IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 17174 OF 2024

Bholashankar Ramsuresh Dubey, ..Petitioner
Age: 64 Years, Occ: Business,
R/at B-11, 2nd Floor, Sainath CHS Ltd,
Kalyan, Hanuman Nagar Road,
Katemanivali, Kalyan (East).

Versus

1. Dinesh Narayan Tiwari
   Age:49 Years, Occ: Business

2. Yogesh Narayan Tiwari
   Age: 46i Years, Occ: Business
   Both R/at Varadvinayak Kunj, Manda,
   Titwala (E), Taluka: Kalyan.

3. Rakesh Sukhdev Tiwari,
   Age: 51 Years, Occ: Business,
   Both R/at Varadvinayak Kunj,
   Manda, Titwala (E), Kalyan.

4. M/s Tiwari Enterprises,
   A Partnership Firm duly registered
   Under the provisions of Partnership
   Act 1932.
   Having Registered Office at, 104-B,
   Gokul Park, 1st Floor, Vasundri Road,
   Manda, Titwala (West), Dist. Thane. …Respondents

Mr. Abhay S. Khandeparkar, Senior Advocate, with Rushikesh Bhagat, Rohit P Mahadik, Farhan Shaikh, Apoorva Khandeparkar, Vaibhav Kulkarni and Sudarshan Bhilare, i/b Khandeparkar & Associates, for the Petitioner.
Mr. Sumedh S. Modak, for the Respondent.

CORAM: N. J. JAMADAR, J.
JUDGMENT RESERVED ON: 13TH JANUARY 2025
JUDGMENT PRONOUNCED ON: 17TH APRIL 2025

JUDGMENT:

1. Rule. Rule made returnable forthwith and with the consent of the learned counsel for the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of a judgment and order dated 4th September 2024 passed by the learned District Judge, Kalyan, in MCA No. 4 of 2024 whereby the Appeal preferred by the Petitioner-original Defendant No.2 against an order passed by the Trial Court refusing to refer the parties to Arbitration under Section 8 of the Arbitration and Conciliation Act 1996 ("the Act of 1996") came to be dismissed.

3. Shorn of superfluities, the background facts can be stated as under:

3.1 The Petitioner-Defendant No.2, Respondent No.3-Defendant No.3 and Narayan Tiwari, the predecessor-in-tile of Respondent Nos. 1 and 2-Plaintiffs, had entered into a partnership under the name and style of M/s Tiwari Enterprises. The firm was engaged in the business of builders and developers and other allied activities. They had agreed to share the profits in the ratio of 50%, 25% and 25%, respectively. The partnership

was at will. The partnership firm-Defendant No.1 did develop certain properties.

3.2 The Plaintiffs asserted Narayan Tiwari, their father, was unwell since the year 2012. Defendant No.2 took undue advantage of the said situation and usurped the control of the said firm and thereby caused prejudice to Narayan Tiwari. On 27th May 2017, Narayan Tiwari passed away. After the demise of Narayan Tiwari, the Plaintiffs called upon Defendant No.2 to determine the share of late Narayan Tiwari. However, the Defendants did not pay head to the request of the Plaintiffs. Instead the Defendant No.2 in collusion with his Son, Yogesh Narayan Tiwari, prepared fraudulent and forged documents to falsely claim that Yogesh Tiwari came to be inducted as a partner of the firm. Hence the Suit for rendition of accounts and determination of the share of late Narayan Tiwari in the firm.

3.3 Defendant No.2 filed an Application under Section 8 of the Act of 1996, contending that the Plaintiffs were in custody of the original Deed of Partnership dated 31st January 2003. The partnership agreement contains an arbitration clause. It was, therefore, necessary to refer the parties to Arbitration.

3.4 The Application was resisted by the Plaintiffs.

3.5 By an order dated 19th December 2023, the learned Civil Judge, Senior Division, Kalyan declined to refer the parties to Arbitration

observing, *inter alia,* that the Plaintiffs had made allegations of fraud and preparation of false documents. Consequently, Arbitrator would not be in a position to decide those issues.

