

Pawan Kumar Gupta and anr Vs. Vinay Malani

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Court : Delhi

Decided On : May-30-2014

Judge : Najmi Waziri

Appellant : Pawan Kumar Gupta and anr

Respondent : Vinay Malani

Judgement :

* + + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

30. 05.2014 CM(M) 1067/2011, CM APPLs. 17144/2011 and 18242/2013 PAWAN KUMAR GUPTA & ANR Petitioner Through: Mr. Manish Kaushik, Advocate versus VINAY MALANI Respondent Through: Mr. Kirti Uppal, Senior Advocate with Mr. Anshumaan Sahni, Ms Aastha Dhawan, Mr. Shanker Chhabra and Ms.Aakriti Jain, Advs. CM(M) 606/2013, CM APPL. 9118/2013 VINAY MALANI Petitioner Through: Mr. Kirti Uppal, Senior Advocate with Mr. Anshumaan Sahni, Ms Aastha Dhawan, Mr. Shanker Chhabra and Ms.Aakriti Jain, Advs. versus DELHI PRANTIYA MARWARI YUVA MANCH & ORS Respondent Through: Mr. Manish Kaushik, Advocate for Pawan Gupta. CORAM: HON'BLE MR. JUSTICE NAJMI WAZIRI % MR. JUSTICE NAJMI WAZIRI1 Two petitions of two parties are being heard and decided by this common judgement. Although the petitions were filed two years apart and in respect of two different impugned orders, the petitions were heard together for two reasons: (a) the decision of CM(M) 1067/2011 (first petition) is likely to have an impact CM(M) 606/2013

(second petition), and (b) the disputes all arise from the same dispute between substantially the same parties. Parties to the dispute 2. Given the multiplicity of parties and the diverse titles attributable to them, for ease of reference the parties are hereinafter referred to as follows: Mr. P is the first petitioner in the first petition; his election has been impugned in the suit that gave rise to both petitions; he is also the third respondent in the second petition. Mr. S is his copetitioner, who is also the fourth respondent in the second petition; he was the Returning Officer for the elections. Mr. V is the sole respondent in the first petition and the petitioner in the second petition; he initiated the suit that gave rise to both petitions. The Society is the first respondent in the second petition; Mr. P was elected as President to the Society. The Organisation is the second respondent in the second petition; the Society is regional component of the Organisation, which functions at three levels (national, prantiya (i.e., regional), and branch). Mr. K is the fifth respondent in the second petition; he is the President of the Faridabad Branch of the Organisation. Proceedings 3. Although the various proceedings are not as many as the parties involved, they deserve to be recounted once. A suit, being Civil Suit No.68 of 2011 (Suit), was filed by Mr. V in the Court of Senior Civil Judge-cum-Rent Controller (Central), Tis Hazari Courts, Delhi (Trial Court) challenging Mr. P's election to the post of the President of the Society. It was filed on 22nd July, 2011 and an interim order was passed on 23rd July, 2011 (first interim order) granting certain interim relief to Mr. V. The Society, Mr. P and Mr. S filed an application (Arbitration Application) under section 8 of the Arbitration and Conciliation Act, 1996 (Act) seeking that the matter be referred to arbitration in view of clause 31G (o) in the Constitution of the Organisation (arbitral clause). This was rejected by the Trial Court by its order dated 8th August, 2011 (first impugned order), which was challenged in the first petition by Mr. P and Mr. S.

4. The proceedings in the Trial Court was initially stayed by this Court in the first petition, which was later modified and only the first impugned order was stayed. Mr. P then preferred an application under Order XXXIX rule 4 of the First Schedule to the Code of Civil Procedure, 1908 (Code) for vacation of the first interim order (Mr. P's application). In the meanwhile, contending that Mr. P has acted in violation of the first interim order, Mr. V filed an application under Order XXXIX rule 2A of the First Schedule to the Code (Mr. V's application). By an order of 3rd March,

2012, Mr. P's application was allowed by the Trial court and Mr. V's application was rejected and a Court Observer was appointed (second interim order). Mr. V challenged the second interim order in RCA No.14/12 (first appeal) in the Court of the Additional District Judge 06 (Central), Delhi (Appellate Court) and Mr. P challenged the same in RCA No.19/12 (second appeal) before the Appellate Court. By its order dated 19th November, 2012 (second impugned order), the Appellate Court rejected the first appeal and allowed the second appeal and set aside the appointment of the Court Observer. The second impugned order is the subject matter of challenge by Mr. V in the second petition. Facts 5. The facts, apart from what is set out hereinabove, are that Mr. P was elected president to the Society by the elections held on 17th July, 2011 (impugned elections). Mr. V filed the Suit challenging the same. Apart from alleging various irregularities, his primary contentions have been that:

5. 1. Mr. P was over the prescribed age limit (40 years) as per the bye-laws and other rules made by the Organisation and could not have been nominated for or have run for, or have become the President of the Society, and 5.2. Mr. K was over the prescribed age limit (45 years) as per the bye-laws and other rules made by the Organisation and could not have been a member of the Faridabad Branch of the Organisation, nor could he have nominated Mr. P for the position of President of the Society 6. Mr. V's case is that both Mr. P and Mr. K have committed a fraud by actively concealing their respective ages. He has further contended that Mr. S, who was made the Returning Officer for the impugned elections, has failed to appropriately scrutinise Mr. P's nomination, and is likely complicit in the fraud. On these as well as other grounds of irregularities, Mr. V sought that the impugned elections and their results ought to be declared as null and void and that Mr. P be not allowed to become the President of the Society or take charge over from the erstwhile President.

