ARBITRALITY OF FRAUD IN INDIA

DHEERESH KUMAR DWIVEDI[1]

Introduction.

Arbitration and Conciliation Act 1996[2] was enacted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards[3]. The object of the Act was to bring the existing law on arbitration in conformity with UNCITRAL Model Law on Commercial Arbitration, 1985[4] and thereby fulfilling India's quest for economic prosperity which was only possible through making the existing legal regime in tune with international law on dispute resolution. Thus, *minimum intervention of courts*,[5] *severability of arbitration agreement form main contract*[6] and *principleofkompetenz-*

1 4th year, NLIU Bhopal.

2 Hereinafter referred to as "Act of 1996".

3 With the passage of Arbitration and Conciliation Act, 1996, three laws dealing with arbitration in India viz., The Arbitration (Protocol and Convention) Act, 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961were brought under one consolidated Act.

4 Preamble of Arbitration and Conciliation Act, 1996.

5 Section 5 & 8 of the Act read as follows:

Section 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 8. Power to refer parties to arbitration where there is an arbitration agreement.—

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

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6 Section 16 (1) (b) of the Arbitration and Conciliation Act, 1996 provides for severability of arbitration agreement from main contract. It reads as follow:

Section 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.

kompetenz[7] were made the fundamental principles of arbitration jurisprudence in India.[8]

Although the Act does not expressly exclude any category of disputes as unarbitrable, by implication, it does exclude the certain cases which require determination of right *inrem*, as against right *inpersonam*, meaning thereby, except criminal proceedings, all disputes of civil nature and/or arising out of contractual relationship between parties are arbitrable.[9] However, the courts in India have tended to enlarge their jurisdiction by overlooking these fundamental principles and have held a certain class of private disputes to be unarbitrable or incapable of being settled by arbitration. One such subject of private/ civil dispute is arbitrability of fraud which, although not, expressly or by implication, excluded from applicability of the Act, has been held to be unarbitrable in a series of judgments.

The present paper analyses the law relating to arbitrability of fraud in India. In Part I of the paper, the author has critically delved into the theme with the help of the decision of the Supreme Court in *N. Radhakrishnan* v. *M/S Maestro Engineers & Ors*[10] and its ramifications on the law in force. In Part II of the paper, the diverging opinions of various High Courts have been discussed to highlight the ambiguity which persisted during the period of 2009-14 in field of arbitrability of fraud. Part III of the paper deals with the single bench decision of the Supreme Court in *Swiss Timing Ltd.* v. *Organizing Committee, CWG Delhi*[11] and its contribution to the debate relating to arbitrability of fraud. Part IV deals with the rather less discussed area of arbitrability of fraud in foreign seated arbitration. Part V and VI of paper discuss arbitrability of fraud in the United Kingdom and the United States of America. As a conclusion, the author highlights the difficulty which is being faced by lower courts

7 Principle of 'Kompetenz-kompetenz' has been taken from Article 16 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 and has been incorporated under Section 16 of the Arbitration and Conciliation Act, 1996.

8 These principles have consistently been held by Indian Courts as fundamental principles of arbitration in India. See SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd., (2011) 14 SCC 66; Swiss Timing Ltd. v. Organizing Committee, CWG Delhi, (2014) 6 SCC 677.

9 Booz-Allen & Hamilton Inc v. SBI Home Finance Ltd. & Ors, (2011) 5 SCC 532, ¶23.

10 N. Radhakrishnan v. M/S Maestro Engineers & Ors., (2010) 1 SCC 72 (hereinafter referred to as "N. Radhakrishnan").

11 Swiss Timing Ltd. v. Organizing Committee, CWG Delhi 2010, (2014) 6 SCC 677 (hereinafter referred to as "Swiss Timing").

after two contrasting decisions of the Supreme Court in the area and tries to provide a solution for the same.

