Avitel Post Studioz Limited And Ors. vs Hsbc Pi Holding (Mauritius) Limited on 19 August, 2020

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Bench: Rohinton Fali Nariman, Navin Sinha, Indira Banerjee

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5145 OF 2016

AVITEL POST STUDIOZ LIMITED & ORS. …APPELLANTS

VERSUS

HSBC PI HOLDINGS (MAURITIUS) LIMITED …RESPONDENT

AND

CIVIL APPEAL NO. 5158 OF 2016

HSBC PI HOLDINGS (MAURITIUS) LIMITED …APPELLANT

VERSUS

AVITEL POST STUDIOZ LIMITED & ORS. …RESPONDENTS

WITH

CIVIL APPEAL NO. 9820 OF 2016

JUDGMENT

R.F. Nariman, J.

1. These two appeals being Civil Appeal No. 5145 of 2016 by Avitel Post Studioz Ltd. [“Avitel India”] and its promoters [the “Jain family”], and the cross appeal being Civil Appeal No. 5158 of 2016 by HSBC PL Holdings (Mauritius) Ltd. [“HSBC”], impugn the interlocutory judgment and order passed in the appeal under section 9 of the Arbitration and Conciliation Act, 1996 [“1996 Act”] dated 31.07.2014. To dispose of the said appeals, we refer to the facts in Civil Appeal No. 5145 of 2016. The brief facts necessary to appreciate the controversy that arises in the present case are as follows:

(i) On 21.04.2011, a Share Subscription Agreement ["SSA"] was entered into between HSBC and the Appellants. HSBC made an investment in the equity capital of Avitel India for a consideration of USD 60 million in order to acquire 7.8% of its paid-up capital. This SSA contained an arbitration clause which reads as follows:-

"16. DISPUTE RESOLUTION 16.1. Arbitration 16.1.1. Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation, breach or termination shall be referred to and finally resolved by binding arbitration at the Singapore International Arbitration Centre ("SIAC") in accordance with the International Arbitration Rules in force at the date of this Agreement ("Rules"), which Rules are deemed to be incorporated by reference into this clause and as may be amended by the rest of this clause.

16.1.2. The seat of arbitration shall be Singapore. 16.1.3. The language of the arbitration proceedings shall be English.

16.1.4. The arbitration tribunal shall consist of three (3) arbitrators: the claimant party shall nominate one (1) arbitrator, the respondent party shall nominate one (1) arbitrator and the two (2) arbitrators thus appointed shall nominate the third arbitrator who shall be the presiding arbitrator (the "Arbitration Tribunal"). If there is more than one claimant party and/or more than one respondent party, the claimant parties (for the purposes of this Clause 16.1 together a "party") shall together designate one (1) arbitrator and the respondent parties (for the purposes of this Clause 16.1 together a "party") shall together designate one (1) arbitrator. If within 30 days of a request from the other party to do so, a party fails to designate an arbitrator, or if the two (2) arbitrators fail to designate the third arbitrator within 30 days after the confirmation of the appointment of the second arbitrator, the appointment shall be made, upon request of a party, by the SIAC council in accordance with the Rules.

16.1.5. If within 14 days of a request from the other party to do so, a party fails to nominate an arbitrator, or if the two (2) arbitrators fail to nominate the third arbitrator within 14 days after the confirmation of the appointment of the second arbitrator, the appointment shall be made, upon request of a party, by the SIAC council in accordance with the Rules. 16.1.6. The parties waive any right to apply to any court of law and/or other judicial authority to determine any preliminary point of law and/or review any question of law and/or the merits, insofar as such waiver may be validly made. The parties shall not be deemed, however, to have waived any right to challenge any award on the ground that the tribunal lacked substantive jurisdiction and/or the ground of serious irregularity affecting the tribunal, the proceedings or the award to the extent allowed by the law of the seat of the arbitration.

16.1.7. Nothing in this Clause 16.1 shall be construed as preventing any party from seeking conservatory or interim relief in any court of competent jurisdiction. 16.1.8. Any award of the

arbitration tribunal shall be made in writing and shall be final and binding on the parties from the day it is made and the parties agree to be bound thereby and to act accordingly. The parties undertake to carry out the award without delay.

16.1.9. During the conduct of any arbitration proceedings pursuant to this Clause 16.1, this Agreement shall remain in full force and effect in all respects except for the matter under arbitration and the parties shall continue to perform their obligations hereunder, except for those obligations involved in the matter under dispute, and to exercise their rights hereunder.

16.2. Costs The costs and expenses of the arbitration, including the fees of the arbitration and the Arbitration Tribunal, shall be borne equally by each Party to the dispute or claim and each Party shall pay its own fees, disbursements and other charges of its counsel, except as may be determined by the Arbitration Tribunal. The Arbitration Tribunal would have the power to award interest on any sum awarded pursuant to the arbitration proceedings and such sum would carry interest, if awarded, until the actual payment of such amounts. 16.3. Final and Binding It is agreed by the Parties that any award made by the Arbitration Tribunal shall be final and binding on each of the Parties that were parties to the dispute.

16.4. Application of Arbitration Act Save for section 9, Part 1 of the Indian Arbitration and Conciliation Act, 1996 (the "Arbitration Act"), the provisions of Part 1 of the Arbitration Act shall not apply to the terms of this Agreement."

(ii) On 06.05.2011, the aforesaid parties entered into a Shareholders' Agreement ["SHA"] which defined the relationship between the parties after the SSA dated 21.04.2011 had been entered into. The SHA also contained an arbitration clause which was identical to the arbitration clause contained in the SSA. It is the case of HSBC that a representation had been made by Appellants No. 2-4 (the Jain family) that the Appellants were at a very advanced stage of finalising a contract with the British Broadcasting Corporation ["BBC"] to convert the BBC's film library from 2D to 3D. This contract was expected to generate a revenue of USD 300 million in the first phase, and ultimately over USD 1 billion. It is the further case of HSBC that this investment of USD 60 million was required by Avitel India to purchase equipment for Avitel Post Studioz FZ LLC ["Avitel Dubai"] to service the BBC contract (Avitel Dubai is a 100% subsidiary of Avitel Holdings Ltd., Mauritius ["Avitel Mauritius"], which, in turn, is a 100% subsidiary of Avitel India. Avitel India, Avitel Mauritius, and Avitel Dubai are collectively referred to as the "Avitel Group").

(iii) In early April 2012, HSBC grew suspicious about the Avitel Group's business of digitising films and Ernst & Young and KPMG Dubai were appointed to inquire into and return findings as to the business activities of the Avitel Group. It is the further case of HSBC that they discovered, thanks to certain preliminary findings of Ernst & Young and KPMG Dubai, inter alia, that the purported BBC contract was non-existent and was set up by the Appellants to induce HSBC into investing the aforesaid money of USD 60 million in the shares of Appellant No. 1. It is also HSBC's case that though Avitel Dubai received the entire investment proceeds of USD 60 million on or about 10.05.2011, it appeared that around USD 51 million were not used to purchase any equipment to service the BBC contract, but appeared to have been siphoned off to companies in which the Jain

family had a stake.

(iv) As disputes arose between the parties, on 11.05.2012, notices of arbitration were issued by HSBC to the Singapore International Arbitration Centre ["SIAC"] to commence arbitral proceedings. On 14.05.2012, the SIAC appointed Mr. Thio Shen Yi, SC, as an Emergency Arbitrator pursuant to an application dated 11.05.2012. On 17.05.2012, the Appellants' challenge to the appointment of the Emergency Arbitrator was considered by the SIAC and rejected. On 25.05.2012, the Appellants filed their response to the notices of arbitration.

(v) The Emergency Arbitrator then passed two Interim Awards dated 28.05.2012 and 29.05.2012, in the SSA and the SHA, respectively, in favour of HSBC, directing the Appellants and Avitel Dubai to refrain from disposing of or dealing with or diminishing the value of their assets up to USD 50 million, and permitting HSBC to deliver a copy of the Interim Awards to financial institutions in India and the UAE with which any of the Appellants hold or may hold or be signatory to accounts, together with a request that the financial institutions freeze such accounts consistent with the Interim Awards. On 27.07.2012, the Emergency Arbitrator made an amendment to Interim Awards dated 28.05.2012 and 29.05.2012 passed in the SSA and the SHA, respectively, granting further relief to HSBC by, inter alia, directing the Appellants and Avitel Dubai to cease and desist from prohibiting or inhibiting Ernst & Young and KPMG Dubai from conducting investigations into the financial affairs of Avitel Dubai and Avitel Mauritius.

(vi) On 30.07.2012, HSBC filed Arbitration Petition No. 1062 of 2012 under section 9 of the 1996 Act in the Bombay High Court, inter alia seeking directions to call upon the Appellants to deposit a security amount to the extent of HSBC's claim in the arbitration proceedings that had begun under both the SSA and the SHA.

(vii) On 03.08.2012, a learned Single Judge of the Bombay High Court passed an interim order under the section 9 petition, inter alia directing the Corporation Bank to allow the Appellants to withdraw a sum of INR 1 crore from their account on or before 09.08.2012, but not to allow any further withdrawals until further orders, till which time, the account was to remain frozen.

(viii) Meanwhile, the Appellants challenged the jurisdiction of the three- member Arbitral Tribunal comprising of Mr. Christopher Lau, SC as its Chairman, and Dr. Michael C. Pryles and Justice (Retd.) Ferdino I. Rebello as co-arbitrators ["Arbitral Tribunal"] set up under the auspices of the SIAC. On 25.09.2012, the Arbitral Tribunal decided that this would be decided as a preliminary issue. On 17.12.2012, the Arbitral Tribunal passed a unanimous "final partial award on jurisdiction", dismissing the jurisdictional challenge, and stating that since Singapore law governs the arbitration agreement, allegations of fraud and complicated issues relating to facts are arbitrable.

(ix) Meanwhile, in the section 9 petition pending before the Bombay High Court, an order was passed by a learned Single Judge dated 22.01.2014, in which the Appellants were directed to deposit any shortfall in their account with the Corporation Bank so as to maintain a balance of USD 60 million. The learned Single Judge gave prima facie findings that the seat of arbitration was at Singapore and that the arbitration agreement was governed by Singapore law; hence, arbitrability of

the dispute at hand would be governed by Singapore law. It held that the unanimous "final partial award on jurisdiction" dated 17.12.2012, delivered by the Arbitral Tribunal in Singapore, upholding the jurisdiction of the Arbitral Tribunal to proceed, had not been challenged in Singapore by the Appellants, and further held that this being the case, since HSBC has a good chance of success in the final arbitral proceedings, the aforesaid order to deposit the shortfall in the account so as to maintain a balance of USD 60 million was passed.