7. By the first interim order, the handing over/taking over of the charge was stayed but Mr. P was allowed to remain as the President of the Society. As earlier recounted, the first impugned order rejected the Arbitration Application, the grounds wherefor would be discussed in further detail at a more appropriate part of the judgement. As earlier outlined, this Court, in the first petition, stayed

operation of the first impugned order. It, however, allowed liberty to Mr. P to seek modification of the first interim order. It was in these circumstances that Mr. P's application seeking vacation of the first interim order came to be filed.

8. In the meanwhile, Mr. P, on 16th October, 2011, called for a meeting of the Executive Committee of the Society. Contending this behaviour to be wilful contempt of the first impugned order, Mr. V's applications came to be filed. It was sought to be contended that by Mr. P calling for the meeting, he has de facto taken charge of/acted in charge of the Society, in violation of the first interim order. By the second interim order, the Trial Court rejected Mr. V's application. It observed that the first interim order expressly allowed for Mr. P to remain as the President of the Society and the call for the meeting is in exercise of Mr. P's prerogative as the President of the Society. It further allowed Mr. P's application, albeit partially. It observed that Mr. P would be unable to function as the President if he is not allowed to oversee the daily functioning of the Society. It further observed that if the Suit is eventually decreed in Mr. V's favour, the passage of this order ought to not adversely affect his or the Society's rights. In the circumstances, it modified the first interim order to the extent of allowing Mr. P to function as a President in toto. However, it appointed a Court Observer regarding the affairs of the Society.

9. In these circumstances, Mr. V as well as Mr. P filed their respective appeals challenging the second interim order. Mr. V contended that (a) the spirit of the first interim order was that Mr. P ought to have remained a President only in title and not discharged any functions of the President, (b) that Mr. V has violated the first interim order in letter as well as in spirit and has thus committed contempt thereof. Mr. P as well as Mr. V challenged the appointment of the Court Observer, contending that where there was neither any prayer for, nor any grounds for appointment of a Receiver, appointment of one in the name of a Court Observer is wholly inappropriate and ought to be set aside. By the second impugned order, which will be discussed in further detail shortly, the first appeal (by Mr. V) was rejected and the second appeal (by Mr. P) was allowed. The impugned orders

First impugned order 10. The first impugned order, as earlier stated, rejected the Arbitration Application filed by Mr. P, Mr. S and the Society. Before the Trial Court, the first objection raised by Mr. V against reference to arbitration under section 8

of the Act was that the arbitral clause required the Organisation to appoint an arbitral tribunal for the purpose of deciding the disputes and differences. This contention was rejected by the Trial Court, which held that the arbitral tribunal was indeed appointed by the Organisation, as evidenced from the minutes of its meeting held on 3rd May, 2009. This finding, having not been challenged in either petition, has become final now.

11. The other contention raised by Mr. V was that since there are allegations of fraud being the active concealment of their respective ages by Mr. P and Mr. K the matter cannot be referred to arbitration. It was contended that an arbitral tribunal would not be competent to consider issues of fraud and hence the matter ought to not be referred to arbitration. Accepting Mr. Vs contention, the Trial Court rejected the Arbitration Application reasoning that:

11. 1. The judgement relied in support of the contention of the applicant-defendants that an election dispute may be referred to arbitration is distinguishable because the matter is squarely covered by the judgements in *General Enterprises & Ors. v Jardine Handerson Ltd.*,¹ and *SW Palanitkar & Ors. v State of Bihar & Ors.*, which were cited by Mr. V.² 11.2. The allegations of fraud strike at the very root of the impugned elections. 1 2 AIR1978 Cal 407. (2002) 1 SCC241 11.3. The subject matter of the dispute is not a dispute at a national, regional or branch level which is arbitrable but is of fraud committed by a person/persons which is not arbitrable. 11.4. The judgements in *NC Padmanabhan & Ors. v S Srinivasan*,³ and *Kashmiri Lal v Union of India*,⁴ mandate that whenever disputes involving fraud and misappropriation are alleged and they are too serious to be tried by the arbitrator, stay of suit ought to be refused.