Part I: The Frankenstein's Monster

The Supreme Court was posed with question of arbitrability of allegations of fraud in *N. Radhakrishnan* v. *M/S Maestro Engineers & Ors.*[12] In this case, appellant and respondents were partners in a partnership firm but later certain dispute arose among them as to contribution of each partner in the firm which was sought to be settled by arbitrator. Meanwhile, the respondent filed an application before the Court of the District Munsif at Coimbatore seeking an injunction against the appellant from disturbing the business of the firm and prayed that the appellant be declared retired from the firm. In response, the appellant filed another application before the same court under Section 8 of the Act of 1996, seeking reference of the dispute to the arbitral tribunal. The plea of the appellant was rejected by both lower court and the High Court of Madras. The issue before the division bench of the Supreme Court was whether matter involving serious allegations of fraud and misappropriation can be referred to arbitration. The Court held that the matter cannot be decided by an arbitrator and therefore, has to be referred to court of law. The Court highly relied upon its earlier decision of full bench in *Abdul Kadir Samsuddin Bubere* v. *Madhav Prabhakar Oak & Ors.*[13], wherein, the Apex Court, holding fraud unarbitrable, observed that if a party alleges fraud on part of another party, and if the party so alleged desires a public trial, courts would, as per Section 20 of the Arbitration Act, 1940[14], be competent to decline to refer the matter to the arbitral tribunal as that would amount to "*sufficient cause"* within the meaning of the Act. The court also relied on decision of Madras High Court in *Oomor Sait HG* v.

12 Supra note 9.

13 Abdul Kadir Samsuddin Bubere v. Madhav Prabhakar Oak & Ors., AIR 1962 SC 406 (hereinafter referred to as "Abdul Kadir").

14 Section 20. Application to file in Court arbitration agreement-

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(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.

……..

(hereinafter referred to as "Act of 1940").

Asiam Sait,[15] wherein it was held that the power of civil courts to refuse to refer certain disputes to arbitration on certain grounds under the Act of 1940 continues to be available to the courts under the Act of 1996 and they would be justified in refusing to refer a matter for arbitration if the dispute involves complicated questions of law and requires *"detailed oral and documentary evidence"*.

Therefore the Court held that since allegation of fraud requires very *"detailed oral or documentary evidence"* to prove or disprove the allegation, the courts, and not the arbitral tribunal, are the appropriate forum to decide the same.

However, the author believes that in view of provisions of Section 8 of the Act of 1996, the reliance by the Apex Court on its earlier decision in Abdul Kadir[16], which was based on Section 20 of the Act of 1940, was misplaced. It is pertinent to note here that the courts could, under Section 20 of the Act of 1940, on "*sufficientcause"* being shown, refuse to refer the matter to arbitration while there is no such discretion on court under Section 8 of the Act of 1996[17] as the language of section 8 is peremptory.[18] Thus, if the subject matter of the dispute is within the scope of arbitration agreement, even if the existence of the arbitration clause itself is questioned, under Section 16 of the Act of 1996, the arbitrator is the sole authority to decide upon the issue and the courts are duty bound to refer the dispute to the arbitral tribunal.[19] The wording of Section 16, that the Arbitral Tribunal may rule *"on any objections with respect to the existence or validity of the arbitration agreement"* themselves shows that the power of the Tribunal under Section 16 is not confined only to the width of its jurisdiction, but goes to the very root of its jurisdiction[20] and in spite of there being an arbitration clause, refusal to refer the matter to arbitration would amount to failure of justice.[21]

15Oomor Sait HG v. Asiam Sait, 2001 (3) CTC 269.

16Supra note 12.

17Wimco Ltd. v. Sambhu Dayal Gupta, 1998 (2) ArbLR 118.

18Hindustan Petroleum Corporation Limited v. Pinkcity Midway Petroleums, 2003 (6) SCC 503 (hereinafter referred to as "HPCL"); Agri Gold Exims Ltd. v. Sri Lakshmi Knits & Wovens, (2007) 3 SCC 686.

19HPCL, supra note 17; See also Gajapati Raju & Ors. v. P.V.G Raju & Ors., [2002] 2 SCR 684 (hereinafter referred to as "Gajapati Raju").

20Konkan Railway Corporation Ltd. & Anr. v. Rani Construction Pvt. Ltd., [2002] 1 SCR 728.

21HPCL supra note 17, ¶ 25.