(x) An appeal against the order of the learned Single Judge was disposed of by the impugned judgment and order of the Division Bench dated 31.07.2014, returning a prima facie finding that since Singapore law governs the arbitration agreement, there was no need to interfere with the findings of the learned Single Judge in this respect. Further, it was held that there is no estoppel in filing the present proceeding despite the Emergency Awards being passed in Singapore as the section 9 petition could be maintained on a plain reading of the arbitration agreement itself. It was further held that an issue of fraud in the context of sections 17 and 18 of the Indian Contract Act, 1872 ["Contract Act"] referred to want of free consent, and was a well- accepted ground that would vitiate the contract, rendering it voidable. After referring to various judgments of this Court, it was held that there was a distinction between the "suitability" and "arbitrability" of disputes, and on the facts of the present case, it could not be said that the dispute was not arbitrable because of an allegation of fraud made by HSBC. After then referring to the claim statement of HSBC before the Arbitral Tribunal at Singapore, it was held that the allegations of fraud and misrepresentation were primarily in the context of "fraud" and "misrepresentation" as defined in sections 17 and 18 of the Contract Act, thus establishing a civil profile of the disputes that had arisen between the parties. However, after referring to certain judgments on interim mandatory injunctions, the High Court prima facie found that HSBC had carried out due diligence by engaging leading agencies like Ernst & Young and Clifford Chance. Also, it was held that the measure of damages that may ultimately be awarded may not be the amount of loss ultimately sustained by HSBC, but can at best be the difference between the price paid by HSBC in acquiring Avitel India's shares and the price HSBC would have received had it resold the said shares in the market. This being the case, and an interim mandatory injunction being in the nature of equitable relief, the Division Bench was of the opinion that the interest of justice would be served if the Appellants are directed to deposit an additional amount equivalent to USD 20 million in its Corporation Bank account, so that the total deposit in the said account is maintained at half the said figure of USD 60 million, i.e., at USD 30 million. The appeal against the order dated 22.01.2014 was therefore partly allowed.

(xi) By a Final Award in the SSA dated 27.09.2014 ["Foreign Final Award"], the Arbitral Tribunal held as follows:

> "21. FORMAL FINAL AWARD 21.1 The Tribunal has carefully considered the oral and documentary evidence as well as the submissions of the Parties and given due weight thereto and rejecting all submissions to the contrary hereby makes, issues and publishes this Final Award and for the reasons set out above FINDS, AWARDS, ORDERS AND DECLARES as follows:

21.2 Finds that the Respondents jointly and severally represented to the Claimant the following:

a. the Avitel Group's propriety stereoscopy technology was superior to that of its competitor; b. Avitel Dubai played an important role in the Avitel Group's business;

c. the Avitel Group was in advanced negotiations with the BBC and that the BBC Contract was close to execution;

d. the Claimant's investment was required and was to be utilized for purchasing equipment in order to enable Avitel Dubai to service the BBC Contract;

e. the Avitel Group had the benefit of the Material Contracts with Kinden, SPAC and Purple Passion with a total value of approximately USD 658 million;

f. the Avitel Group's key customers Kinden, SPAC and Purple Passion as well as Avitel Dubai's key supplier, Digital Fusion, and key service provider, Highend, were all independent and legitimate companies;

g. the representations and warranties contained in Clauses 6.1 and 6.2 of the SSA and in Clauses 7.1, 7.3, 7.5 , 8, 10 and 11 of Schedule 3 of the SSA to be true, complete, accurate and not misleading;

21.3 Finds that the Respondents made the representations and/or warranties in order to induce the Claimant to invest in the First Respondent;

21.4 Finds that the Claimant did rely on the representations and/or warranties in making its investment in the First Respondent;

21.5 Finds that the representations and/or warranties referred to in paragraph 21.2 (a) to (g) above were false and/or misleading;

21.6 Finds that the Respondents made the representations and/or warranties referred to in paragraph 21.2 (a) to (g) above knowing that these were false and/or without belief in their truth;

21.7 Finds that the Respondents are jointly and severally liable to the Claimant in tort for deceit;

21.8 Finds that the Respondents are jointly and severally liable to the Claimant for fraudulent misrepresentation under the Contract Act;

21.9 Finds that the Respondents are jointly and severally liable to the Claimant for breach of warranty;

21.10 Finds that the Second, Third and Fourth Respondents are to jointly and severally indemnify the Claimant for the loss of its investment in the amount of USD 60 million as well as for the costs of

and associated with this arbitration and associated court actions;

21.11 Finds that the Claimant in respect of its claim for fraudulent misrepresentation and its claim in tort for deceit is entitled to damages in the total amount of USD 60 million; 21.12 Finds that the Claimant is entitled to interest on the sum of USD 60 million from 6 May 2011 to the date of this Final Award at the rate of 4.25 % per annum;

21.13 Finds that the Claimant is entitled to its legal and other costs as well as the costs of the arbitration in the total amount of SGD 827,615.67 comprising of the following:

(a) the amount of SGD 29,235.88 in respect of the Emergency Arbitrators fees and expenses

(b) the amount of SGD 756,513.19 in respect of the Tribunal's fees and expenses;

(c) the amount of SGD 41,866.60 in respect of SIAC administrative fees and expenses;

21.14 Finds that upon the Respondents' paying in full and unconditionally the sums awarded to the Claimant in paragraphs 21.15, 21.16, 21.18, 21.19 below, the Claimant's Preference Subscription Shares and Equity Subscription Shares (as defined in the SSA) in Avitel India are to be cancelled forthwith;

21.15 Awards to the Claimant and Orders the Respondents to pay damages in the amount of USD 60 million in respect of which award the First, Second, Third and Fourth Respondents are jointly and severally liable; 21.16 Awards to the Claimant and Orders the Respondents to pay interest on the sum of USD 60 million from 6 May 2011 to the date of this Final Award at the rate of 4.25% per annum in respect of which award the First, Second, Third and Fourth Respondents are jointly and severally liable; 21.17 Orders in terms identical to the orders in the Interim Award (as amended by the Addendum and Amendment to Interim Award dated 15 June 2012 and by the Amendment to Interim Award dated 27 July 2012), which orders are to remain in force up to and including the date on which the Respondents comply with all other orders in this Final Award; 21.18 Awards to the Claimant and Orders the Respondents to pay the Claimant's legal and other costs amounting to USD 1,652,890.14 in respect of which award the First, Second, Third and Fourth Respondents are jointly and severally liable;

21.19 Awards to the Claimant and Orders the Respondents to pay all the costs of this arbitration in the total amount of SGD 827,615.67 as follows:

(a) the amount of SGD 29,235.88 in respect of the Emergency Arbitrator's fees and expenses;

(b) the amount of SGD 756,513.19 in respect of the Tribunal's fees and expenses;

(c) the amount of SGD 41,868.60 in respect of SIAC administrative fees and expenses;

21.20 Declares the Second, Third and Fourth Respondents jointly and severally liable to indemnify the Claimant for the loss of its investment in the amount of USD 60 million together with interest thereon for the period and at the rate specified in paragraph 21.16 hereinabove and the Claimant's legal costs, related expenses as well as the costs of this arbitration as specified in paragraph 21.19 hereinabove; 21.21 Declares and Orders that upon the Respondents' paying in full and unconditionally the sums awarded to the Claimant in paragraphs 21.15, 21.16, 21.18, 21.19 hereinabove and all costs arising out of and incidental to the cancellation of the Claimant's Preference Subscription Shares and Equity Subscription Shares (as defined in the SSA) in Avitel India, that the said shares be cancelled and that in this regard, the Parties take the requisite steps to effect the said cancellation within 30 days of receipt of such payment." Initially, this Foreign Final Award was challenged by the Appellants in a section 34 proceeding in the Bombay High Court. By a judgment dated 28.09.2015, the section 34 petition was dismissed as being not maintainable. An appeal under section 37 of the 1996 Act was dismissed on 05.05.2017. Meanwhile, HSBC moved the Bombay High Court on 15.04.2015 to enforce the Foreign Final Award in the SSA dated 27.09.2014, which enforcement proceedings are still pending.

2. Mr. Mukul Rohatgi, learned Senior Advocate and Mr. Saurabh Kirpal, learned counsel, appearing on behalf of the Appellants, took us through the Single Judge order and the Division Bench judgment, and then referred to the Indian law on the allegations of fraud made in arbitral proceedings, which, according to them, show that if the transaction entered into between the parties involve serious criminal offences such as forgery and impersonation, then it is clear that under Indian law, such dispute would not be arbitrable. In fact, they stated that a criminal complaint was filed by HSBC against the Appellants dated 16.01.2013, alleging offences under sections 420, 467, 468, read with section 120B of the Indian Penal Code, 1860, with the Economic Offences Wing, Mumbai ["EOW"], resulting in an FIR being registered. However, the EOW informed HSBC that a closure report was filed before the concerned Magistrate in Mumbai. This closure report was then accepted. HSBC then filed a protest petition seeking rejection of the closure report, which was dismissed by the learned Magistrate on 05.05.2018. This order passed by the Magistrate was in turn challenged by HSBC in Writ Petition (Criminal) No. 5659 of 2018, which petition is still pending. They then argued that, ultimately, in enforcement proceedings in India, the gateways of section 48 of the 1996 Act have to be met. "The public policy of India" is contained in the judgments of this Court regarding serious allegations of fraud made in arbitral proceedings, and if HSBC cannot pass this gateway, then enforcing a foreign award in India would not be possible. It was from this prism that a prima facie case had to be made out under section 9 of the 1996 Act. They, therefore, attacked both the Single Judge order and the Division Bench judgment, stating that a prima facie case for enforcement of such foreign awards cannot possibly refer to the Singapore law on fraud being alleged in arbitral proceedings, but can only refer to Indian law. They further argued that the Division Bench of the Bombay High Court had relied upon a Single Judge judgment of this Court reported as Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 ["Swiss Timing"] which had held the judgment in N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 ["N. Radhakrishnan"] per incuriam, vitiating the entire Division Bench judgment.

This is clear because a Single Judge judgment of this Court under section 11 of the 1996 Act has no precedential value as has correctly been held in State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 ["Associated Contractors"]. Mr. Rohatgi also indicated that Mr. Christopher Lau, SC, the Chairman of the Arbitral Tribunal in the Singapore proceedings was biased, in that HSBC was a client of the firm to which he belonged, and this is one of the important grounds taken up in the section 48 proceeding which is pending in the Bombay High Court. He also sought to raise an argument (for the first time before us) that the award being insufficiently stamped could not be looked at and that this would also go to show that there is no prima facie case in order to sustain the interim mandatory orders passed by the Division Bench of the High Court. It was further added that Report No. 246 of the Law Commission of India on 'Amendment to the Arbitration and Conciliation Act, 1996' of August 2014 ["246th Law Commission Report"] had recommended that a section 16(7) be added so as to do away with the ratio of N. Radhakrishnan (supra). However, Parliament thought it fit, when it passed the Arbitration and Conciliation (Amendment) Act, 2015 ["2015 Amendment Act"], not to incorporate such a section, showing that N. Radhakrishnan (supra) holds the field and that, therefore, serious questions of fraud raised, like in the present arbitral proceedings, would render such dispute inarbitrable. For this proposition, they relied heavily on the House of Lords judgment in President of India and La Pintada Compania Navigacion S.A., [1985] A.C. 104 ["La Pintada"].