12. Reasoning thus, the first impugned order refused to refer the dispute to arbitration, which has been challenged by Mr. P and Mr. S in the first petition herein. Second impugned order 13. As earlier stated the second impugned order was considering the appeals filed by Mr. V and Mr. P against the second impugned order and had rejected the first appeal but allowed the second appeal. It had reasoned that:

13. 1. The Trial Courts specifically stated in the first interim order that Mr. P may remain as the President of the Society. 13.2. The Trial Courts has clarified to the same effect in its further orders, although it has not made it clear as to whether calling for and holding a meeting of the Executive Committee would fall within the prerogative of the President or whether it 3 4 AIR1967 Mad 201. AIR1966J&K134 would amount to taking charge/papers over which latter activity is prohibited. 13.3. The Trial Court, by the second interim order, has considered the calling of the meeting as not amounting to a violation of the first interim order. 13.4. The interpretation of the first interim order by the Trial Court is a reasonable and plausible interpretation and is not capricious, arbitrary or perverse. 13.5. Given the above, there is no basis for interference with the interim order especially when the application under Order XXXIX rules 1 and 2 of the Code is still pending before the Trial Court. 13.6. The challenge to the second impugned order on this ground by the first appeal ought to hence be rejected. 13.7. The appointment of the Court Observer is, in effect, an appointment of a Receiver under Order XL rule 1 of the Code. 13.8. A Receiver/Observer may be appointed only where there is a requirement of preservation of property or subject matter of the Suit. 13.9. No allegations of misappropriation or embezzlement of funds, nor of apprehension thereof have been pleaded by the plaintiff, nor is there any prayer for appointment of a Receiver/Observer. 13.10. No valid reason has been given for the appointment of a Court Observer when Mr. P has already been allowed to function as a President in toto. 13.11. In the circumstances, the second appeal by Mr. P has to be allowed in its entirety; the appointment of the Court Observer is set aside.

14. This order is the subject matter of challenge in the second petition. Contentions and Analysis As to the second impugned order 15. The second petition filed by Mr. V may be taken up for consideration first, although due to what this Court will be holding in the first petition, it need not, ordinarily, consider the second petition.

16. By the second petition, the second impugned order is challenged by Mr. V before this Court. Much of what has been contended before the Trial Court and the Appellate Court have been reiterated here that (i) neither could Mr. P have been

nominated for nor have run for President of the Society; (b) Mr. K could not have been a member of the Faridabad Branch and hence could not have nominated Mr. P for the impugned elections; (c) that the impugned elections are vitiated by the fraud perpetrated by Mr. P and Mr. K; (d) that there were further and other irregularities in the impugned elections; (e) that Mr. P ought to not have been allowed to function as the President of the Society. Senior Advocate Mr. Kirti Uppal, appearing on behalf of Mr. V, contended that the Trial Court had failed to appreciate the spirit of the first interim order when it passed the second interim order setting the former aside. He contended that when there is a prima facie doubt as to the validity of the impugned elections, the Trial Court ought to not have allowed Mr. P to continue as President. He contended that in any case, the Appellate Court has failed to appreciate these errors, which are apparent from the record of the Trial Court itself. He lastly contends that the Appellate Court was incorrect in holding that the appointment of the Court Observer was contrary to the provisions of Order XL rule 1 and ought to not have set the same aside by the second impugned order.

17. Although they traverse the contentions on behalf of Mr. V, it is unnecessary to set out the contentions on behalf of Mr. P in this regard; this Court finds no merit in the contentions on behalf of Mr. V. The limitations of this Court when it exercises supervisory jurisdiction especially in respect of interim and/or discretionary orders are well established and hardly need reiteration.⁵ The petition, too, would be considered on this touchstone of whether there was an error of jurisdiction or an illegality patent, warranting interference with under article 227 of the Constitution of India. The answer, to the mind of this Court, ought to be in the negative. The second impugned order, to the extent that it rejects Mr. Vs appeal from the second interim order, is not contrary to material available on record. The Appellate Court has refrained from interfering with (a) the interpretation placed upon its own earlier order by the Trial Useful reference may be made to para. 38 of *Surya Devi Rai v Ram Chander Rai & Ors.*, (2003) 6 SCC675 in this regard. ⁵ Court, and (b) an interim order as well as an order on an application under Order XXXIX rule 2A of the Code when the main application under Order XXXIX rule 1 and 2 of the Code is still to be decided finally.

18. The Appellate Court has, in its discretion refused to interfere with a reasonable interpretation by the Trial Court of its own order; this exercise of discretion is not arbitrary, nor is it contrary to material available on record. It is not Mr. Vs case that the first interim order cannot be interpreted in the manner that the Trial Court did interpret it. It is not his case that the only manner it ought to be interpreted was the one posited by him. This Court will be loath to interfere with a reasonable and plausible interpretation its own judicial order by a Court, especially when the Appellate Court which had jurisdiction to reappreciate evidence found no contention by Mr. V compelling enough to warrant such interference. Further, it is not the case that this interim order of the Trial Court will be incapable of correction at a later stage or that the refusal to interfere with at this stage would result in unnecessary prolonging of the disputes; this Court finds no reason to interfere with the second impugned order on this count.⁶ 19. This brings us to the second count on which the second impugned order has been challenged: that it ought to not have interfered with the appointment of the Court Observer. Although all that this Court has observed in the previous paragraph would apply on all fours to the present contention, it is being considered for one further reason. ⁶ Ibid., at para. 38(8), p.