Also, the decision in *N. Radhakrishnan*[22] does not carry out the intention of the legislature which, by its wisdom, has made certain private disputes to be arbitrable without intervention of the courts[23]. Moreover, it will be wrong to assume that arbitrator is not capable of solving intricate issues involving allegations of fraud[24] as the sole reason for exclusion of applicability of general rules of procedure and evidence to arbitration proceedings[25] was to enable experts to resolve the dispute in hand without getting involved in the legal intricacies of the dispute. Further, plea of public defence in cases of allegations of fraud[26] cannot override the arbitration agreement.[27]

Part II: An Era of confusion

Despite clear wording of Section 16 of the Act, the Hon'ble Supreme Court rendered contradictory decisions in *HPCL*[28] and *Gajapati Raju*[29] on one hand and *N. Radhakrishnan* on the other hand and thereby created confusion regarding arbitrability of fraud in India. This unclear position of law has resulted into divergent opinions by the Supreme Court and various High Courts in subsequent cases which have been discussed below.

22 Supra note 9.

23 Section 5 of the Arbitration and Conciliation Act, 1996.

24 Robert Merkin, Arbitration Law, P. 85-86, (Informa Law from Routledge, London; 3 Rev. Ed. (2004) (hereinafter referred to as "Robert Merkin").

25 Section 19 of the Arbitration and Conciliation Act, 1996 excludes the applicability of Code of Civil Procedure, 1908 and Indian Evidence Act, 1872 in arbitration proceedings and empowers the tribunal to adopt its own procedure. It reads as follow:

Section 19: Determination of rules of procedure-

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

26 Decision of N. Radhakrishnan (supra note 9) was partially based on "the plea of public defence". However, origin of "the plea of public defence" goes way back to decision of the Court of Chancery in Russell v. Russell, (1880) 14 Ch. D 471.

27 Robert Merkin, supra note 23.

28 Supra note 17.

29 Supra note 18.

The Apex Court in *Bharat Rasiklal* v. *Gautam Rasiklal*,[30] while deciding whether it is necessary for the court to look at the validity of arbitration agreement before appointing the arbitrator, held that since the existence of a valid and enforceable arbitration agreement is a condition precedent for appointment of arbitrator, the Chief Justice or his designate must decide preliminary issue of existence of valid arbitration agreement before appointing an arbitrator as this cannot be left to be decided by the arbitrator.[31] This was based on presumption that serious allegations of fraud, if proved, would go into the root of the validity of both underlying contract and arbitration agreement and thereby would render the entire proceeding fruitless.[32]

However, the stand taken by various High Courts has not been consistent as result of which different High Courts have given different decisions. Thus the Bombay High Court has held that where the serious allegations of fraud are *primafacie* demonstrable[33] or if the party against whom serious allegations of fraud are made desires to have public trial,[34] dispute cannot be referred to the arbitration.[35] However, the Punjab & Haryana High Court[36] refused to accept the view that mere appearance of expressions of fraud or undue influence will automatically render the dispute unarbitrable. On similar line, the Bombay High Court in *Rekha Agarwal* v. *Anil Agarwal & Ors*[37]held that though the courts still enjoy the discretion to deny a reference to arbitration, there is no bar on a reference to arbitration on account of allegations of fraud and the arbitrator shall enjoy jurisdiction to adjudicate upon the matter, even if an independent criminal trial is or may, in the future, be pursued before appropriate courts.

30Bharat Rasiklal v. Gautam Rasiklal, (2012) 2 SCC 144 (hereinafter referred to as "Bharat Rasiklal").

31S.B.P. & Co. v. Patel Engineering Ltd. (2005) 8 SCC 618; National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267, ¶ 17.

32Bharat Rasiklal, supra note 29.

33Goldstar Metal Solutions v. Dattarao Gajanan Kavtankar , 2013 (3) ABR 529.

34Ivory Properties and Hotels Pvt. Ltd. v. Nusli Neville Wadia, (2011) 2 ArbLR 479 (Bom.).

35The view taken by Calcutta High Court has been more rigid and even cases where the party making charges of fraud desires public trial have been held to be unarbitrable. See General Enterprises Ltd. v. Jardine Handerson Ltd., AIR 1978 Cal 407.

36Hughes Communications India Ltd. & Ors. v. East West Traders and Anr., 2013 (3) ArbLR 283 (P&H).