3. Mr. Harish Salve, learned Senior Advocate appearing on behalf of the Respondent, HSBC, countered all these submissions by relying upon several judgments of this Court, including the recent judgment in Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 ["Rashid Raza"]. According to the learned Senior Advocate, this judgment has, with great clarity, explained the judgment in A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 ["Ayyasamy"], which in turn had explained N. Radhakrishnan (supra), as referring only to such serious allegations of fraud as would vitiate the arbitration clause along with the agreement, and allegations of fraud which are not merely inter parties, but affect the public at large. He argued that a reading of the pleadings in the present case would show that neither of these two tests has been met. He also copiously read from the Foreign Final Award dated 27.09.2014, which found not merely on impersonation, which was one small leg on which it stood, but also on siphoning off or diversion of a substantial portion of the USD 60 million paid by HSBC into companies owned or controlled by the Jain family. He said that these issues are predominantly civil law issues to be decided inter parties. He further argued that insofar as Mr. Christopher Lau SC's alleged bias is concerned, this was not the time or place to go into such allegations, which would only be fully met in the section 48 proceedings which are pending. He indicated that in any case, this Foreign Final Award was unanimous and consisted of two other arbitrators, Dr. Michael C. Pryles and Justice (Retd.) Ferdino I. Rebello, retired Chief Justice of the Allahabad High Court. He also asked us not to go into the stamping aspect of the Foreign Final Award inasmuch as it was raised here for the first time without any proper pleading; if properly pleaded, then his client would have had an opportunity to rebut the same to show that there was no insufficiency of stamp duty paid. Mr. Salve therefore supported the ultimate order of the learned Single Judge of the Bombay High Court, and said that the Division Bench ought not to have reduced the amount of USD 60 million to half, i.e., USD 30 million without any reasoning worth the name, particularly because the Foreign Final Award had held that the USD 60 million was to be paid by way of damages with interest and costs, the shares in HSBC's name standing cancelled. Once it is

clear that the aforesaid shares stood cancelled, it is clear that the 7.8% of the paid-up share capital of Avitel India that was held by HSBC reverts to Avitel India. This being the case, there would be no awarding of the difference between market value of the shares as on the date of breach and USD 60 million, as the shares are back in the hands of Avitel India.

4. Having heard learned counsel appearing on behalf of both the parties, the only real question that needs to be addressed in the section 9 proceedings is the extent to which HSBC could be said to have a strong prima facie case in the enforcement proceedings under section 48 which are pending before the Bombay High Court. If so, whether irreparable prejudice would be caused to HSBC if protective orders were not issued in its favour, and generally, whether the balance of convenience tilts in its favour and to what extent.

5. First and foremost, it is correct to state that this prima facie case would necessarily depend upon what is the substantive law in India qua arbitrability when allegations of fraud are raised by one of the parties to the arbitration agreement. The law on this point has its origins in a judgment under the Arbitration Act, 1940 ["1940 Act"], the predecessor to the 1996 Act, which repealed the 1940 Act. Thus, in Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, [1962] 3 SCR 702 ["Abdul Kadir"], disputes arose out of an agreement between the parties, which contained an arbitration clause. Consequently, respondents no.1 and 2 filed an application under section 20 of the 1940 Act, as it then stood. This application was opposed by the appellant on four grounds before the Hon'ble Supreme Court. The fourth ground is important from our point of view and reads thus:

> "xxx xxx xxx (4) The respondents had made allegations of fraud against the appellant in their application and that was also a ground for not referring the dispute to arbitration." (at p. 707) In dealing with this ground, the Court first referred to section 20(4) of the 1940 Act, which laid down that "where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court." This Court referred to the fact that the words of this sub-section leave a wide discretion with the Court to consider whether an order for filing an agreement should be made and reference thereon should also be made. Various English judgments were referred to. Russel v. Russel, [1880] 14 Ch D 471 was referred to for the proposition that the Court will, in general, refuse to send a dispute to arbitration if the party charged with fraud desires a public inquiry, but where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved [see Abdul Kadir (supra) at p. 713]. The next English judgment is Charles Osenton & Co. v. Johnston, 1942 A.C. 130. This case held that as the professional reputation of a particular firm was involved, the matter should not be referred to arbitration for the reason that the normal tribunal of a High Court with a jury, from which there is recourse to a right to appeal, could not be substituted by proceedings before an official referee under section 89 of the Judicature Act, 1925. After referring to these cases, this Court cautioned:

"There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in Russel case [1880 14 Ch D 471]. In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above. Even so, the learned Master of the Rolls also observed in the course of the judgment at p. 476 as follows:

"Why should it be necessarily beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions do involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties." We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in Russel's case [1880 14 Ch D 471] to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to Minifie v. Railway Passengers Assurance Company [(1881) 44 LT 552]. There the question was whether certain proceedings should be stayed; and it was held that notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of a certain person and of those who attended him and so might involve a question similar to that of fraud or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference." (at pp. 714-716) The Court then turned to the facts of the case before it and held that allegations as to the correctness or otherwise of entries in accounts are not serious allegations of fraud, stating that such allegations are often made in suits for accounts, which are purely civil proceedings. It was added:

"That is why we emphasise that even in the leading case of Russel [1880 14 Ch D 471], the learned Master of the Rolls was at pains to point out that it could not necessarily be said in a case of accounts that no reference to arbitration should be made, even though questions relating to accounts which might involve misconduct amounting even to dishonesty on the part of some partner might arise in the arbitration proceedings and even cases where moral dishonesty or moral misconduct is

> attributed to one party or the other might be referred to arbitration. It seems to us that every allegation tending to suggest or imply moral dishonesty or moral misconduct in the matter of keeping accounts would not amount to such serious allegation of fraud as would impel a court to refuse to order the arbitration agreement to be filed and refuse to make a reference. Looking to the allegations which have been made in this case we are of opinion that there are no such serious allegations of fraud in this case as would be sufficient for the court to say that there is sufficient cause for not referring the dispute to arbitration. This contention of the appellant must also therefore fail." (at pp. 717-718)

6. In N. Radhakrishnan (supra), differences between the partners of a firm were sought to be adjudicated in a civil suit filed by the respondents. The appellant filed an application under section 8 of the 1996 Act stating that as there was an arbitration clause between the partners, the matter should now be referred to arbitration. This Court, after considering the judgment in Abdul Kadir (supra), extracted one sentence from the said judgment at p. 714 as follows:

> "There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference." This sentence, according to the learned Division Bench, being the ratio in Abdul Kadir (supra), would necessarily mean that wherever serious allegations of fraud are raised in a case in which there is an arbitration agreement, they should be tried in a court of law. In the fact situation before the Court, the Court found that the appellant had made serious allegations against the respondents alleging that they were committing malpractices in the account books and had manipulated the finances of the partnership firm. This, according to the learned Division Bench of this Court, was enough to dismiss the section 8 application. We may also refer to the fact that the appellant's counsel had relied upon the judgment in Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503 ["Hindustan Petroleum"], in which it was stated that it is mandatory for a civil court to refer to arbitration a dispute that arises between parties with an arbitration agreement, under section 8 of the 1996 Act. We may only note at this stage that this judgment was not dealt with at all by the Court. On the contrary, a judgment delivered under section 20(4) of the 1940 Act was referred to, in order to arrive at the conclusion arrived at by the Court.

7. In Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 ["Afcons"], this Court held as follows:

> "27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:
>
> (i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a

compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).

(ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association, etc.).

(iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.

(iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.

(v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against the Government.

(vi) Cases involving prosecution for criminal offences." It will be seen that items (iv) and (vi) are relevant from our point of view and require to be explained in the light of subsequent decisions of this Court.

8. In Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 ["Booz Allen"], this Court decided that proceedings in rem, such as a mortgage suit filed under Order XXXIV of the Civil Procedure Code, 1908 (which was a proceeding in rem), would not be arbitrable. In a significant passage, this Court held:

"36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property.

Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force"." The Court then held, following Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd., (1999) 5 SCC 688, that similarly, winding up proceedings under the Companies Act, 1956 cannot be referred to arbitration (see paragraph 42). As against this, suits for specific performance are arbitrable despite the fact that the court is vested with discretion to be exercised based upon principles laid down as to when not to decree specific performance (see paragraphs 43 and 44). The Court then concluded:

> "46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but creates only a personal obligation. Therefore, if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by the courts of law and not by Arbitral Tribunals.
>
> 47. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of the Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security."
>
> 9. We now come to a learned Single Judge's judgment in Swiss Timing (supra). There is no doubt that this judgment delivered by a learned Single Judge under a section 11 jurisdiction cannot be said to be a binding precedent [see Associated Contractors (supra) at paragraph 17]. However, the learned Judge's reasoning has strong persuasive value which we are inclined to adopt. The learned Single Judge first held

that the judgment in P. Anand Gajapathi Raju v. P.V.G. Raju, (2000) 4 SCC 539, was not brought to the notice of this Court in N. Radhakrishnan (supra). The judgment of Hindustan Petroleum (supra) which was brought to the notice of the Court was not dealt with at all.

Further, the provisions of sections 5 and 16 of the 1996 Act were also not referred to. Section 5 of the 1996 Act states as follows:

"5. Extent of judicial intervention.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part." Section 16(1) of the 1996 Act states:

"16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause." These provisions, together with section 8 of the 1996 Act, which now makes it mandatory to refer an action which is brought before a judicial authority, which is the subject matter of an arbitration agreement, to arbitration, if the conditions of the section are met, all point to a sea change from the 1940 Act which was repealed by this 1996 Act. By way of contrast with section 8 of the 1996 Act, section 20 of the 1940 Act is set out hereinbelow:

"20. Application to file in Court arbitration agreement.— (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show

cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable." It will be seen from section 20 of the 1940 Act, as was held in Abdul Kadir (supra), that a wide discretion is vested in the Court if sufficient cause is made out not to refer parties to arbitration. It was in that context that the observations in Abdul Kadir (supra) as to serious allegations of fraud triable in a civil court, being "sufficient cause" shown under section 20(4) of the 1940 Act were made. Also, the approach of the 1940 Act is made clear by section 35(1), which is set out hereinbelow:

"35. Effect of legal proceedings on arbitration.—(1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Section 34, be invalid.

xxx xxx xxx" Thus, even where arbitral proceedings are ongoing, such proceedings become invalid the moment legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire. As against this, sections 5, 8 and 16 of the 1996 Act reflect a completely new approach to arbitration, which is that when a judicial authority is shown an arbitration clause in an agreement, it is mandatory for the authority to refer parties to arbitration bearing in mind the fact that the arbitration clause is an agreement independent of the other terms of the contract and that, therefore, a decision by the arbitral tribunal that the contract is null and void does not entail ipso jure the invalidity of the arbitration clause. Even otherwise, N. Radhakrishnan (supra) did not refer to the ratio of Abdul Kadir (supra) correctly. As has been seen by us hereinabove, Abdul Kadir (supra) held that serious allegations of fraud are not made out when allegations of moral or other wrongdoing inter parties are made. In particular, it was held that discrepancies in account books are the usual subject matter in account suits, which are purely of a civil nature. For all these reasons, we are broadly in agreement with the observations of Nijjar, J. rendering N. Radhakrishnan (supra) lacking in precedential value.