696. The first appeal, a copy of the memorandum whereof has been filed with the second petition, discloses that Mr. V has himself contended lack of consent for appointment of the Court Observer; this has also been recorded in the second impugned order. Mr. V, having already objected to the appointment of the Court Observer in his appeal which gave rise to the second impugned order cannot be heard to contend that the second impugned order ought to not have set aside the appointment of the Court Observer; quod approbo non reprobō.⁷ 20. On merits, the Appellate Court found that there has been no case made out that Mr. P is embezzling or misappropriating the funds of the Society in his position as the President thereof, or that there is an apprehension thereof. It observed that there was no prayer on Mr. Vs behalf for appointment of a Court Observer, either. On this basis, the Appellate Court set aside the appointment of the Court Observer, holding it to not be in consonance with the rigours of Order XL rule 1. Mr. V has not been able to demonstrate before this Court as to how the pleadings in the Suit can be construed as making out a case of embezzlement or of misappropriation or

of apprehension thereof. This Court finds no reason to interfere with the second impugned order; consequently, the second petition, filed by Mr. V, is hereby dismissed. As to the first impugned order 21. Advocate Mr. Manish Kaushik, appearing for Mr. P and Mr. S, in support of the first petition, contended that the mandatory provision 7 Latin: That which is approved cannot be condemned. of arbitration the arbitral clause will cover the present dispute, and it ought to be referred to arbitration. He contended that:

21. 1. The impugned order was wrong in holding that in view of the allegations of fraud, the matter cannot be referred to arbitration. 21.2. The Trial Court, once it came to the conclusion that an arbitration clause exists, and the dispute would but for the allegation of fraud be arbitrable, ought to not have refused there reference to arbitration merely because bald allegations of fraud have been made. 21.3. The allegations of fraud were made without furnishing any particulars thereto and cannot form the basis of a rejection of the Arbitration Application. 21.4. The fraud alleged is not of such a serious nature as to be tried only by a Civil Court; the arbitral tribunal would well be competent to try the same. 21.5. In any case, where the party against whom the fraud is alleged is willing to have the allegations of fraud tried in arbitration, in respect of frauds of this nature of simple active concealment of age in elections the arbitral clause must be given effect to.

22. In reply, Mr. Uppal contended that the first impugned order was rightly passed and ought to not be interfered with. He contended that:

22. 1. The petition is not maintainable under article 227 of the Constitution of India. 22.2. The Arbitration Application did not disclose the disputes sought to be referred to arbitration and in the absence thereof, the application will not be maintainable. 22.3. Relying on the judgements in Utkarsh v Delhi Bar Association,⁸ and Akshay Kapur v Rishav Kapur & Ors.,⁹ he contended that the Suit merely sought for enforcement of a mandatory term of an agreement and hence cannot be referred to arbitration. 22.4. Where a prima facie case of fraud is made out, the matter ought to not be referred to arbitration and must be tried by the Civil Courts.

23. After hearing the parties, the Court reserved the matter for consideration. This Court, after consideration of the contentions, is of the view that the first petition ought to be allowed in the circumstances of the case; there is much merit in the submissions on behalf of Mr. P and Mr. S.

24. The issue of arbitrability of disputes where fraud is alleged is not new, and has been the subject of pronouncements in the past too. An early case on an issue of whether parties may be referred to arbitration although there are contentions of fraud is that of the Madras High Court in *Anglo-Persian Oil Company Ltd. v PS Panchapakesa Aiyar*,¹⁰ where SCHWABE C.J.

held: Judgement dated 25th February, 2014 of this Court in CS(OS) No.2625/2013. 105 (2003) DLT467 10 AIR1924 Mad 336, at p.

337. 8 9 As I understand the principle in England and here, the Court, where there is a submission to arbitration, in order to refuse to stay the proceedings, must be satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission, that is, really saying in other words that the onus is on the party resisting the application for stay to show some sufficient reason why in the particular case the parties should be relieved from the obligation which they should have contracted namely that their case should go before the arbitrators selected by them and not before the ordinary tribunals of the land. There are certain well defined instances where a court almost invariably refuses to stay, such as a case where there are serious allegations of fraud (Emphasis supplied) 25. In the said case, the Court held that since no case of fraud is made out or even pleaded, the matter ought to be referred to arbitration. Shortly thereafter, the Calcutta High Court had a similar issue before it. The dispute was in respect of certain fraudulent misappropriation of funds by misuse of office of a Managing Agency of the Maharajah of Kasisimbazars collieries, with the Maharajah seeking an injunction against the Managing Agency from functioning as such qua the collieries or a decree of declaration of determination of the contract of agency. It appears that the matter involved the officers of the Managing Agencies covertly selling coal from the collieries and appropriating the funds for themselves, without the knowledge of the Maharajah. Rejecting the application

under Section 19 of the Indian Arbitration Act, 1899, the CC GHOSE J.