3.6 Aggrieved, Defendant No.2 preferred an Appeal under Section 37 of the Act of 1996. By the impugned order, the learned District Judge, dismissed the Appeal on a different ground, namely, Defendant No.2 was not admitting the existence or enforcement of the Partnership Deed which contains arbitration clause, as Defendant No.2 had set up a Deed of Reconstitution of the partnership firm under which late Narayan Tiwari and Rakesh Tiwari retired from the firm and Yogesh Tiwari, son of Defendant No.2, allegedly came to be inducted in the firm.

3.7 Being aggrieved, Defendant No.2 has approached this Court.

4. I have heard Mr. Abhay S. Khandeparkar, the learned Senior Advocate, for the Petitioner and Mr. Sumedh Modak, the learned Counsel for the Respondents-Plaintiffs. With the assistance of the learned Counsel for the parties, I have perused the pleadings and documents on record.

5. Mr. Khandeparkar, the learned Senior Advocate for the Petitioner, submitted that the learned Civil Judge as well as the learned District Judge were clearly in error in refusing to refer the parties to Arbitration in the face of an explicit arbitration clause. All the prerequisites to refer the parties to Arbitration under Section 8 of the Act of 1996 were

fulfilled. The Trial Court declined to refer the parties to Arbitration on the ground that allegations of fraud were made. With the development in law, where party autonomy is to be respected, mere allegations of fraud cannot be used as a refuge to decline to refer the parties to Arbitration as that would defeat the very object of the Act of 1996.

6. The learned District Judge though correctly recorded that the Trial Court could not have refused to refer the parties to Arbitration on the said count, fell in error in refusing to refer the parties to Arbitration on the count that the Defendant No.2 did not admit the existence of the partnership. In the process, Mr. Khandeparkar would urge, the learned District Judge completely misconstrued the resistance sought to be put forth by Defendant No.2. The contention that after the partnership firm commenced business there was subsequent change in the constitution of the firm and Narayan Tiwari, the predecessor-in-tile of the Plaintiffs, and Rakesh Tiwari, Defendant No.3, retired from the firm and Yogesh Tiwari was inducted as a partner in the firm does not imply that Defendant No.2 has denied the existence of the partnership much less the Partnership Agreement.

7. Mr. Khandeparkar strenuously submitted that Clause 17 of the Partnership Agreement contains an arbitration clause which not only binds the parties but their legal representatives. Even in the Deed of Reconstitution of partnership, there is a clear recital that the terms and

conditions of Partnership Deed dated 31st January 2003 shall be valid except the one modified by the said Deed of Reconstitution. The learned District Judge thus could not have refused to refer the parties to Arbitration on the ground that Defendant No.2 did not admit the existence of Partnership Deed.

8. Mr. Modak, the learned Counsel for the Respondent-Plaintiff, however, supported the impugned order. It was submitted that the Plaintiffs who are the legal representatives of Narayan Tiwari, the deceased partner, cannot be bound by the Arbitration Agreement contained in the Partnership Deed. Laying emphasis on the distinction in the terminology used in Section 2(1)(h) which defines the term "party" and Section 7(1) which refers to, "Parties", Mr. Modak would urge that the expression, "Party" means only a party to an Arbitration Agreement. It does not include a person claiming through or under a party. Under Section 8 of the Act of 1996, only parties to the Arbitration Agreement can be referred to Arbitration and none else.

9. To buttress this submission, Mr. Modak placed a very strong reliance on the Constitution Bench judgment of the Supreme Court in the case of **Cox and Kings Limited Vs SAP India Private Limited & Anr.**[1]

10. Mr. Khandeparkar joined the issue by canvassing a submission that the decision in the case of **Cox and Kings Limited (Supra)** does not support the submission sought to be canvassed on behalf of the

1 (2024) 4 SCC 1.

Plaintiffs. As the provision contained in Section 8 of the Act of 1996 is peremptory in nature, the myriad objections sought to be raised on behalf of the Plaintiffs before the Trial Court, learned District Judge and this Court, do not merit countenance. Therefore, the parties deserve to be referred to Arbitration, submitted Mr. Khandeparkar.