10. The next judgment to be dealt with, chronologically speaking, is the judgment in Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 ["Vimal Kishor Shah"]. To the six categories of

exceptions to arbitrability of civil disputes, a seventh category has been added, namely, disputes arising under trust deeds governed by the Trusts Act, 1882. Here, it was held that a consideration of the Trusts Act would show that the intention of the legislature was to confer jurisdiction only on civil courts for deciding disputes arising under the Trusts Act, which would amount to an implied bar on other proceedings including arbitral proceedings. The Court therefore found:

> "53. We, accordingly, hold that the disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. A fortiori, we hold that the application filed by the respondents under Section 11 of the Act is not maintainable on the ground that firstly, it is not based on an "arbitration agreement" within the meaning of Sections 2(1)(b) and 2(1)(h) read with Section 7 of the Act and secondly, assuming that there exists an arbitration agreement (Clause 20 of the trust deed) yet the disputes specified therein are not capable of being referred to private arbitration for their adjudication on merits.
>
> 54. We thus add one more category of cases i.e. Category
>
> (vii), namely, cases arising out of trust deed and the Trusts Act, 1882, in the list of six categories of cases specified by this Court in para 36 at pp. 546-47 of the decision rendered in Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v.

SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] which as held above cannot be decided by the arbitrator(s)." [This judgment was referred to with approval in Vidya Drolia and Ors. v. Durga Trading Corporation, 2019 SCC OnLine SC 358 at paragraph 30].

11. Now comes the important judgment in Ayyasamy (supra). Two separate judgments were delivered by a Division Bench of this Court. Sikri, J., after referring to the judgments in Abdul Kadir (supra), N. Radhakrishnan (supra), Swiss Timing (supra), and Booz Allen (supra), then referred to the 246 th Law Commission Report, in particular to paragraphs 50 and 51 thereof. He then held:

> "23. A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognised that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud and fraud simpliciter. It, thus, follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simpliciter and such allegations are merely alleged, we are of the opinion that it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.

> 24. Before we apply the aforesaid test to the facts of the present case, a word on the observations in Swiss Timing Ltd. case [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] to the effect that the judgment of N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] was per incuriam, is warranted. In fact, we do not have to labour on this aspect as this task is already undertaken by this Court in State of W.B. v. Associated Contractors [State of W.B. v. Associated Contractors, (2015) 1 SCC 32 : (2015) 1 SCC (Civ) 1]. It has been clarified in the aforesaid case that Swiss Timing Ltd. [Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642] was a judgment rendered while dealing with Section 11(6) of the Act and Section 11 essentially confers power on the Chief Judge of India or the Chief Justice of the High Court as a designate to appoint an arbitrator, which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. This power of appointment of an arbitrator under Section 11, by the Court, notwithstanding the fact that it has been held in SBP & Co. v. Patel Engg.

Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] as a judicial power, cannot be deemed to have precedential value and, therefore, it cannot be deemed to have overruled the proposition of law laid down in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 :

> (2010) 1 SCC (Civ) 12].

25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can side-track the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc.

are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected." Chandrachud, J., in a separate judgment, referred to the judgment in N. Radhakrishnan (supra) and then held:

> "40. The above extract from the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] relies extensively on the view propounded in Abdul Kadir [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406]. The decision in Abdul Kadir [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406] arose under the Arbitration Act, 1940 and was in the context of the provisions of Section 20. In Abdul Kadir [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406] , this Court emphasised that sub-section (4) of Section 20 of the Arbitration Act, 1940 left a wide discretion in the court. In contrast, the scheme of the 1996 Act has made a radical departure from the position under the erstwhile enactment. A marked distinction is made in Section 8 where no option has been left to the judicial authority but to refer parties to arbitration. Abdul Kadir [Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406] explains the position under the Arbitration Act, 1940.

The present legislation on the subject embodies a conscious departure which is intended to strengthen the efficacy of arbitration.

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43. Hence, the 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." He then cautioned against the use of N. Radhakrishnan (supra) as a precedent, and distinguished it as follows:

> "45. The position that emerges both before and after the decision in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject-matter of the arbitration agreement is under a positive obligation to refer

parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 :

(2010) 1 SCC (Civ) 12] has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud:

45.1. First and foremost, it is necessary to emphasise that the judgment in N. Radhakrishnan [N. Radhakrishnan v.

Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. More often than not, a bogey of fraud is set forth if only to plead that the dispute cannot be arbitrated upon. To allow such a plea would be a plain misreading of the judgment in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] . As I have noted earlier, that was a case where the appellant who had filed an application under Section 8 faced with a suit on a dispute in partnership had raised serious issues of criminal wrongdoing, misappropriation of funds and malpractice on the part of the respondent. It was in this background that this Court accepted the submission of the respondent that the arbitrator would not be competent to deal with matters "which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation". Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. 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 arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 :

(2010) 1 SCC (Civ) 12] may come into existence.

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. The 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. The 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." After the statement of the law, the learned Judge referred to an instructive passage by Gary B. Born as follows:

> "56. The legal position has been succinctly summarised in International Commercial Arbitration by Gary B. Born [2nd Edn., Vol. I, p. 846] thus:
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> "... 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." (See also in this context International Arbitration Law and Practice by Mauro Rubino-Sammartano [2nd Edn., p. 179].)" Mr. Saurabh Kirpal took exception to Sikri, J.'s judgment in that Sikri, J.
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> did not refer to paragraph 52 of the 246 th Law Commission Report and its aftermath. Paragraph 52 of the 246th Law Commission Report reads as follows:
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> "52. The Commission believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to section 16." (at p. 28) The Law Commission then added, by way of amendment, a proposed section 16(7) as follows:
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> "Amendment of Section 16
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> 10. In section 16, After sub-section (6), insert sub-section "(7) The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc." [NOTE: This amendment is proposed in the light of the Supreme Court decisions (e.g. N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72) which appear to denude an arbitral tribunal of the power to decide on issues of fraud etc.]" (at p. 50) He then referred to the fact that the aforesaid sub-section was not inserted by Parliament by the 2015 Amendment Act, which largely incorporated other amendments proposed by the Law Commission. His argument therefore was that N. Radhakrishnan (supra) not having been legislatively overruled, cannot now be said to be in any way deprived of its precedential value, as Parliament has taken note of the proposed section 16(7) in the 246th Law Commission Report, and has expressly chosen not to enact it. For this proposition, he

referred to La Pintada (supra). This judgment related to a challenge to an award granting compound interest, inter alia, in a case where a debt is paid late, but before any proceedings for its recovery had begun. Lord Brandon of Oakbrook, who wrote the main judgment in this case, stated:

"There are three cases in which the absence of any common law remedy for damage or loss caused by the late payment of a debt may arise, cases which I shall in what follows describe for convenience as case 1, case 2 and case 3. Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged" (at p. 122) After referring to various precedents, the learned Judge referred to a Law Commission Report of 07.04.1978, which contained recommendations for alterations in the law and a draft bill which would remedy injustice to unpaid creditors in all the three cases set out hereinabove. However, when Parliament passed the Administration of Justice Act, 1982, it covered cases 2 and 3 but not case 1. In this context, Lord Brandon held:

"My first main reason is that the greater part of the injustice to creditors which resulted from the London, Chatham and Dover Railway case has now been removed, to a large extent by legislative intervention, and to a lesser extent by judicial qualification of the scope of the decision itself. My second main reason is that, when Parliament has given effect by legislation to some recommendations of the Law Commission in a particular field, but has taken what appears to be a policy decision not to give effect to a further such recommendation, any decision of your Lordships' House which would have the result of giving effect, by another route, to the very recommendation which Parliament appears to have taken that policy decision to reject, could well be regarded as an unjustifiable usurpation by your Lordships' House of the functions which belong properly to Parliament, rather than as a judicial exercise in departing from an earlier decision on the ground that it has become obsolete and could still, in a limited class of cases, continue to cause some degree of injustice." (at pp. 129-130) One can see from the speeches of the other Law Lords, with what great reluctance they allowed the appeal and set aside the Court of Appeal's judgment. Each of the Law Lords did so with regret and reluctance. The real reason why London, Chatham and Dover Railway Company v.

South Eastern Railway Company, [1893] A.C. 429 ["London Railway Case"] could not be overruled via a common law (as opposed to a statutory) route was because the statutory route regarded the award of interest on debts as a remedy to which a creditor should not be entitled to as of right, but only as a matter of discretion; whereas the common law route granted them such interest as a matter of right. If, in overruling the London Railway Case (supra), two parallel remedies would be created, this would lead to an inconsistent position in law, as a result of which, no departure

was made from the 1893 decision. Also, in the words of Lord Brandon, it was held:

> "In any event the only remaining loophole of injustice to creditors paid late is small, has existed for many years and does not seem to require closing urgently." (at pp. 130-131)

> 12. It is a little difficult to apply this case to resurrect the ratio of N. Radhakrishnan (supra) as a binding precedent given the advance made in the law by this Court since N. Radhakrishnan (supra) was decided.

Quite apart from what has been stated by us in paragraph 9 above, as to how N. Radhakrishnan (supra) cannot be considered to be a binding precedent for the reasons given in the said paragraph, we are of the view that the development of the law by this Court cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by Parliament. Parliament may have felt, as was mentioned by Lord Reid in British Railways Board and Herrington, 1972 A.C. 877 [House of Lords], that it was unable to make up its mind and instead, leave it to the courts to continue, case by case, deciding upon what should constitute the fraud exception. 1 Parliament may also have thought that section 16(7), proposed by the Law Commission, is clumsily worded as it speaks of "a serious question of law, complicated questions of fact, or allegations of fraud, corruption, etc." N. Radhakrishnan (supra) did not lay down that serious questions of law or complicated questions of fact are non-arbitrable. Further, "allegations of fraud, corruption, etc." is vague. For this reason also, Parliament may have left it to the courts to work out the fraud exception. In any case, we have pointed out that dehors any such provision, the ratio in N. Radhakrishnan (supra), being based upon a judgment under the 1940 Act, and without considering sections 5, 8 and 16 of the 1996 Act in their proper perspective, would all show that the law laid down in this case cannot now be applied as a precedent for application of the fraud mantra to negate arbitral proceedings. For the reasons given in this judgment, the House of Lords' decision would have no application inasmuch as N. 1 This case is referred to in Lord Brandon's judgment in La Pintada (supra) and distinguished at p. 130 of his judgment.

Radhakrishnan (supra) has been tackled on the judicial side and has been found to be wanting.