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[U]nder S. 19 of the Indian Arbitration Act, the Court has a discretion in the matter of staying actions which it is bound to exercise judicially and in accordance with certain well settled rules. The prima facie leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed but the Court may in its discretion, after considering all the circumstances of the case, refuse a stay on the ground that the matters in dispute between the parties involve the investigation of grave charges of fraud and may hold that in such circumstances arbitration is not the most suitable method of determining the questions raised between the parties. Sir Benoud Mitter and Mr. SC Bose, who appeared for the defendant company, have strongly pressed upon me the case of Russel v Russel, and have argued that where fraud is charged the Court will, in general, refuse to send the case to arbitration if the party charged with fraud desires a public enquiry and that where it is the party who is making the charge desires that the matter should be given publicity of a public trial, the Court is much less inclined to free him from the undertaking to go to arbitration into which he has seen fit to enter. I assent, if I may respectfully do so, to the proposition laid down in Russel v Russel, but it is to be observed that this very case virtually decides that, provided a prima facie case of fraud is made out, the action will be allowed to proceed, although it is the party alleging the fraud who desires the public enquiry. On this motion for stay of the action, I am not at liberty to offer any opinion whatsoever on the merits of the plaintiffs claim, but it is permissible for me to state that I am convinced that the plaintiff has a substantial and bona fide cause of action and that on the affidavits a sufficient prima facie case of fraud has been made out. In my judgement, a question like this should not be sent to the determination of arbitrators, and on this ground alone, I would decline to stay the action.

11 (Emphasis supplied) 26. While upholding the refusal of the Court of Small Causes to refer parties to arbitration given the allegations of fraud, the Sind Court of Judicial Commissioner had, as early as in 1934, warned against lightly allowing such matters to be tried by Courts. Relying on the Calcutta High Courts

decision,¹² OSULLIVAN A.J.C. observed:

With regard to the question of forgery, when there is charge of fraud or forgery, against one of the parties to a submission clause a Court has discretion to refuse a stay. Generally speaking where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration but where the party making the charge desires that the matter should be dealt with in Court the Court will be less inclined to stay the suit. However, with reference to this question we desire to sound a note of warning. To ensure a proper discretion in refusing to stay a suit on an allegation of fraud or forgery, the Court should ascertain that there is some foundation for such a charge; otherwise there will be a tendency to allege fraud in any case in which a party to a submission clause wishes to avoid arbitration.

13 (Emphasis supplied) Maharajah Sir Manindra Chandra Nandy v HV Low & Co. Ltd., AIR1924 Cal 796, at p.

800. Ibid. 13 FO Murlimal Santram v Messrs. Bansaridas & Sons & Anr., AIR1935 Sind 62, at p.

67. 11 12 27. Relying on Russel v Russel,¹⁴ LEACH C.J.

speaking for the Division Bench of the Madras High Court, refused to refer parties to arbitration in a matter involving forgery of documents observing:

We have no hesitation in holding that the discretion [to not refer parties to arbitration where fraud is alleged]. which [the learned Single Judge]. did exercise was exercised wisely. The questions at issue between the appellants and the respondent involve serious allegations of fraud, and the respondent has the right to ask the Court that matters which affect his honesty and integrity should be decided in open Court.

15 28. The position did not appear to change much even after the enactment of the Arbitration Act, 1940. Before the Allahabad High Court, a case was brought in appeal from an order of a Civil Judge refusing stay of a suit on grounds inter alia of serious issues of fraud having been raised. Reversing this, the Division Bench of

the Court referred with approval to *Russel v Russel*¹⁶ and the Calcutta High Courts judgement¹⁷ and observed:

[4]. Unless a prima facie case of fraud is made out, the proceedings should when an arbitration agreement exists, be stayed. If the plaintiff objects to the case being referred to a domestic tribunal in accordance with an arbitration agreement between the parties he must make out a substantial and bona fide case of fraud. In the present case, respondent 1 has no doubt, made serious allegations of fraud against the appellant. But he did not come into the witness box and the statement on oath of the appellant and the affidavit filed on his behalf stand unrebutted. On the other hand, the appellant has filed two affidavits sworn by respondent 1 in which he has denied the allegations of fraud. No doubt, it is said on behalf of respondent 1 that these affidavits had been obtained from him by undue influence and misrepresentation. But, as I have said before, respondent 1 has not appeared in the witness-box to state these facts on oath and there is also no affidavit on his behalf in support of these allegations.

18 (1880) 14 Ch 471. *Laldas Lakshmi Das & Anr. v JD Italia*, AIR1938 Mad 918. 16 *Supra*, at n.

14. 17 *Supra*, at n.

11. 18 *Budhu Lal v Jagan Nath*, AIR1949 All 70, at p.

72. 14 15 (Emphasis supplied) 29. In the same year, the East Punjab High Court was to consider a matter where a plaintiff sued two defendants, but only the first defendant was party to the arbitral clause. The contention of the plaintiff was that the two defendants colluded with each other to defraud him. Refusing to refer the matter to arbitration, the Court held:

[39]. Although there is no legal bar to the Court proceeding with the trial of the suit as against defendant 2 not party to the arbitration agreement while the suit, in so far as it affects defendant 1, who is a party to arbitration agreement remains stayed, consideration of practical convenience appear to make it eminently desirable that the allegations of fraud and collusion against both the defendants be

tried in the same action and at the same time.¹⁹ (Emphasis supplied) 30. In a matter involving the Union of India alleging supply of adulterated ghee to it by the plaintiff, the Civil Judge refused stay of the suit *inter alia* in view of the plaintiff alleging fraud by former officers during testing of the ghee. Refusing to interfere with the same, the Division Bench of the Allahabad High Court observed:

[7]. [A]. party to the arbitration agreement is not entitled as of right to the stay of proceedings. Whether or not the Court shall exercise the power given to it by the section [section 34 of Arbitration Act, 1940]. is entirely one of discretion. This discretion, of course, must be judicially exercised. But where it has been exercised it will not readily be interfered with, even though the tribunal which is asked to review it may feel that, if the decision had rested with them, their own conclusion may have been different. Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have to dispute determined by Court, *prima facie* the leaning of the Court is to stay the action and leave the plaintiff to the tribunal to which he has agreed. But where the dispute referred to arbitration involves a question of fraud or where the dispute under consideration involves charges against the character of one 19 Banwari Lal Ram Deo v Board of Trustees, Hindu College, Delhi, AIR1949E. Punj 165, at p.