11. To start with, it is necessary to note that the jural relationship between Narayan Tiwari, the father of the Plaintiffs, and Defendant Nos. 2 and 3, is not much in contest. Incontrovertibly, under the Deed of Partnership dated 31st January 2003, late Narayan Tiwari and Defendant Nos 2 and 3 had entered into a partnership. Nor there is much dispute about the relationship between the Plaintiffs and late Narayan Tiwari. The parties are at issue over the fact as to whether late Narayan Tiwari continued to be a partner of Defendant No.1 firm till he passed away on 27th May 2017 and whether the Plaintiffs are entitled to rendition of accounts and distribution of the share of late Narayan Tiwari.

12. In the context of aforesaid nature of the dispute between the parties, few clauses of the Deed of Partnership deserve to be noted. Clauses 12, 14 and 17 are material and hence extracted below.

> "12. Death, retirement or insolvency of any partner shall not dissolve the firm, the remaining partners shall be entitled to continue the business of the firm as before subject to the determination of shares of the deceased, retired or insolvent partner as the case may be.

> 14. On dissolution of the partnership firm, a full and general account shall be taken of all money, stock in trade, debts and effects that belonging or due to the partnership and of all liabilities of the partnership including capital. Such account shall be made up within six months from the date of dissolution and the amount payable to each partner shall be paid to him.
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> 17. In case of any disputes, doubts, or differences arising between the parties hereto, in respect of the conduct of the business of partnership or in respect of interpretation, operation or enforcement of any of the terms or conditions of this deed or in respect of any other matter, cause or thing whatsoever not contained herein otherwise provided for, the same shall be referred to adjudication to the Arbitration subject to the provisions of the Indian Arbitration Act, 1996 or any statutory modifications or reenactment thereof for the time being in force, whose decision shall be binding on the parties and their legal representatives."

13. Under Clause 12, the parties had agreed that the death, retirement or insolvency of any partner would not dissolve the firm and remaining partners would continue the business of the firm, subject to the determination of the share of deceased, retired or insolvent partner. Under Clause 14, upon dissolution of the firm, a full and general account was agreed to be taken within six months of the date of dissolution and assets distributed. Clause 17 contains an arbitration clause. The parties agreed to arbitrate the disputes in accordance with

the provisions of Act of 1996. The decision of the Arbitrator was to bind all the parties as well as their legal representatives.

14. There is a dispute over the execution of Deed of Reconstitution of partnership dated 2nd March 2015. The Plaintiff alleged that the said Deed of Reconstitution is forged and fabricated. Under the said Deed of Reconstitution, Yogesh Tiwari, the son of Defendant No.2 was purportedly inducted as a partner in the firm and deceased Narayan Tiwari and Rakesh Tiwari, Defendant No.3, stood retired from the firm. Clause 7 of the purported Deed of Reconstitution is relevant and reads as under.

> "7. The terms and condition of the Deed of Partnership dated 31.01.2003 shall be valid except in so far as the same are modified by this agreement, continue in full and effect."

15. In the wake of the allegations of fraud and, especially, forgery of the said Deed of Reconstitution of the partnership firm, the learned Civil Judge was dissuaded from referring the parties to Arbitration.

16. In the face of the development in law, the learned Civil Judge was clearly in error. The jurisdiction of the Court under Section 8 of the Arbitration Act 1996 is extremely limited and restricted. The development of law can be traced as under:

17. In Afcons Infrastructure Ltd. V/s. Cherian Varkey Construction Co. (P) Ltd.[2], the Supreme Court enunciated the categories of cases which are not considered suitable for ADR process having regard to their nature. The relevant part of the observations in paragraph 27 reads as under :

> "27. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature :
> (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
> (v) Cases involving prosecution for criminal offences."

18. In the case of Booz Allen & Hamilton Inc. V SBI Home Finance Ltd.[3] it was again reiterated that the disputes relating to rights and liabilities which give rise to or arise out of criminal offences, are non-arbitrable disputes.