37Rekha Agarwal v. Anil Agarwal & Ors., Arbitration Petition Nos. 257 and 258 of 2013, Order dated April 3, 2014 [Bombay High Court].

Part III: Holding fraud arbitrable- Swiss Timing Ltd. v. Organizing Committee, CWG Delhi 2010 [2013, Single Bench]

The law regarding the arbitrability of fraud saw an upside down shift after decision of the Supreme Court in *Swiss Timing* in which the single bench of the Apex Court held that the N. Radhakrishnan was *perincuriam* as it was contrary to well established principle laid down by the Apex Court in *HPCL* and *Gajapati Raju* and Section 16 of the Act of 1996.

Applicant, Swiss Timing entered into a contract with the respondent for providing timing, score etc. during the Commonwealth Games, 2010. Later certain dispute arose between parties where the applicant alleged that the respondent has defaulted in making payment to the applicant and invoked the arbitration agreement. When the respondent failed to appoint an arbitrator on its behalf, the applicant approached the Supreme Court under Section 11(6) of the Act of 1996 for appointment of arbitrator. Opposing the appointment of arbitrator, the respondent claimed that since the applicant have resorted to corrupt practices and therefore, as per the contract between the applicant and the respondent, the contract stands *void ab initio.* It was also contended by the respondent that since dispute involves serious allegations of fraud, it cannot be referred to arbitration. Further, the respondents claimed that since various criminal proceedings have already been initiated against petitioners, matter should not be referred to arbitration as it may lead to unnecessary confusion by two conflicting conclusions.

While rejecting the first claim of the respondent, the court placed its reliance on its earlier decision of seven judges' bench in *SBP & Co.* v. *Patel Engineering Ltd.,*[38] and held that since an arbitration agreement is severable from main contract, invalidity of underlying contract does not render it otiose.[39] For the purpose of appointment of arbitrator, it was held, courts are not required to undertake a detailed scrutiny of the merits and demerits of the case and are only required to decide preliminary issues such as jurisdiction to entertain the application, the existence of a valid arbitration agreement, whether a live claim existed or not.[40]

38SBP & Co. v. Patel Engineering Ltd., (2002) 2 SCC 388 (hereinafter referred to as "Patel Engineering").

39See also Reva Electric Car Company Private Limited v. Green Mobil, (2012) 2 SCC 93.

40Today Homes & Infrastructure Pvt. Ltd. v. Ludhiana Improvement Trust & Anr., 2013 (7) SCALE 327.

The court further observed that once parties have agreed to settle their disputes through arbitration, they cannot be permitted to avoid arbitration without satisfying the Court that it will be just and in the interest of all the parties to not to proceed with the arbitration. [41] Echoing the principle of the least interference, the court held that with the conjoint reading of Section 5 and Section 16 of the Act of 1996, it becomes clear that all matters including the issue of the validity of main contract can be referred to arbitration.[42] Thus the court clearly differentiated between term *void* and *voidable* and held that in cases, where it *primafacie* appears to the Court that contract is *void*, it would be justified in declining reference to arbitration. However, this is not open for court to decide where the contract is *voidable*.[43] Thus, since a contract affected by fraud is a voidable contract,[44] the courts cannot refuse to refer dispute to arbitration.

Rejecting the contention of the respondent that since dispute involves serious allegations of fraud, it should be decided by the court itself,[45] the court held that since *N. Radhakrishnan* was decided in ignorance of express provisions of Section 16 of the Act of 1996 and the decision of the division bench of the Hon'ble Supreme Court in HPCL and Gajapati Raju, the decision of the division bench of Hon'ble Supreme Court in N. Radhakrishnan is *perincurium* and does not lay down correct position of law.

Regarding the third claim of the respondent, the Apex Court held that the existence of dual proceedings; one under the criminal law and the other under the civil law is a well-accepted legal phenomenon in the Indian jurisprudence[46] and the possibility of conflicting decisions is not a bar against simultaneous arbitration proceeding and criminal proceedings.[47] Thus, existence of criminal proceeding of fraud cannot render a dispute unarbitrable as even if the underlying contract is declared void because of fraud and arbitral award is also passed, the aggrieved party has still an option to resist the *execution/enforcement* of such award under section 34 of the Act of

41Swiss Timing, supra note 10, ¶ 26.
42Ibid.
43Ibid. ¶ 27.
44Section 19 of Indian Contract Act, 1872.
45N. Radhakrishnan, supra note 9.
46HPCL, supra note 17, ¶ 23.
47Swiss Timing, supra note 10, ¶ 28.