175. of the parties, the Court will usually permit the party against whom such charges are made, if he so desires, to have them investigated in open Court. It is not proper that a party against whom such charges are made should be without a right of appeal on questions of fact²⁰ (Emphasis supplied) 31. In the oft-cited case of Abdul Kadir Shamsuddin Buber v Madhav Prabhakar Oak & Anr.,²¹ KN WANCHOO J.

(as he then was), citing *Russel v Russel*,²² and speaking for the Bench of three Judges:

(17) 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, would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. We are clearly of the 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 allegation of fraud of a serious nature that the court will refuse²³ (Emphasis supplied) ³². In the case of *General Enterprises & Ors. v Jardine Handerson Ltd.*,²⁴ after discussing *Russel v Russel*,²⁵ the Calcutta High Court, after referring to the above judgement of the Supreme Court²⁶ observed:

The true ratio of that decision, in my opinion, is that where allegations of fraud are made in an action in respect of which stay is being sought, those allegations are factors which the Court takes into consideration in exercising the discretion [to grant or refuse stay].. It was normally the practice if party charged with fraud *Union of India v Firm Vishydhha Ghee Vyopar Mandal*, AIR1951 All 541, at p.

543. AIR 1962 SC406 22 *Supra*, at n.

14. 23 *Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak & Anr.*, *supra*, at n. 21, p.

411. 24 *Supra*, at n. 1 para. 16, p.

418. 25 *Supra* at n. 14 26 *Abdul Kadir Shamsuddin Bubere v Madhav Prabhakar Oak & Anr.*, *supra*, at n.

21. 20 21 desired public and open trial in courts to refuse to grant stay even where the stay was merited. This principle grew up at a time when people with dignity very often sought vindication of honour in public. Jessel M.R. has noted that there is a tendency of making false or reckless allegation and it is often a tendency of those who make those allegation to want exposure at a public forum. At the same time it has to be borne in mind that sense of dignity is at discount in the present times, people are no longer keen for vindication of honour. People who are guilty of fraud tend to avoid public trial. Therefore, keeping this trend in mind, in my

opinion, the effect of allegations of fraud in exercising the discretion of the Court should be examined. In my opinion the fact that there are allegations of fraud is a factor which the Court should take into consideration in considering the exercise of discretion. The nature and type of the allegations are also relevant factors. If a party charged with fraud wants public trial stay should, subject to the above factors, be always refused. But even if the party charged with fraud does not want public trial but the party charging the fraud so wants there in appropriate cases the court should refuse to grant stay (Emphasis supplied) 33. It must be borne in mind that in the above matter, the dispute involved the Plaintiffs own assistant causing it to enter into the contract with a firm which was comprised of his wife and child, which the plaintiff cited as reason inter alia to refuse to honour the contract. Speaking for the Division Bench of the Andhra Pradesh High Court in a matter with similar facts, JAGANNADHA RAO J.

(as he then was), relied upon the said judgement to refuse reference to arbitration at the insistence of the plaintiff.²⁷ He also held that cases involving professional/occupational negligence, impropriety and dishonesty ought also to be treated in a similar manner, with the person against whom it is contended being given an opportunity to have the matter tried in Court.²⁸ In a subsequent case, the Calcutta High Court was faced with an appeal from a stay of suit in view of serious allegations of fraud having been made. The plaintiffs suit was 27 28 Muthavarapu Venkateswara Rao v N Subbarao, AIR 1984 AP200 Ibid., at para. 29, p.

206. that the defendant-contractor colluded with its officers and presented a false picture as to the quantum of work completed by him and thus obtained payment therefor. Reversing the order of stay, and holding that the actual dispute was qua the quantum of work done and not the collusion the Division Bench held:

43. However, mere allegation of fraud unconnected with the real point at issue will, in our view, not operate as a bar to the stay of the legal proceeding. According to us, the most vital question for consideration in such matters would be whether in deciding the real dispute between the parties it would be necessary for the arbitrator to enter into the allegation of fraud involving the reputation of a professional man. If it is necessary for the arbitrator to enter into such question for

determining the real point at issue between the parties, the Court will be reluctant to allow the matter to go to arbitration.