19. In the context of allegations of fraud and serious malpratices on the part of the Respondents, in the case of N. Radhakrishnan V. Maestro Engineers[4], it was interalia observed in para No.23, as under :

> "23. The learned Counsel appearing on behalf of the Respondents on the other hand contended that the appellant had made serious allegations against the respondents alleging that they had manipulated the accounts and defrauded the appellant by cheating the

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2(2010) 8 SCC 24
3(2011) 5 SCC 532
4(2010) 1 SCC 72

> appellant of his dues, thereby warning the respondents with serious criminal action against them for the alleged commission of criminal offences. In this connection, reliance was placed on a decision of this Court in **Abdul Kadir Shamsuddin Bubere V. Madhav Prabhakar Oak**[5] in which this Court under para 17 held as under :
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> *"17. Three is no doubt that were 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.*
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> In our view and relying on the aforesaid observations of this Court in the aforesaid decision and going by the ratio of the abovementioned case, the facts of the present case do not warrant the matter to be tried and decided by the arbitrator, rather for the furtherance of justice, it should be tried in a court of law which would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute."

20. These judgments were referred to in the case of **A. Ayyasamy V. A. Paramasivam**[6]. A distinction was made in the case of **A. Ayyasamy (supra)** in the potency of the defence of fraud, namely serious allegations of fraud and allegations simplicitor for the sake of resistance to reference to an arbitration. In paragraph 23, the Supreme Court (speaking through Hon'ble Shri Justice Sikri) ruled as under :

5AIR 1962 SC 406

6(2016) 10 SCC 386

"23. A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognized 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 simplicitor. It, thus, follows that those cases were 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, were there are allegations of fraud simplicitor 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."

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."

21. In paragraph No.45, the Supreme Court (speaking through Hon'ble Justice Dr. Chandrachud) cautioned against the use of N. Radhakrishnan case (supra) as a precedent and distinguished the same as under :

> "45. The position that emerges both before and after the decision in N. Radhakrishnan (supra) 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 (supra) has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud :
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> 45.1. First and foremost, it is necessary to emphasis that the judgment in N. Radhakrishnan (supra) 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 (supra). 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 (supra) 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."

22. In the case of **Rashid Raza V. Sadaf Akhtar**[7] after following **A. Ayyasamy (supra)**, the Supreme Court enunciated the twin test for considering the issue of non-arbitrability in the backdrop of the allegation of fraud.

> "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 won 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."

23. The entire law on the aspect of fraud, in the context of the resistance for reference to arbitration, was revisited by the Supreme Court in the case of **Avitel Post Studioz Ltd. V/s. HSBC PI Holdings (Mauritius) Ltd.**[8]. The Supreme Court postulated the tests to be applied in assessing the plea of fraud as under :

> 35. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied,

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7(2019) 8 SCC 710

8(2021) 4 SCC 713

> 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."

24. The Supreme Court expressly observed that **N. Radhakrishnan (supra)** lacks in precedential value and further explained the rider subject to which the decisions in **Afcons Infrastructure Ltd. (supra)** and **Booz Allen (supra)** are required to be read. Paragraph No.43 of Avitel (supra) reads thus :

> "43. 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."

25. Following the aforesaid pronouncement in the case of **Avitel (supra),** the Supreme Court explained the aspect of non-arbitrability in the context of fraud in the case of **Vidya Drolia and Ors Vs Durga Trading Corporation**[9] as under :

> "74. The judgment in Avitel Post (supra) interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud and post contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.
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> 78. In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishnan (supra) inter alia observing that allegations of fraud can (sic cannot) be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in HDFC Bank Ltd. V/s. Satpal Singh Bakshi[10] which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."

26. In view of the aforesaid pronouncements, the progressive development in law, in the context of the resistance to reference to arbitration on the basis of the allegations of fraud, forgery and the like vitiating factors, can be traced as under :

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9 (2021) 2 SCC 1.