1996.[48] Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal, it would have the wholly undesirable result of delaying the arbitration and thereby frustrating the very object of the Arbitration and Conciliation Act, 1996.[49]

Part IV: Arbitrability of fraud in foreign seated arbitration

The Arbitration and Conciliation Act, 1996 divides domestic arbitration and foreign seated arbitration in two different parts *viz*., Part I and Part II and provides different mechanism for their application. Unlike domestic arbitration, in case of foreign seated arbitration, the domestic courts have no jurisdiction to entertain a dispute covered by arbitration agreement, unless the arbitration agreement, as provided under Section 44 of the Act of 1996, is *"null or void, or inoperative and incapable of being performed."* Therefore in all cases of foreign seated arbitration except those mentioned under Section 44 of the Act of 1996 the courts have to mandatorily refer the dispute to arbitration.[50]

The question of arbitrability of fraud in foreign seated arbitration came up for consideration before the Apex Court in *World Sport Group (Mauritius) Ltd.* v *MSM Satellite (Singapore) Pvt. Ltd.*,[51] wherein, relying on Section 45 of the Act of 1996[52], it was observed that since the role of courts in foreign seated arbitration is limited to enforcement of foreign awards;[53] they will have to refer a dispute for arbitration unless the arbitration clause is inoperative or where it is incapable of being performed or the arbitration agreement is null and void. Since the arbitration agreement does not become *"null and void"* or *"inoperative or incapable of being performed"*

48 Ibid.; as per section 34 of the Arbitration and Conciliation Act, 1996, an appeal for setting aside an arbitral award can be made before court of law on the ground that the arbitration agreement is not valid under the law to which parties have subjected to themselves.

49 Swiss Timing, supra note 10, ¶ 28.

50 State of Orissa v. Klockner & Co., AIR 1996 SC 2140.

51 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pvt. Ltd., AIR 2014 SC 968 (hereinafter referred to as "World Sports").

52 Section 45. Power of judicial authority to refer parties to arbitration.—
Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

53 Section 49 of the Arbitration and Conciliation Act, 1996.

where allegations of fraud have to be inquired into, court cannot refuse to refer the dispute to arbitration.[54]

Part V: Position in UK

The judicial trend in the United Kingdom, too, has been in favour of severability of arbitration clause from main contract[55] and the arbitration agreement is treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement.[56] The court in *Harbour v Kansa*[57] held that the arbitration clause applied to a dispute even when the agreement in which it was embedded was void for initial illegality provided that the arbitration clause itself is not directly impeached. Once the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.[58]

Hence, under English law, unless the language of the arbitration clause specifically excludes the arbitrability of disputes related to validity of contract, the tribunal would have the jurisdiction to decide the dispute.[59]

Part VI: Position in the USA

Under the Federal Arbitration Act, 1925, court must grant a motion to compel arbitration if it is satisfied that the parties actually agreed to arbitrate the dispute.[60] Thus, once the Court is satisfied that the parties actually agreed to arbitrate the

54 World Sports, supra note 50, ¶ 29.

55 Section 7(2) of the English Arbitration Act 1996.

56 Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors. [2007] UKHL 40, ¶ 17 (hereinafter referred as "Premium Nafta Products").

57 Harbour v Kansa, [1992] 1 Lloyds Rep 81, at P.92

58 Premium Nafta Products, supra note 55, ¶ 18.

59 Fiona Trust & Holding Corporation v. Yuri Privalov, [2007] APP.L.R. 01/24.

60 Section 3 of Federal Arbitration Act 1925. It read as follows: (No need of Quoting the whole section, just the section number and title of the section.)