29 (Emphasis supplied) 34. Indirectly affirming the principle that consent can clothe an arbitrator with power to consider issues of fraud, a learned Single Judge of this Court, rejected challenge to an award based on an agreement contended as being obtained by fraud in *Amir Singh Jain v Bimla Devi Jain*.³⁰ In negating the petitioners contention that the arbitrator ought to have sent the matter back to the Courts for their consideration once fraud has been raised as an issue in the arbitration, the Court held:

I have considered this aspect. In my opinion the contention of Mr. Mittal has no force. The matter was referred by the Court for decision. No application could be filed before the Arbitrator to return the reference on the ground that allegations of fraud had been pleaded. The proper remedy was to apply to the court for revocation of the authority of the arbitrator. It [sic: if]. advised, the plaintiff could move the *West Bengal Comprehensive Area Development Corporation and Anr. v Sansanka Sekhar Banerjee*, AIR1985 Cal 290. 30 1993 (27) DRJ74 29 court for revocation of the authority of the Arbitrator on the ground that the subject matter of the reference contained allegations of fraud³¹ 35. RC LAHOTI J.

(as he then was), when sitting singly in this Court, had occasion to consider the issue in *Subhash Chander Kathuria v Ashoka Alloys Steels Pvt. Ltd. & Ors.*,³² where the plaintiff sought to oppose the application for stay of suit on the ground that the defendants had committed fraud in inducing him to enter into the contract. After examining the decisions of the Andhra Pradesh High Court,³³ Allahabad High Courts,³⁴ and that of the Sind Court of Judicial Commissioner,³⁵ the learned Judge held:

18. I have carefully perused the several so-called false representations and persuasions made by the defendants, according to the plaintiff. Firstly, there is a distinction between a misrepresentation and a fraud. A case of misrepresentation is not a case of fraud. If not all, most of the false representations set out in the plaint and attributed to the defendants are such as to which the plaintiffs could have made enquiries of their own and by exercise of sheer reasonable diligence,

they could have known the correct state of affairs of the defendants company, howsoever held out and falsely projected by the defendants. It would not be a case of fraud 19. The allegations of fraud are against the defendants. Primarily they have the option to have the matter decided by the civil court. They wishes [sic: wish]. to have the matter adjudicated upon by the arbitrator. If the applicability of S.34 of the Arbitration is attracted the plaintiffs cannot in the facts and circumstances of the case force upon the defendants a trial by civil court to the exclusion of the arbitration clause.

36 (Emphasis supplied) 36. The position of law remains substantially unchanged subsequent to the enactment of the Act, as well. Now it must be borne in mind that the 1940 Act afforded a discretion to the Court before which an Ibid., at p.

77. 1995 (35) DRJ319 33 Muthavarapu Venkateswara Rao v N Subbarao, supra, at n.

27. 34 Budhu Lal v Jagan Nath, supra at n.

18. 35 FO Murlimal Santram v Messrs. Bansaridas & Sons & Anr., supra, at n.

13. 36 Subhash Chander Kathuria v Ashoka Alloys Steels Pvt. Ltd. & Ors., supra at n. 32, p.

323. 31 32 application for stay of a suit governed by an arbitral clause is made, whereas section 8 of the Act provides no such scope for discretion. This proposition, which was pressed into operation by the petitioner, is undeniable. The judgements of the Supreme Court in P Anand Gajapathi Raju & Ors. v PVG Raju (dead) & Ors.³⁷ and Hindustan Petroleum Corpn. Ltd. v Pinkcity Midway Petroleums,³⁸ squarely cover this issue, and this Court is bound by the same. However, the position of law under the 1899 Act as well as the 1940 Act that in a matter where serious fraud is alleged, the arbitrability thereof may be at issue has been extended in respect even of the 1996 Act.

37. In a cause clbre where the award was being challenged before the Bombay High Court, the parties had agreed to the reference to arbitration even on the issue of fraud which was accepted by the Supreme Court. Setting aside the interim

award the tribunal had passed on preliminary issues, the learned Single Judge observed:

Normally, it is difficult to the Arbitral Tribunal to decide the issue of fraud. However, in the present facts and circumstances of the case, and pursuant to the order of the Supreme Court, parties agreed to get the issue of fraud decided by the Arbitrator. Having once accepted the position, unless the same issue is decided by giving full opportunity to the parties and specially to the Appellants, who have made the averments about the fraud and collusion, the interim award in question is unsustainable³⁹ 38. The most important judgement, however, on the Act, is *N Radhakrishnan v Maestro Engineers & Ors.*⁴⁰ A reading of this judgement shows that the Supreme Court has distinguished its earlier (2000) 4 SCC539 (2003) 6 SCC503 39 *Oriental Bank of Commerce v Kikabhai Premchand Trust*, 2008 (3) Bom LR0886 40 (2010) 1 SCC72 37 38 judgements⁴¹ and thereby continued the position of law as existed prior to the Act, in respect of the issue of arbitrability of issues of fraud. It observed therein:

20. The learned counsel for the respondents on the other hand argued that when a case involves substantial questions relating to facts where detailed material evidence (both documentary and oral) is needed to be produced by either parties, and serious allegations pertaining to fraud and malpractices were raised, then the matter must be tried in a court and the arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation.

21. In our opinion, the contention of the respondents relating to the jurisdiction of the arbitrator to decide a dispute pertaining to a matter of this proportion should be upheld, in view of the facts and circumstances of the case. The High Court in its impugned judgment has rightly held that since the case relates to allegations of fraud and serious malpractices on the part of the respondents, such a situation can only be settled in court through furtherance of detailed evidence by either parties and such a situation can not be properly gone into by the arbitrator. 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 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* [AIR 1962 SC406 in which this Court under para 17 held as under: (AIR p. 411)

17. 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.