13. The judgment in Ayyasamy (supra) was then applied in Ameet Lalchand Shah v. Rishabh Enterprises, (2018) 15 SCC 678. After extracting paragraph 25 from Sikri, J.'s judgment and paragraph 48 of Chandrachud, J.'s judgment in Ayyasamy (supra), the Court held:

> "37. 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 1 Ameet Lalchand Shah misrepresented by inducing the respondents to pay higher 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 5-3-2015 before the Economic Offences Wing, Delhi. Appellant 1 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."

14. In a recent judgment reported as Rashid Raza (supra), 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." 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 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.

15. At this stage, it is necessary to deal with the broad statement of the law in Afcons (supra) and Booz Allen (supra). When Afcons (supra) refers in paragraph 27(iv) to "cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.", this must now be understood in the sense laid down in Ayyasamy (supra) and Rashid Raza (supra). When it comes to paragraph 27(vi) in Afcons (supra), and paragraph 36(i) in Booz Allen (supra), namely, cases involving prosecution for criminal offences, it is also important to remember that the same set of facts may have civil as well as criminal consequences. Thus, in K.G. Premshanker v. Inspector of Police, (2002) 8 SCC 87 ["Premshanker"], this Court had to answer a reference made to it as follows:

> "7. This Court on 9-11-1998, passed the following order:
>
> "Since we are of the view that the judgment of this Court in V.M. Shah v. State of Maharashtra [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] which has been relied upon by Mr Gopal Subramaniam, learned Senior Counsel appearing for the petitioner, requires reconsideration, we refer this petition to a larger Bench for disposal. Let the

record be placed before Hon. the Chief Justice for necessary orders." The observations in V.M. Shah v. State of Maharashtra, 1995 (5) SCC 767, which led to the reference, are set out in paragraph 11 as follows:

"11. In the background of the aforesaid facts, we would refer to the observations made in V.M. Shah case [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] which are as under: (SCC p.

770, para 11) "11. As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court, in particular, in summary trial for offences like Section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets nor the decree becomes inoperative." (emphasis in original) After referring to sections 40 to 43 of the Indian Evidence Act, 1872, and the judgment in M.S. Sheriff v. The State of Madras, 1954 SCR 1144, this Court held:

"32. In the present case, the decision rendered by the Constitution Bench in M.S. Sheriff case [AIR 1954 SC 397 :

1954 Cri LJ 1019] would be binding, wherein it has been specifically held that no hard-and-fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. The law envisages "such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for limited purpose such as sentence or damages".

33. Hence, the observation made by this Court in V.M. Shah case [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case [(1970) 3 SCC 694] are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case [AIR 1954 SC 397 : 1954 Cri LJ 1019] as well as Sections 40 to 43 of the Evidence Act." Likewise, in P. Swaroopa Rani v. M. Hari Narayana, (2008) 5 SCC 765, this Court laid down the proposition:-

"11. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the facts and circumstances of each case.

(See M.S. Sheriff v. State of Madras [AIR 1954 SC 397], Iqbal Singh Marwah v. Meenakshi Marwah [(2005) 4 SCC 370 : 2005 SCC (Cri) 1101] and Institute of Chartered Accountants of India v. Assn. of Chartered Certified Accountants [(2005) 12 SCC 226 : (2006) 1 SCC (Cri) 544].)" In Syed Askari Hadi Ali Augustine Imam v. State (Delhi Admn.), (2009) 5 SCC 528 , it was held:

"24. If primacy is to be given to a criminal proceeding, indisputably, the civil suit must be determined on its own merit, keeping in view the evidence brought before it and not in terms of the evidence brought in the criminal proceeding. The question came up for consideration in K.G. Premshanker v. Inspector of Police [(2002) 8 SCC 87 : 2003 SCC (Cri) 223] .....

25. It is, however, significant to notice that the decision of this Court in Karam Chand Ganga Prasad v. Union of India [(1970) 3 SCC 694] , wherein it was categorically held that the decisions of the civil courts will be binding on the criminal courts but the converse is not true, was overruled ..... Axiomatically, if judgment of a civil court is not binding on a criminal court, a judgment of a criminal court will certainly not be binding on a civil court. " In Kishan Singh v. Gurpal Singh (2010) 8 SCC 775, the Court referred to all the relevant judgments on the subject and ultimately held thus:

"13. In V.M. Shah v. State of Maharashtra [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] this Court has held as under: (SCC p. 770, para 11) "11. As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court, in particular, in summary trial for offences like Section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets disturbed nor the decree becomes inoperative."

14. The correctness of the aforesaid judgment in V.M. Shah [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] was doubted by this Court and the case was referred to a larger Bench in K.G. Premshanker v. Inspector of Police [(2002) 8 SCC 87 :

2003 SCC (Cri) 223 : AIR 2002 SC 3372] . In the said case, the judgment in V.M. Shah [(1995) 5 SCC 767 : 1995 SCC (Cri) 1077] was not approved. While deciding the case, this Court placed reliance upon the judgment of the Privy Council in King Emperor v. Khwaja Nazir Ahmad [(1943-44) 71 IA 203 : AIR 1945 PC 18] wherein it has been held as under:

(IA p. 212) "... It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded [upon] the same or similar allegations. Moreover, the police investigation was stopped, and it cannot be said with certainty that no more information could be obtained. But even if it were not, it is the duty of a criminal court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision which is not binding [upon] it." (emphasis added)

15. In P. Swaroopa Rani v. M. Hari Narayana [(2008) 5 SCC 765 : (2008) 3 SCC (Cri) 79 : AIR 2008 SC 1884] this Court has held as under: (SCC pp. 769-71, paras 11, 13 & 18) "11. It is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the facts and circumstances of each case. ... xxx xxx xxx

13. Filing of an independent criminal proceeding, although initiated in terms of some observations made by the civil court, is not barred under any statute. ... xxx xxx xxx

18. It goes without saying that the respondent shall be at liberty to take recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case are permissible."

16. In Iqbal Singh Marwah v. Meenakshi Marwah [(2005) 4 SCC 370 : 2005 SCC (Cri) 1101] this Court held as under:

(SCC pp. 389-90, para 32) "32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings is entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein."

17. In Syed Askari Hadi Ali Augustine Imam v. State (Delhi Admn.) [(2009) 5 SCC 528] this Court considered all the earlier judgments on the issue and held that while deciding the case in Karam Chand [(1970) 3 SCC 694 : AIR 1971 SC 1244], this Court failed to take note of the Constitution Bench judgment in M.S. Sheriff [AIR 1954 SC 397 : 1954 Cri LJ 1019] and, therefore, it remains per incuriam and does not lay down the correct law. A similar view has been reiterated by this Court in Vishnu Dutt Sharma v. Daya Sapra [(2009) 13 SCC 729 : (2010) 1 SCC (Cri) 1229] , wherein it has been held by this Court that the decision in Karam Chand [(1970) 3 SCC 694 : AIR 1971 SC 1244] stood overruled in K.G. Premshanker [(2002) 8 SCC 87 : 2003 SCC (Cri) 223 : AIR 2002 SC 3372].

18. Thus, in view of the above, the law on the issue stands crystallised to the effect that the findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject-matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Evidence Act, 1872, dealing with the relevance of previous judgments in subsequent cases may be taken into consideration. " To complete the review of case law on the subject, we may finally refer to Guru Granth Saheb Sthan Meerghat Vanaras v. Ved Prakash, (2013) 7 SCC 622, wherein this Court, after referring to the previous case law on the subject held as follows:

> "17. In K.G. Premshanker [K.G. Premshanker v. Inspector of Police, (2002) 8 SCC 87 : 2003 SCC (Cri) 223] the effect of the above provisions (Sections 40 to 43 of the Evidence Act) has been broadly noted thus: (SCC p. 97, para 30) "30. ... (4) if the criminal case and civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41.
>
> Section 41 provides which judgment would be conclusive proof of what is stated therein." Moreover, the judgment, order or decree passed in previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case the court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. In each and every case the first question which would require consideration is, whether the judgment, order or decree is relevant; if relevant, its effect. This would depend upon the facts of each case.
>
> 18. In light of the above legal position, it may be immediately observed that the High Court was not at all justified in staying the proceedings in the civil suit till the decision of criminal case. Firstly, because even if there is a possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration.

Secondly, in the facts of the present case there is no likelihood of any embarrassment to the defendants (Respondents 1 to 4 herein) as they had already filed the written statement in the civil suit and based on the pleadings of the parties the issues have been framed. In this view of the matter, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defence(s) of Respondents 1 to 4 in the criminal proceedings."

16. In the light of the aforesaid judgments, paragraph 27(vi) of Afcons (supra) 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.

17. Section 17 of the Contract Act defines "fraud" as follows:

> "17. "Fraud" defined.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent 2, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract— (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
>
> (2) the active concealment of a fact by one having knowledge or belief of the fact;
>
> (3) a promise made without any intention of performing it; (4) any other act fitted to deceive;
>
> (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak3, or unless his silence is, in itself, equivalent to speech." Section 10 of the Contract Act states that all agreements are contracts if they are made with the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. Section 14 states that consent is said to be free when it is not caused inter alia by fraud as defined in section 17. Importantly, the section goes on to say that consent is said to be so caused when it would not have been given but for the existence, inter 2 Cf. S. 238, infra.

3 See S. 143, infra.

alia, of such fraud. Where such fraud is proved, and consent to an agreement is caused by fraud, the contract is voidable at the option of the party whose consent was so caused. This is provided by section 19 of the Contract Act which reads as follows:

> "19. Voidability of agreements without free consent.— When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true.

> Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. 4 Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party of whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.
>
> It has been held by the Bombay High Court in Fazal D. Allana v.
>
> Mangaldas M. Pakvasa, AIR 1922 Bom 303, that section 17 of the Contract Act only applies if the contract itself is obtained by fraud or

4 It is important to note that the exception in section 19 does not apply to fraudulent misrepresentation as the words "by silence" alone go with the word "fraudulent", thus not applying to cases of fraudulent misrepresentation. In John Minas Apcar v. Louis Caird Malchus, AIR 1939 Cal 473, the concurrent judgments of Derbyshire, C.J. and Lort Williams, J. referred to a passage from Sir Frederick Pollock and Sir Dinshah Mulla, in their work on the Contract Act, 6 th Edition, which said:

> "It will be observed that the exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent".
>
> (see pp. 476-477) cheating. However, a distinction is made between a contract being obtained by fraud and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating. The latter would fall outside section 17 of the Contract Act, in which the remedy for damages would be available, but not the remedy for treating the contract itself as being void (see pp. 311-312). This is for the reason that the words "with intent to deceive another party thereto or his agent" must be read with the words "or to induce him to enter into the contract", both sets of expressions speaking in relation to the formation of the contract itself. This is further made clear by sections 10, 14 and 19, which have already been referred to hereinabove, all of which deal with "fraud" at the stage of entering into the contract. Even section 17(5) which speaks of "any such act or omission as the law specially deals to be fraudulent" must mean such act or omission under such law at the stage of entering into the contract.