Section 3. Stay of proceedings where issue therein referable to arbitration-

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

dispute, it is for the arbitration panel, not the court, to determine whether the underlying contracts in general is enforceable.[61]

The doctrine of severability of arbitration agreement from the main contract has been recognized by the courts of United States of America as well. The Supreme Court of the United States of America in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[62] ruled that arbitration clauses are separable from the contracts in which they are included and a claim of fraudulent inducement of the contract generally is a matter to be resolved by the arbitrator, whereas a claim that the arbitration clause itself is fraudulently induced would be for the court to decide because such a claim put the making of the arbitration agreement in issue.[63] This doctrine was further explained by the 11th Circuit Court[64] wherein the court held that under normal circumstances, "when there is an arbitration clause in a signed contract," the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract *in general.*

In *Bess v. Check Express*,[65] the court went one step further and held that even when the main contract is alleged to be *voidabinitio*, even then the arbitrator would be said to have the jurisdiction to decide the validity of the contract. Thus, the position in USA, too, is in consonance with the object of arbitration and minimum interference of the court.

Part VII: Conclusion

The decision of the Apex Court in Swiss Timing, given by single judge bench and contrary to its earlier decision of the division bench in N. Radhakrishnan, has caused confusion to lower courts as to which decision should be followed thereby leading to divergent views taken by different High Courts. Though, as per Article 141 of the Constitution of India decision of the Supreme Court is binding on all courts within

61 Riverwalk Apartments, L.P. v. RTM General Contractors, Inc., 779 So. 2d 537 (Fla. Dist. Ct. App. 2000).

62 Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395 (1967) (hereinafter referred as Prima Paint Corp); see also Burden v. Check Into Cash of Kentucky, LLC, 267 F.3d 483 (6th Cir. 2001).

63 Prima Paint Corp, supra note 61.

64 Chastain v. Robinson-Humphry Co., 957 F.2d 851 (11th Cir. 1992).

65 Bess v. Check Express, 294 F.3d 1298 (11th Cir. 2002).

the territory of India,[66] decision taken by Chief justice of India or his designate under Section 11 of the Act of 1996 being judicial order of Chief Justice of India/ High Court or his designate[67] and not the decision of the Supreme Court[68] it does not have precedential value[69]. Nonetheless, the Bombay High Court[70] has rejected the argument that the Swiss Timing being a single bench decision cannot take precedence over a decision of higher bench in N. Radhakrishnan as it does not lay down any general or peremptory norm that allegation of fraud, in all cases, is incapable of settlement by arbitration. On the contrary, the Delhi High Court[71] has held that N. Radhakrishnan being the decision of higher bench judgement would prevail and bind lower courts and therefore, serious allegations of fraud still remains non-arbitrable under Indian law.

Therefore, in light of differing legal opinion on the subject, it is suggested that, to bring the law of arbitration in consonance with the scheme and object of Arbitration and Conciliation Act 1996, issue of fraud should, as suggested by the Law Commission in its 246th report,[72] be expressly made arbitrable by an amendment in section 16 of the Act. This will serve the purpose of the Act as if the courts are to determine the competence of the arbitrator to decide an issue, they may be fled with the cases with an oblique motive alleging fraud so as to prolong the litigation and frustrate the legitimate claim of the parties. While it is suggested and desirable that court should continue to retain some discretion to refuse reference to arbitration in certain peculiar case, this should be treated as an exception rather than general rule.

66 Article 141 Law declared by Supreme Court to be binding on all courts-The law declared by the Supreme Court shall be binding on all courts within the territory of India.

67 Patel Engineering, supra note 37.

68 Section 2(1) (e) of the Arbitration and Conciliation Act, 1996 defines "Court". Interpreting the provision, the Supreme Court held that "in exercise of his power under Section 11 of the Act, Chief Justice of India/ High Court does not represent the Supreme Court or High Court as the case may be." See State of West Bengal v. Associated Contractors, (2015) 1 SCC 32 ¶ 17.

69 Ibid.

70 Avitel Post Studioz Ltd. & Ors. v. HSBC PI Holdings (Mauritius) Ltd., Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012.

71 RRB Energy Ltd. v. Vestas Wind Systems & Anr., C.S. (OS) No.999/2014, Decided on 15th April, 2015, ¶ 54.

72 Law Commission of India, 246th Report on Amendments to the Arbitration and Conciliation Act 1996 (August, 2014) ¶ 52.