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.

42 *P Anand Gajapathi Raju & Ors. v PVG Raju (dead) & Ors.*, (2000) 4 SCC539
Hindustan Petroleum Corpn. Ltd. v Pinkcity Midway Petroleums, (2003) 6 SCC503
42 *N Radhakrishnan v Maestro Engineers & Ors.*, supra, at n. 40, pp. 76-77. 41
39. A review of the authorities cited, to the mind of this Court, makes the following obvious:

39. 1. Under section 8 of the Act, where an arbitration agreement is shown to exist, the Court is bound to refer parties and disputes to arbitration. 39.2. The mandate of section 8 of the Act extends only to matters where the disputes are arbitrable in nature. 39.3. A matter involves fraud only when:

39. 3.1. A clear and unambiguous case of fraud either active concealment or active misrepresentation with intent to make wrongful gain or create wrongful loss is made out. 39.3.2. The case of fraud is supported by sufficient particulars to arrive at a prima facie conclusion of existence of a case of fraud. 39.3.3. The fraud either vitiates the arbitral agreement (and not the agreement containing the arbitral

agreement, which is a separate agreement in itself), or goes to the root of the dispute itself, as opposed to the subject matter of the dispute. 39.3.4. The dispute cannot be tried without trying the issue of fraud. 39.4. Matters involving fraud include matters where allegations of professional/occupational negligence, impropriety and dishonesty or such other allegations as amount to an imputation adverse to their personal or professional character. 39.5. Matters involving fraud are per se arbitrable, subject to the following. 39.6. The party against whom fraud is alleged has an option but not a right to demand that the matter be tried in open court and not in arbitration. 39.7. The party alleging fraud or such other allegations has an option but not a right to demand that the matter be tried in open court and not in arbitration. 39.8. The Court, when considering the an application under section 8 of the Act in a matter where fraud has been alleged:

39. 8.1. If the party against whom it is so alleged has prayed that it be heard in open court in a regular trial, ought to ordinarily reject the application. 39.8.2. if the party by whom it is so alleged has prayed that it be heard in open court in a regular trial, ought to ordinarily allow the application, unless it deems it necessary and in the interest of justice and expediency that the matter be heard in Court. 39.8.3. If neither party makes a prayer that it be heard in open court in a regular trial, ought to ordinarily allow the application. 39.9. In extraordinary circumstances, the Court may exercise its discretion in view of the special circumstances, to either allow or reject the application contrary to what is set out in para. 38.6 hereinabove. 39.10. An allegation of fraud will be considered as an allegation of serious fraud when it is of a grievous, aggravated or egregious nature as would warrant (a) the Court trying the matter itself to ensure a proper trial of the allegation, (b) the findings of facts in respect thereof is likely to so adversely affect either or both parties that they ought to have a right of appeal from the findings, or (c) the allegations are of such a nature that, if found on, it is likely to affect persons other than the parties to the dispute. 39.11. Matters involving serious fraud are ordinarily not arbitrable. 39.12. The Court, when considering the application under section 8 of the Act in a matter where serious fraud has been alleged, has to ordinarily reject the application. 39.13. Although this Court cannot envision any exceptional circumstance that would warrant referring to arbitration a matter involving allegations of serious fraud, the discretion of the Court in such cases is not

adversely affected.

40. Mr. V has, in this matter, contended that Mr. P and Mr. K have committed fraud by actively concealing their respective ages and thereby attempting to make wrongful gain for themselves. Given the findings above, this Court is of the view that this allegation does not affect the arbitrability of the dispute for the following reasons:

40. 1. The real dispute is as to whether Mr. P was over the maximum age limit when he was nominated for, and he ran for the President of the Society. 40.2. The real dispute is as to whether Mr. K was over the maximum age limit when he nominated Mr. P for contesting the impugned elections. 40.3. The arbitral tribunal, should this matter be referred to arbitration, may not need to consider the issue of fraud to come to a conclusion as to the main dispute whether Mr. P may be/remain President of the Society. 40.4. Even if the issue of fraud is necessary for deciding the dispute, the same is not a case of serious fraud, only of a simple case of fraud. 40.5. Mr. P and Mr. S, against whom the fraud has been alleged, have expressed their willingness to have the matter referred to arbitration. 40.6. There is no reason for the matter being tried in Court, it is a private dispute between members of a private Society in respect of its elections, with no basis for believing that any serious fraud has been or is being committed.

41. In the circumstances, the first petition has to succeed; the first impugned order is hereby set aside. All disputes and differences between the parties are referred to arbitration before the arbitral tribunal of the Organisation, constituted under the arbitral clause. All rights and contentions of the parties are left open. The arbitral tribunal shall consider the reference without being affected by any observations in this order or any of the orders of the Trial Court or Appellate court. Mr. V shall take necessary steps to communicate this order to the arbitral tribunal and initiate appropriate proceedings as necessary in respect thereof, as he may be advised. A copy of this order shall be sent to the Trial Court. The parties shall bear their own costs. NAJMI WAZIRI (JUDGE) MAY30 2014