Thus, fraud that is practiced outside of section 17 of the Contract Act, i.e., in the performance of the contract, may be governed by the tort of deceit, which would lead to damages, but not rescission of the contract itself.5 5 In State of Tripura v. Province of East Bengal, Union of India, 1951 SCR 1, in a separate concurring judgment, Mukherjea, J. went into what in English law was considered as a tort (see pp. 44-49). The learned Judge concluded as follows:

"Thus tort is a civil injury other than a breach of contract which is capable of sustaining an action for unliquidated damages in a court of law. If the appropriate remedy is not a claim for unliquidated damages but for injunction or some other relief, it would not rank as a tort though all the same it would be an actionable wrong." (at p. 48)

18. Both kinds of fraud are subsumed within the expression "fraud" when it comes to arbitrability of an agreement which contains an arbitration clause.

19. Now, as to the measure of damages for fraudulent misrepresentation by which a party to the contract is induced to enter into the contract. In Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd., [1996] 4 All ER 769, the appellant, Smith New Court ["SMC"] purchased shares in a company, Ferranti International Signal Inc. ["F. Inc."], which had been pledged to a bank as security for a loan made by the bank to a client. SMC was given the impression that it was in competition with two other bidders for the Likewise, in Ellerman & Bucknall Steamship Co. Ltd. v. Sha Misrimal Bherajee, [1966] Supp SCR 92, the Court referred to the tort of deceit as follows:

"Deceit is a false statement of a fact made by a person knowingly or recklessly with the intent that it shall be acted upon by another who does act upon it and thereby suffers damage"; see A Textbook of the Law of Tort by Winfield, 5th Edn., at p. 379." (at p. 99) On the facts, it was then concluded:

"Now let us look at the relevant facts of the present case. It was one of the terms of the contract between the seller and the buyer that the goods should be packed in new fibre drums. The standard of good order and condition of the packages was agreed upon by the parties to the contract. The shipowners knew that condition as the Mate's receipt disclosed the same. If the drums had been mentioned as old in the bill of lading, the said bill would not have been a clean bill. Though the apparent condition of the drums was old, the shipowners made an assertion that they were not old drums, i.e., they gave a clean bill. This representation was obviously intended, in collusion with the seller, to enable him to operate upon the credit with the Bank. This collusion is also apparent from the indemnity bond they took from the seller to guard themselves against the consequences of the said representation. All the elements of deceit are present." (at p. 102) shares and, therefore, bid a very high price for the shares. When the share price collapsed as a result of a major fraud, SMC investigated the circumstances of its purchase and discovered that the two other bidders were not there at the time of the sale. SMC then brought proceedings against the first defendant, Scrimgeour Vickers (Asset Management) Ltd., and the bank, claiming damages for fraudulent misrepresentation.

The House of Lords referred to the leading judgment in Doyle v. Olby (Ironmongers) Ltd., [1969] 2 All ER 119 (Queen's Bench) ["Doyle"], and held:

"Doyle v. Olby (Ironmongers) Ltd. establishes four points. First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (i.e. caused by) entering into the transaction. Second, that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it. Third, damages for deceit are not limited to those which were reasonably foreseeable. Fourth, the damages recoverable can include consequential loss suffered by reason of having acquired the asset." (at p. 777) In this judgment of Lord Browne-Wilkinson, a useful summary of the principles that apply in assessing the damages payable where the plaintiff has been induced to enter into a contract by a fraudulent misrepresentation, are stated as follows:

"In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property:

(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;

(4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;

(5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or

(b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud." (at pp. 778-779) Likewise, in the same judgment Lord Steyn, after referring to the seminal judgment in Doyle [supra] stated the law thus:-

"The logic of the decision in Doyle v. Olby (Ironmongers) Ltd. justifies the following propositions.

(1) The plaintiff in an action for deceit is not entitled to be compensated in accordance with the contractual measure of damage, i.e. the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain.

(2) The plaintiff in an action for deceit is, however, entitled to be compensated in respect of his negative interest. The aim is to put the plaintiff into the position he would have been in if no false representation had been made.

(3) The practical difference between the two measures was lucidly explained in a contemporary case note on Doyle v. Olby (Ironmongers) Ltd.: G. H. Treitel, "Damages for Deceit" (1969) 32 M.L.R. 556, 558–559. The author said:

"If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure (under which he may recover something even if the actual value of what he has recovered is greater than the price)." (4) Concentrating on the tort measure, the remoteness test whether the loss was reasonably foreseeable had been authoritatively laid down in The Wagon Mound in respect of the tort of negligence a few years before Doyle v. Olby (Ironmongers) Ltd. was decided: Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound) [1961] A.C. 388. Doyle v. Olby (Ironmongers) Ltd. settled that a wider test applies in an action for deceit. (5) The dicta in all three judgments, as well as the actual calculation of damages in Doyle v. Olby (Ironmongers) Ltd. , make clear that the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction induced by the wrongdoer. That includes heads of consequential loss.

(6) Significantly in the present context the rule in the previous paragraph is not tied to any process of valuation at the date of the transaction. It is squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences. The legal measure is to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement." (at p. 792) In an important passage titled "the date of transaction rule", Lord Steyn emphasised that in cases of fraudulent misrepresentation, there is only one and not two alternative measures of damages, namely, the loss truly suffered by the party affected who must be put back in the same place as if he had never entered into the transaction. In an action for deceit, the price paid less the valuation at the transaction date is simply a method of measuring such a loss, but is not a substitute for the basic rule. This was felicitously

stated as follows:

"The date of transaction rule That brings me to the perceived difficulty caused by the date of transaction rule. The Court of Appeal [1994] 1 W.L.R. 1271, 1283G, referred to the rigidity of "the rule in Waddell v. Blockey (1879) 4 Q.B.D. 678, which requires the damages to be calculated as at the date of sale." No doubt this view was influenced by the shape of arguments before the Court of Appeal which treated the central issue as being in reality a valuation exercise. It is right that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale. To the extent that this method is adopted, the selection of a date of valuation is necessary. And generally the date of the transaction would be a practical and just date to adopt. But it is not always so. It is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overriding compensatory rule: Potts v. Miller , 64 C.L.R. 282, 299, per Dixon J. and County Personnel (Employment Agency) Ltd. v. Alan R. Pulver & Co. [1987] 1 W.L.R. 916, 925–926, per Bingham L.J. Moreover, and more importantly, the date of transaction rule is simply a second order rule applicable only where the valuation method is employed. If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it. An example of such a case is to be found in Cemp Properties (U.K.) Ltd. v. Dentsply Research & Development Corporation [1991] 2 E.G.L.R. 197, 201, per Bingham L.J. There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In Ruxley Electronics and Construction Ltd. v. Forsyth [1996] A.C. 344, 360G, Lord Mustill said: "There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee." In an action for deceit the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases. It is not a substitute for the single legal measure: it is an application of it." (at pp. 793-794)

20. At this stage, in order to discover whether there is a strong prima facie case made out in favour of HSBC in the present section 9 proceedings, it is necessary to refer to the Foreign Final Award dated 27.09.2014. The Foreign Final Award in this case, after setting out the case of HSBC (the Claimant before the Arbitral Tribunal) and the case of Avitel India and the Jain family (the Respondents before the Arbitral Tribunal), set out the issues for determination thus:

"ISSUES Issues for Determination 4.8 Against this background, the Tribunal considers that the issues for determination are as follows:

i. have any of the Respondents made representations and/or warranties to the Claimant before the Claimant's investment in Avitel India and if so, what were these representations and/or warranties;

ii. if so, did the Respondents make the representations and/or warranties in order to induce the Claimant to invest in Avitel India;

iii. if so, was the Claimant so induced and did it rely on the Respondents' representations and/or warranties; iv. if so, were any of these representations and/or warranties untrue;

v. if so, have any of the Respondents made such representations and/or warranties knowing that these were false and/or without belief in their truth, or recklessly and without caring whether these representations and/or warranties were true or false;

vi. if so, are any of the Respondents liable to the Claimant in tort for deceit;

vii. if so, are any of the Respondents liable to the Claimant for fraudulent misrepresentation pursuant to the relevant provisions of the Contract Act;

viii. if so, is the Claimant entitled to damages for fraudulent misrepresentation pursuant to the relevant provisions of the Contract Act;

ix. If so, are any of the Respondents liable to the Claimant for breach of warranty;

x. If so, are any of the Respondents to indemnify the Claimant in respect of any of the Claimant's claims; xi. if the Claimant is entitled to claim damages, what is the amount of damages the Claimant is entitled to; xii. if so, is the Claimant entitled to interest and if so, at what rate;

xiii. is the Claimant entitled to the reliefs sought; xiv. costs;

xv. are the Claimant's shares in Avitel India to be cancelled and if so, on what basis?" In answering these issues, the Arbitral Tribunal found:

"7.14 The Tribunal additionally accepts the Claimant's submission and finds that the Claimant was induced by and did rely on the Respondents' further representations that, inter alia, the Avitel Group had immediate business with a value of approximately USD 1 billion with independent and legitimate customers as well as good relationships with independent and legitimate suppliers and service providers (see paragraphs 5.2(i)(l), 5.17(a.xv) and 5.17(a.xvi) above). 7.15 The Tribunal rejects

the Respondents' submission and finds that Clause 6.3 of the SSA unequivocally establishes that the Claimant did rely on the representations and warranties in making its investment in Avitel India." It further found that the siphoning off of a large part of the amount of USD 60 million into companies owned or controlled by the Jain family was made out as follows:

"8.20 The Claimant relies in support, inter alia, on the witness evidence of Mr. van Schalkwyk, HSBC Middle East Limited's Regional Head of Fraud Risk, who conducted an investigation into the banking activities of the Jain Family in the United Arab Emirates. This investigation established the flow of funds following the Claimant's investment [Witness Statement of Mr. van Schalkwyk, at para.9] in summary as follows:

(i) on 10 May 2011,an amount of USD 60,000,000.00 was received by Avitel Dubai (Emirates NDB account number 744859021001) ("the Avitel Dubai Account") from Avitel Mauritius. This represented the Claimant's initial investment [Witness Statement of Mr. van Schalkwyk, at para.17(a)]. Mr. van Schalkwyk was able to ascertain this information from a statement of the Avitel Dubai Account for the period between 1 May 2011 to 23 September 2011 which statement was provided to him by Mr. Derek Wylde of HSBC [A copy of this statement is exhibited to the Witness Statement of Mr. van Schalkwyk, at RVS-I pp. 2 to 3];

(ii) a series of payments was then made by Avitel Dubai as follows:

a. on 15 May 2011 the Avitel Dubai Account was debited in the amount of USD 6 million and which amount was credited to an Emirates NBD account held in the name of Highend. This was followed by multiple small transfers out of Highend's bank account to a number of miscellaneous accounts [Witness Statement of Mr. van Schalkwyk, at para. 17(b)(i)] ;

b. on 23 May 2011, the Avitel Dubai Account was debited in the amount of USD 12.22 million and which amount was credited to the same Emirates NBD account held in the name of Highend. This amount was in turn transferred to an entity identified as Avitel Limited on 30 May 2011 whose full beneficial ownership Mr. van Schalkwyk has not been able to confirm [Witness Statement of Mr. van Schalkwyk, at para. 17(b)

(ii)];

c. on 9 June 2011 the Avitel Dubai Account was debited in the amount of USD 10 million which amount was then credited to a different Emirates NBD bank account which is also held in the name of Highend. On 27 July 2011 this amount was transferred to a further Emirates NBD account in the name of Digital Fusion. This sum was thereafter transferred to Cralton Capital Commercial Broker Services LLC ("Cralton") which appears to be a broking and investment company [Witness Statement of Mr. van Schalkwyk, at para.17(b) (iii)] in respect of which company Mr. Boban Idiculla

is the sole signatory to its bank account with Emirates NDB [Witness Statement of Mr. van Schalkwyk, at fn. 9];

d. on 13 June 2011 and 14 June 2011, the Avitel Dubai Account was debited in the amounts of USD 10 million and USD 5 million respectively which amounts were credited to an Emirates NBD account held in the name of Digital Fusion.

