposed to be appointed as an arbitrator on behalf of the applicant.

(II) The Court appoints Mr. Justice D. B. Bhosale (Retd), former Chief Justice of Allahabad High Court, having address at 6, Bhagyoday, Nagindas Master Road, Behind Kandil Restaurant, Near Stock Exchange, MumbaiÂ?400001, as a nominee arbitrator on behalf of the respondent.

(III) The prospective arbitrators appointed by the Court shall appoint the Presiding Arbitrator in accordance with the provisions of the Act.

(IV) The prospective arbitrators before entering a reference, shall make a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, and forward the same to the Prothonotary and Senior Master of this Court to be placed on record of this application, with a copy to be forwarded to both the parties.

(V) The Arbitration Application is disposed of in the above terms. No costs.

32. The above observations are primaÂ?facie and are made only in the context of

adjudication of the present application under Section 11(6) of the

Act. All contentions of the parties on merits of the dispute on all issues are expressly kept open.