10 2012 SCC Online Del 4815

Initially, the judicial opinion favoured determination of the allegations of fraud by the Court. Thus, where there were serious and specific allegations of fraud, forgery and fabrication of documents, it was considered that the Arbitrator was not equipped to determine such allegations and a court of law would be more competent and have the means to decide those questions. In keeping with the principle of minimal judicial interference in the matter of arbitration and respecting the party autonomy, where the parties have exercised the option to resolve the disputes in a swift and inexpensive manner through a forum of choice, the non-arbitrability of the dispute for the mere reason that the adversary made allegations of fraud, gave way to a more balanced approach. A distinction has, therefore, been made between the cases involving serious allegations of fraud and allegations of fraud 'simplicitor'. Lest, it would give a long leash to a party to obviate the dispute resolution mechanism of choice, simply by making the allegations of fraud with a view to derail the resolution.

27. The non-arbitrability of the dispute, in the backdrop of the allegations of fraud, has also been subjected to two test**s.** First, whether the alleged fraud affects the underlying contract, rendering it void. Two, whether the fraud is restricted to the affairs of the parties, inter se, without any implication in the public domain. To put it in other words, the civil aspect of fraud may legitimately form a subject matter of

arbitration. However, the criminal aspect of fraud, which entails penal consequences, can only be adjudicated by a court of law. In contemporary arbitration, the broad proposition that the allegations of fraud are non-arbitrable is not favoured. If an allegation of fraud can be adjudicated upon before a civil court, there is no justifiable reason to exclude such disputes from being resolved through arbitration.

28. Reverting to the facts of the case, on the aforesaid touchstone, it becomes abundantly clear that the allegations of fraud are in relation to the execution of Deed of Reconstitution of the firm and not in relation to the Deed of Partnership which contains the arbitration clause. It also does not appear that the allegations of fraud in the instant case have any implications in the public domain. Primarily, the allegations of fraud revolve around civil aspect. Consequently, the civil aspect of fraud can legitimately form a subject matter of Arbitration. Therefore, the learned Civil Judge was clearly in error in declining to refer the disputes to Arbitration on the ground that there were allegations of fraud and preparation of false documents.

29. The learned District Judge refused to refer the parties to Arbitration on a completely different ground. It was observed that Defendant No.2 did not acknowledge the existence of the Partnership Deed and thus the parties could not be referred to Arbitration.

30. Having considered the material on record, the view of the learned District Judge is equally infirm. What Defendant No.2 contended was that the original partnership stood reconstituted under the Deed of Reconstitution dated 2nd March 2015 of the firm. It was nowhere the case of Defendant No.2 that there was no partnership as such between Defendant No.2, Defendant No.3 and late Narayan Tiwari. Nor the execution of Partnership Deed was ever contested. In fact, as noted above, Clause 7 of the Deed of Reconstitution of firm explicitly states that subject to the modifications brought about by the reconstitution of the firm all other stipulations in the Deed of Partnership would govern the rights and liabilities of the partners. It defies comprehension as to how Defendant No.2 can be said to have denied the existence of the Deed of Partnership containing the arbitration clause.

31. The learned District Judge lost sight of the fact that the basis of the Plaintiffs suit for rendition of account and distribution of assets was the Deed of Partnership which contains an arbitration clause. Without disputing the existence of the partnership or for that matter the Deed of Partnership, Defendant No.2 contended that the partnership firm incorporated under the Deed of Partnership dated 31st January 2003, stood reconstituted under Deed of Reconstitution dated 2nd March 2015. In that view of the matter, refusal to refer the parties to Arbitration on

the ground that Defendant No.2 did not admit the existence of the partnership was clearly erroneous.

32. This leads me to the submission of Mr Modak that only the parties to Arbitration Agreement can be referred to Arbitration and not the person who claim through or under such a party. The sheetanchor of the submission of Mr. Modak is the judgment of the Constitution Bench in the case of **Cox And Kings Limited (Supra)**. In the said case, the Constitution Bench was called upon to determine the validity of the "Group of companies" in the jurisprudence of the Indian Arbitration, as propounded in the case of **Chloro Controls India (P) Ltd Vs Severn Trent Water Purification.**[11] After an elaborate analysis, the Constitution Bench answered the reference as under:

> "170. In view of the discussion above, we arrive at the following conclusions:
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> 170.1 The definition of "parties" under Section 2(1)(h) read with Section 7 of the Arbitration Act includes both the signatory as well as non-signatory parties;
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> 170.2 Conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement;
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> 170.3 The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties;
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> 170.4 Under the Arbitration Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement;

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11 (2021) 3 SCC (Civ) 307.