On 19 July 2011 and 26 July 2011, Digital Fusion's account was debited in the amounts USD 5 million and USD 10 million respectively which amounts were credited to an Emirates NBD account held in the name of Cralton. The account records of Cralton held with Emirates NBD show that the transfers in July 2011 totalling USD 25 million were used to make various transfers, fixed term deposits and investments between Cralton, Highend, Digital Fusion and SPAC [Witness Statement of Mr. van Schalkwyk, at para.17(b)(iv)];

e. on 23 February 2012, the Avitel Dubai Account was debited in the amount of USD 8 million which amount was credited to the Emirates NBD account held in the name of Highend. On 28 February 2012, this account was debited in the amount of USD 7.48 million which was credited to a different Emirates NBD account held in the name of SPAC. A further debit in the amount of USD 500,000 occurred on 28 February 2012 which sum was routed through two different Emirates NBD accounts, one held in the name of DejaVu FZ-LLC and one in the name of Al Jalore Trading FZE, before this sum was finally credited to a Dubai Multi Commodities Centre entity, namely Emerald DMCC [Witness Statement of Mr. van Schalkwyk, at para.17(b)(v)];

f. Mr. van Schalkwyk understands that between 18 April 2012 and 29 April 2012, there was a further transfer from the Avitel Dubai Account of USD 8.5 million. However, he has been unable to ascertain to which account(s) these funds have been transferred to [Witness Statement of Mr. van Schalkwyk, at para.18].” It then found that the following admitted facts would show that most of the representations made by the Avitel Group and the Jain family to HSBC were false in that:

> “8.70 The Tribunal notes that the Respondents have not denied the accuracy of the following:
>
> a. the Avitel Group did not have a direct relationship with the BBC and was not close to signing the BBC Contract;
>
> b. Avitel Dubai's offices had been closed for a period of time;
>
> c. Mr. Siddhartha Jain was a forty nine percent shareholder in Highend as well as in Digital Fusion at the material time;
>
> d. Mr. Siddhartha Jain is the sole signatory of and therefore controls Highend's and Digital Fusion's bank accounts with Emirates NBD;

e. Mr. Siddhartha Jain was co-signatory (together with one Mr. Ankit Garg) of SPAC's bank accounts with Emirates NDB;

f. Kinden was not in existence between 12 October 2010 and 26 October 2011;

g. Mr. Boban Idiculla who is the sole shareholder and director of Kinden, is also the sole signatory of and therefore controls Cralton's bank accounts with Emirates NDB;

h. Purple Passion, which was wholly owned by Mr. Siddhartha Jain, was dissolved on 23 November 2010;

i. In total, USD 59.72 million of the Claimant's USD 60 million investment have been transferred out of Avitel Dubai's bank accounts and into bank accounts the majority of which are controlled by the Jain Family;

j. the domain names for Kinden, SPAC, Highend and Digital Fusion had been registered by Mr. Hrishi Jain;

k. on 28 January 2012, the websites for Kinden, SPAC, Highend and Digital Fusion had been transferred from the hosting site "rediffinalpro.com " to "rirev.com", the same hosting site which had been utilized by Avitel Dubai since 28 June 2011. Each website was thereafter re-registered employing a proxy service called "Domains By Proxy, LLC", which provides anonymity to the owners of websites on the internet." As a result thereof, issue (iv) was answered stating:

> "8.72 In these circumstances and also for the reasons set out below, the Tribunal accepts the Claimant's submissions and finds that the following representations and/or warranties made by the Respondents were false and/or misleading:
>
> a. the Avitel Group had been in advanced negotiations with the BBC and a BBC Contract had been close to execution. This is because the Respondents do not deny that the Avitel Group never had a direct relationship with the BBC and was not about to sign the BBC Contract;
>
> b. at the Completion Date, the Avitel Group had the benefit of the Material Contracts with Kinden, SPAC and Purple Passion in total valued at approximately USD 658 million. This is because in effect, Kinden and Purple Passion had not been in existence at the time of the Claimant's investment;
>
> c. at the Completion Date, the Avitel Group's key customers Kinden, SPAC and Purple Passion as well as Avitel Dubai's key supplier, Highend, and key service provider, Digital Fusion, were all independent and legitimate companies. This is because in effect, Kinden and Purple Passion had not been in existence at the time of the Claimant's investment and Mr. Siddhartha Jain was the shareholder and/or sole signatory to Highend's and Digital Fusion's bank accounts with Emirates NDB and

was also co-signatory to SPAC's bank accounts with Emirates NDB.

Further, in light of the complex web of transactions to, from and between Highend's, Digital Fusion's, SPAC's and Cralton's various bank accounts with Emirates NDB (see paragraph 8.20 above), the Tribunal accepts the Claimant's submission that none of these entities were independent and legitimate companies. As for Mr. van Schalkwyk's evidence, as there is no evidence adduced which would challenge the veracity and reliability of Mr. van Schalkwyk's evidence, the Tribunal sees no reason to disregard his evidence. In the Tribunal's view he is a credible witness;

d. the Claimant's investment was required and was to be utilized for purchasing equipment in order to enable Avitel Dubai to service the BBC Contract. In light of the circumstances referred to in paragraph 8.68 above, the Tribunal accepts the Claimant's submission that its investment has been siphoned off by the Respondents;

e. the representations and/or warranties contained in Clause 6.2.1 of the SSA because the information provided to the Claimant prior to and during the negotiations and the preparations of the SSA had not been provided by the Respondents and its/or their representatives and advisors in good faith and had been untrue, inaccurate and misleading for the reasons set out in paragraphs 8.72 (a) to (d) above;

f. the representations and/or warranties contained in Clause 6.2.2 of the SSA because the representations and warranties made by the Respondents in the SSA read in conjunction with Clause 7 of Schedule 3 as well as Annexure C to the Disclosure Letter did contain untrue statements of material facts as the Avitel Group did not have immediate business worth close to USD 1 billion with independent and legitimate customers including the purported relationship with the BBC;

g. the representations and/or warranties contained in Clause 6.2.3 of the SSA because there had been facts or circumstances relating to the affairs of Avitel India or any Subsidiary which had not been disclosed to the Claimant and which could have had an impact on the decision of the Claimant to invest in Avitel India. In the Tribunal's view, the fact that Kinden and Purple Passion did not exist at the material time and that Highend's, Digital Fusion's and SPAC's bank accounts with Emirates NDB are controlled by Mr. Siddhartha Jain, would have had an impact on the Claimant's decision to invest in Avitel India;

h. the representations and/or warranties contained in Clauses 7.1 and 7.3 of Schedule 3 of the SSA read in conjunction with the Disclosure Letter as Kinden and Purple Passion did not exist at the Completion Date such that the Material Contracts with these entities could not have existed either;

i. the representations and/or warranties contained in Clause 7.5 of Schedule 3 of the SSA because Mr. Siddhartha Jain was at the Completion Date a forty nine percent

shareholder of Highend and Digital Fusion so any transactions with these entities were Related Party Transactions which were not permitted pursuant to Clause 7.5 of Schedule 3 of the SSA and which, in any event, had not been concluded on an arm's length basis;

j. the representations and/or warranties contained in Clause 10 of Schedule 3 of the SSA because Avitel India's and the Subsidiaries' accounts could not have given a true and fair view of the assets, liabilities and state of affairs of Avitel India and the Subsidiaries at the Accounts Date and of the profits or losses for the period concerned. For example, the Material Contracts with Kinden and Purple Passion did not exist at the Completion Date;

k. the representations and warranties contained in Clause 8 of Schedule 3 of the SSA because if the accounts did not give a true and fair view of the assets, liabilities and state of affairs of Avitel India and the Subsidiaries, all Tax Returns relating to Avitel India and the Subsidiaries or the Business or the assets of Avitel India and each of the Subsidiaries could not have been correct in all material respects;

l. the representations and warranties contained in Clause 11 of Schedule 3 of the SSA because the Respondents falsely represented and warranted that Avitel India and each of the Subsidiaries were in material compliance with all applicable laws which in light of the Tribunal's findings in paragraphs 8.72(a) to (j) above, could not have been the case;

m. the representations and warranties contained in Clause 6.1 of the SSA because in light of the Tribunal's findings in paragraphs 8.72(a) to (k) above, not every representation and warranty made in the SSA and in Schedule 3 of the SSA was true, complete, accurate and not misleading at the Completion Date." As a result, in paragraph 20, a summary of findings was given as follows:

"20. SUMMARY 20.1 The Respondents chose not to attend the November 2013 Oral Hearing and the Tribunal is not satisfied that they were unable to attend or prevented from doing so. The dates for the November 2013 Oral Hearing had been fixed some nine months before the hearing itself. It was only on 19 April 2013 that the First Respondent vide Mr. Yogesh Garodia's Request applied for these dates to be rescheduled to dates later than 9 November 2013 but without any indication as to the exact dates it sought. The Second, Third and Fourth Respondent did not seek a re-scheduling of the November 2013 Oral Hearing until 29 July 2013 giving also no indication of alternative hearing dates asserting that the Respondents following the issue of the EOW Final Report, required additional time to file their witness statements and to prepare for the oral hearing. The Tribunal did not find this to be persuasive as there was still time. In subsequent correspondence on 15 October 2013, the Respondents further asserted that the November 2013 Oral Hearing fell over a holiday period in India, namely the Diwali Festival.