170.5 The underlying basis for the application of the group of companies doctrine rests on maintaining the corporate separateness of the group companies while determining the common intention of the parties to bind the non-signatory party to the arbitration agreement;

170.6 The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the group of companies doctrine;

170.7 The group of companies doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the Arbitration Act;

170.8 To apply the group of companies doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in Discovery Enterprises. Resultantly, the principle of single economic unit cannot be the sole basis for invoking the group of companies doctrine;

170.9 The persons "claiming through or under" can only assert a right in a derivative capacity;

170.10 The approach of this Court in Chloro Controls (supra) to the extent that it traced the group of companies doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law;

170.11 The group of companies doctrine should be retained in the Indian arbitration jurisprudence considering its utility in determining the intention of the parties in the context of complex transactions involving multiple parties and multiple agreements;

170.12 At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement; and

170.13 In the course of this judgment, any authoritative determination given by this Court pertaining to the group of companies doctrine should not be interpreted to exclude the

> application of other doctrines and principles for binding non-signatories to the arbitration agreement."

33. The Supreme Court highlighted that the term "Party" and "the person claiming through or under" are different. The phrase claiming through or under has not been used in either in Section 2(1)(h) or Section 7 of the Act of 1996. Therefore, a person claiming through or under cannot be a party to an arbitration agreement on its own terms because it only stands in the shoes of the original party.

34. I am afraid, the issue sought to be raised in this Petition by Mr. Modak would be governed by the aforesaid pronouncement in the case of **Cox And Kings Limited (Supra).** As noted above, the controversy arose over the use of group of companies doctrine to refer the parties to Arbitration who were not the signatories to the Arbitration Agreement. The binding efficacy to such Arbitration Agreement on the parties who were purportedly claiming through or under the parties to the Agreement was at the heart of the controversy.

35. In the case at hand, the Plaintiffs are the legal representatives of the deceased partner. The Partnership Deed contains a clear and explicit Arbitration Agreement. The decision of the Arbitrator would bind not only the partners but their legal representatives. Thus, the analogy of theory of group of companies and binding efficacy of the Arbitration

Agreement to non-signatories to the Arbitration Agreement cannot be readily imported to a case of the present nature.

36. The issue need not be obfuscated as the provisions of the Act of 1996 provide a complete answer to the controversy sought to be raised by Mr. Modak. Sub-section (1) of Section 40 provides in clear and explicit terms that an arbitration agreement shall not be discharged by the death of any party thereto either as respects the deceased or as respects any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

37. Resultantly, I am not inclined to accede to the submission of Mr. Modak.

38. Hence the following order:

: O R D E R :

(i) Petition stands allowed.

(ii) The impugned orders passed by the learned District Judge as well as the Trial Court stand quashed and set aside.

(iii) The parties are referred to Arbitration.

(iv) With the consent of the Counsel for the parties, Advocate Vishal Kanade, is appointed as a sole Arbitrator to decide the disputes and differences between the parties.

(v) The details of Advocate Vishal Kanade are as under:

Address: 1st Floor, Gundecha Chambers, Nagindas Master Road, Kala Ghoda, Fort, Mumbai 400 001, Email Id: kanadevishal@gmail.com, Mob No: 9819668711,

(vi) The learned Arbitrator is requested to file his disclosure statement under Section 11(8) read with Section 12(1) of the Act, 1996 within two weeks with the Prothonotary and Senior Master and provide copies to the parties.

(vii) Parties to appear before the Sole Arbitrator on a date to be fixed by him at his earliest convenience.

(viii) Fees payable to the Sole Arbitrator will be in accordance with the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

[N. J. JAMADAR, J.]