While the Tribunal accepts this, this hearing which was scheduled for and to be held in Singapore together with the substantial delay in seeking a postponement of the November 2013 Oral Hearing was not satisfactorily explained. The Respondents also sought an adjournment on the grounds, inter alia, of their inability to engage counsel. However, it appears to the Tribunal that during this period (i.e. from the time when they sought an adjournment up to the date of the November 2013 Oral Hearing), they were able to. The Tribunal also points out that although the Respondents at various stages ceased to be represented by lawyers, the letters written and signed by Mr. Yogesh Garodia either on behalf of the First Respondent or on behalf of all Respondents or the letters signed by the First Respondent (through Mr. Yogesh Garodia) Second, Third and Fourth Respondents, during this period were written in legal terminology including the employment of legal Latin maxims. The Respondents' applications for re-scheduling the hearing dates in the Tribunal's view must be viewed against the background of the failure of the Respondents to comply with the orders of the Emergency Arbitrator in proceedings in Singapore in which the Respondents had been represented by both Indian and Singapore counsel and provided evidence. All of the above are suggestive to the Tribunal of an attempt to delay these proceedings. 20.2 The Respondents provided no witness statements and did not adduce any oral evidence before this Tribunal although the Tribunal accepts that they did so in the proceedings before the Emergency Arbitrator, namely in Mr. Yogesh Garodia's Witness Statement. In reaching its findings and its decisions, this Tribunal has considered fully the Respondents' numerous submissions and Mr. Yogesh Garodia's Witness Statement as well as the documentary evidence. The Claimant provided evidence from a number of witnesses and also documentary evidence. As the Respondents did not attend the November 2013 Oral Hearing, the Tribunal tested the evidence of the Claimant's witnesses by asking a number of questions. The Tribunal finds each of the Claimant's witnesses to be credible and it accepts their evidence part of which is corroborated by the documentary evidence submitted by the Claimant Including an email from Ms. Sarah Jones, General Counsel at the BBC, dated 4 May 2012 confirming, inter alia, that the BBC had not entered into a contract with Avitel India, that Mr. John Linwood had not attended a meeting on 19 April 2011 with Mr. Anthony Bernbaum but at the same time was in an internal meeting with BBC staff.

20.3 In summary, the Tribunal finds that the Jain Family (namely the Second, Third and Fourth Respondents) engaged in a deliberate and dishonest scheme to induce the Claimant (part of HSBC) to invest in Avitel India (namely the First Respondent). The Claimant placed the investment because it had been advised by the Jain Family (making the representations also on behalf of Avitel India), verbally, in writing and in the SSA itself, that Avitel India was about to and from 2 August 2011 had signed a contract with the BBC, for the BBC to use the services of Avitel India. This was false. Not only had a contract not been negotiated, let alone signed with the BBC, but the BBC had no knowledge of it. 20.4 The misrepresentations and deception of the Respondents included the arrangement of a meeting between a representative of HSBC and a person who was falsely held out by the Respondents and purported to be the Chief Technical Officer of the BBC and who falsely purported to corroborate the Respondents' misrepresentations. The representations were made prior to the conclusion of the SSA and in the SSA itself. They were made knowingly to be untrue and were fraudulent." As a result thereof, it was found that HSBC, in respect of its claim for fraudulent misrepresentation, and its claim in tort for deceit, is entitled to damages in the total amount of USD 60 million plus interest and costs as awarded. The final declaration made in the Award then reads:

> "21.21 [The tribunal] Declares and Orders that upon the Respondents paying in full and unconditionally the sums awarded to the Claimant in paragraphs 21.15, 21.16, 21.18,

21.19 hereinabove and all costs arising out of and incidental to the cancellation of the Claimant's Preference Subscription Shares and Equity Subscription Shares (as defined in the SSA) in Avitel India, that the said shares be cancelled and that in this regard, the Parties take the requisite steps to effect the said cancellation within 30 days of receipt of such payment."

21. There can be no doubt whatsoever after reading the issues and some of the material findings in the Foreign Final Award that the issues raised and answered are the subject matter of civil as opposed to criminal proceedings. The fact that a separate criminal proceeding was sought to be started and may have failed is of no consequence whatsoever. We, therefore, hold on a conspectus of these facts, and following our judgments, that the issues raised and answered in the Foreign Final Award would indicate:

> (i) That there is no such fraud as would vitiate the arbitration clause in the SSA entered into between the parties as it is clear that this clause has to be read as an independent clause. Further, any finding that the contract itself is either null and void or voidable as a result of fraud or misrepresentation does not entail the invalidity of the arbitration clause which is extremely wide, reading as follows:
>
> "Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation, breach or termination ....." (emphasis supplied)
>
> (ii) That the impersonation, false representations made, and diversion of funds are all inter parties, having no "public flavour" as explained in paragraph 14 so as to attract the "fraud exception".

22. Thus, a reading of the Foreign Final Award in this case would show that a strong prima facie case has indeed been made out as the Award holds the BBC transaction as a basis on which the contract was entered into and the USD 60 million paid by HSBC, which would clearly fall within fraudulent inducement to enter into a contract under section 17 of the Contract Act. Such a contract would be voidable at the instance of HSBC. Also, the findings on the siphoning off of monies that were meant to be allocated for the performance of the BBC contract would attract the tort of deceit. The measure of damages for such fraudulent misrepresentation is not the difference between the value of the shares on the date of making the contract and the value HSBC would have received, if it had resold those shares in the market, after the purchase. As has been held in the judgments stated hereinabove, the measure of such damages would be to put HSBC in the same position as if the contract had never been entered into, which is, the entitlement to recover the price paid for the shares and all consequential losses. This being the case, it is difficult to accede to the Division Bench's finding as to the measure of damages in such cases.

23. So far as the other points raised by M/s. Mukul Rohatgi and Saurabh Kirpal are concerned, we wish to say nothing, as any finding on these points even prima facie would prejudice the section 48 proceedings pending in the Bombay High Court. So far as the appeal of HSBC is concerned, we are of the view that it has substance in that the USD 60 million that was to be kept aside vide the Single Judge's order, was fair and just in the facts of the case in that it is only the principal amount without any interest or costs that is ordered to be kept aside. Further, the reduction of USD 60 million to USD 30 million by the Division Bench is not justified given our finding on the measure of damages in the facts of this case.

24. It is clarified that any finding made on facts in this judgment is only prima facie for the purpose of deciding the section 9 petition. We have held that HSBC has made out a strong prima facie case necessitating that USD 60 million, being the principal amount awarded to them, is kept apart in the manner indicated by the learned Single Judge of the Bombay High Court. The balance of convenience is also in its favour. It is clear that in case HSBC was to enforce the Foreign Final Award in India in accordance with section 48 of the 1996 Act, irreparable loss would be caused to it unless at least the principal sum were kept aside for purposes of enforcement of the award in India. Accordingly, we dismiss Civil Appeal No.5145 of 2016 filed by Avitel India and the Jain family, and allow Civil Appeal No.5158 of 2016 filed by HSBC.

25. In this case, the Appellant is an angel investor in the shares of Avitel India. By a letter dated 04.07.2016, the Appellant herein expressed his concern on the observations and the freezing of the company's bank account by the Bombay High Court vide orders dated 22.01.2014 and 31.07.2014. The Appellant attended a meeting of the Board of Directors of Avitel India on 11.07.2016, in which the Chairman of the company, i.e., Mr. Pradeep Jain, explained to the Appellant in some detail as to the proceedings filed by HSBC against the company and the orders passed by the Arbitrators and Courts therein. The Chairman expressed a view that, ultimately, they were likely to succeed in this litigation. The Appellant stated that he was not satisfied with this point of view and asked for the return of the money invested along with interest at the rate of 12% per annum. The Chairman stated that the amounts invested by the Appellant were in equity shares, which were the fixed capital of the company, and any return of such investment is not permissible in law. The Appellant then stated the following, which is recorded in the Minutes of the Board Meeting dated 11.07.2016:

> "Mr. Savla stated that he would like to peruse the documents in detail and would not rest content till full justification is made available, if need so arises for redressal of issues involved. He requested that the disputes be decided by an Arbitrator. The Board unanimously consented that any disputes raised by Mr. Ravindra Savla, so long as they are arbitrable under law, shall be referred to arbitration in accordance with Indian law. Mr. Ravindra Savla stated that he would examine the papers provided to him and determine his further course of action.
>
> Mr. Ravindra Savla further requested that a copy of the Minutes of this Meeting of the Board of Directors be made available to him. The Chairman accepted the said request."

26. Almost immediately, the Appellant filed a section 9 petition under the 1996 Act before the learned ADJ, Mohali, which was decided by a judgment dated 03.08.2016, in which the learned ADJ held that the Board Resolution dated 11.07.2016 only showed that any disputes raised by the Appellant shall be referred to arbitration in accordance with Indian law, provided they are arbitrable disputes. It was then held that as serious allegations of fraud were raised by HSBC in the dispute between HSBC and the Avitel Group/Jain family, such dispute would not be arbitrable as per Indian law. Even otherwise, according to the learned ADJ, this dispute (i.e., the dispute between HSBC and the Avitel Group/Jain family) is pending adjudication before the Supreme Court of India, and any decision made by that Court shall have a direct bearing on the dispute between the parties in this case also. It was, therefore, held:

"11. In view of the detailed discussion made above, this court can safely conclude that the petitioner is a shareholder and has no specific separate arbitration agreement, so no arbitrable dispute arises, as per Indian law, which may be referred to arbitration or for which, provisions of section 9 of Arbitration and Conciliation Act can be involved for protection of his interest qua the shares purchased by him. Therefore, I do not find that any prima-facie case is made out in favour of applicant. Even balance of convenience is not in favour of the applicant and no irreparable loss will be caused to the applicant, if this application is not allowed. Thus no ground is made out for grant of relief under section 9 of the Act and section 151 of CPC and the application stands dismissed accordingly. File be consigned to the record room."

27. An appeal was filed against this judgment to the Punjab and Haryana High Court. A learned Single Judge of the High Court, by the impugned judgment dated 02.09.2016, held that the final relief sought for is the return of an invested amount with interest together with cancellation of the shares. Such disputes would be governed by the Companies Act, 2013. Therefore, following some of the judgments of the Supreme Court, the remedy for arbitration sought by the Appellant would be barred by implication in view of the provisions of the Companies Act, 2013. After discussing the "fraud exception" in some detail and stating that serious allegations of fraud and impersonation are not arbitrable, the High Court concluded:

"For the foregoing reasons, I am of the view that primarily, the appellant is trying to make out a case of parity with the case of HSBC, which is already a matter sub-judice before the Competent Court, but as per the facts narrated above, I am of the view that the prima facie allegation of fraud, as already noticed above, would not fall in the realm of arbitrable dispute and therefore, rightly so, the court below has declined to grant the interim relief as sought. I do not intend to differ with the order under challenge. No ground for interference is made out.

The appeal is dismissed."

28. In view of the judgment in Civil Appeal No.5145 of 2016 and Civil Appeal No.5158 of 2016, we set aside the judgments of the learned ADJ and the learned Single Judge that are impugned in this appeal, and remand the matter for adjudication afresh by the ADJ, Mohali. This civil appeal is, accordingly, allowed, the judgments dated 03.08.2016 and 02.09.2016 are set aside, and the matter is remanded to the ADJ, Mohali for fresh disposal in accordance with law.

.....J. (R. F. Nariman) .....J. (Navin Sinha) New Delhi August 19, 2020.