ARBITRABILITY OF FRAUD: ANALYSING INDIA'S PROBLEMATIC JURISPRUDENCE

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Abstract

*Arbitrability of fraud has consistently been the subject of immense judicial scrutiny by the Indian courts. Despite that, the final statement of Indian law on this point remains deeply disappointing, and is detrimental to the arbitration landscape in India. In this paper, the author shall demonstrate that the existing jurisprudence on this issue does not suitably deal with the controversy. The paper begins by outlining the scope of 'arbitrability'. It shall proceed towards tracing the judicial developments on the subject starting from pre-independence India. The paper shall then analyse the significant contemporary developments under the Arbitration and Conciliation Act, 1996 [the "**1996 Act**"], and critically examine how the existing precedents compel the courts to undertake an adjudication on merits at the pre-reference stage. The paper shall conclude by offering suggestions to reduce the judicial uncertainty on this point.*

I. Introduction

Globally, arbitration is the preferred mode of commercial dispute resolution since it offers timely relief, provides full expression to contractual autonomy, and ensures predictability of outcomes. Parties, incentivised by these advantages, insist upon the insertion of arbitration clauses in their contracts. Such clauses indicate that parties are ad idem that in the event disputes arise, they shall be resolved via arbitration. The arbitration mechanism helps them avoid the long-winded judicial process associated with civil courts.

The question that follows is whether all disputes are capable of being resolved via arbitration, and whether the insertion of an arbitration clause can remove all types of disputes from the ambit of judicial forums in favour of an arbitral tribunal. This question stands answered by the Indian Supreme Court in *Booz Allen and Hamilton Inc.* v. *SBI Home Finance Ltd.* ["**Booz Allen**"].[1] This verdict is also the first time that the Supreme Court ventured to explain the contours of 'arbitrability', a term that is nowhere defined in the 1996 Act or its preceding statutory enactments.

The Supreme Court employed a three-pronged test to determine 'arbitrability'. *First*, whether the dispute is capable of being resolved via arbitration. *Second*, whether the dispute is covered by the arbitration agreement. Finally, whether the parties have referred the dispute to arbitration.[2] In answering this three-pronged formulation, the apex court categorized disputes as arbitrable and non-arbitrable by classifying them into disputes which deal with rights *in rem* and rights *in personam*. It is relevant to note that while *rights in rem* are enforceable against the public at large, rights *in personam* are attached to specific person(s) alone.

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1 Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors., (2011) 5 SCC 532 [*hereinafter* "Booz Allen"].

2 *Id.* ¶ 34.

The Supreme Court via Justice R.V. Raveendran held that rights *in personam* are arbitrable, but *rights in rem* are non-arbitrable on the ground that rights *in rem* tend to have an impact on society at large, as they involve the adjudication of the entitlements of not only the parties *inter se* but against all people who might be claiming an interest in the property. *Per contra*, rights *in personam* are restricted to rendering a decision on private rights alone.[3] The direct impact of this reasoning was an affirmance of the conventional understanding that mere choice of parties to categorise a dispute as being covered by an arbitration clause would not necessarily mean that it is capable of being resolved by arbitration, and hence would not oust the jurisdiction of civil courts.

The Supreme Court, while laying down this flexible rule, also outlined certain disputes that are essentially non-arbitrable. A few examples of these non-arbitrable disputes are:

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(iii) guardianship matters;
(iv) insolvency and winding up matters;
(v) testamentary matters (grant of probate, letters of administration and succession certificate); and
(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.[4]

This classification as conceptualized in *Booz Allen*, though instructive, is also fluid in nature. The Supreme Court has sometimes chosen to shrink the scope of arbitrable disputes, and on at least one occasion, has grappled with the difficulties that may arise if the scope of arbitrability is expanded. In 2016, the Supreme Court, in *Vimal Kishore Shah and Others* v. *Jayesh Dinesh Shah and Others*[5] ["**Vimal Kishore Shah**"], added disputes arising out of trust deeds and the Indian Trusts Act, 1882 to the category of non-arbitrable disputes. The reason behind holding trust disputes to be non-arbitrable was that sufficient and adequate remedy is provided under the Indian Trusts Act itself.

Likewise, in 2018, the Supreme Court, while hearing a review petition in *Emaar MGF Land Limited* v. *Aftab Singh*[6] ["**Emaar MGF Land Limited**"], held consumer disputes to be non-arbitrable. It added an important clarification in holding that consumer disputes are capable of being arbitrated provided that the agreement contains an arbitration clause, but in situations wherein the consumer has first approached the consumer courts, then the judicial authority would be within its rights to refuse a reference to arbitration.[7] It also noted that it is only in cases

3 *Id.* ¶ 38.
4 *Id.* ¶ 36.
5 Vimal Kishore Shah and Ors. v. Jayesh Dinesh Shah and Ors., (2016) 8 SCC 788.
6 Emaar MGF Land Limited v. Aftab Singh, 2018 SCC Online SC 2771.
7 Nidisha Garg, *Consumer Disputes to be Non-Arbitrable: SC Lays to Rest the Controversy,* INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2019/01/consumer-disputes-non-arbitrable-sc-lays-rest-controversy.html.

where specific remedies are provided for and opted by the aggrieved person that the court can deny reference to arbitration.

Further, two division benches of the Supreme Court have taken divergent views regarding the arbitrability of tenancy disputes. In 2017, the Supreme Court in *Himangi Enterprises* v. *Kamaljeet Ahluwalia,* ["**Himangni Enterprises**"] relying on *Natraj Studios (P) Ltd.* v. *Navrang Studios and Another*[8] ["**Natraj Studios**"] and *Booz Allen*, held that tenancy disputes involving questions of eviction and rent recovery shall be adjudicated by a civil court as opposed to an arbitral tribunal,[9] under the Transfer of Property Act, 1882 even when the Delhi Rent Act, 1995 (special legislation governing tenancy disputes) is not applicable.[10] In 2019, another division bench of the Supreme Court in *Vidya Drolia and Others* v. *Durga Trading Corporation*[11] ["**Vidya Drolia**"] doubted the correctness of the view expressed in *Himangni Enterprises.* It held that under the Transfer of Property Act, 1882, there was no specific bar vis-à-vis arbitrability of tenancy disputes,[12] as opposed to in *Vimal Kishore Shah*, wherein the doctrine of necessary implication effectively excluded the Trust Act from the ambit of arbitrability.[13] The Supreme Court, therefore, allowed the parties to continue with the arbitral proceedings and also referred this matter for adjudication by a larger bench of at least three judges.[14]

With this backdrop in mind, it is apt to examine how the Indian courts have historically approached the issue relating to arbitrability of fraud especially since *Booz Allen*, *Vimal Kishore Shah*, *Emaaar MGF Land Limited*, *Himangini Enterprises* and *Vidya Drolia* did not specifically exclude fraud from the ambit of arbitrable disputes.

II. Historical Analysis of Judicial Precedents

The legislations that preceded the 1996 Act were the Indian Arbitration Act, 1899 [the "**1899 Act**"] and the Arbitration and Conciliation Act, 1940. Application of the former was, however, limited to the Presidency towns, namely Bombay, Calcutta and Madras.[15] Under both these statutory enactments, Indian courts dealt with the issue of whether fraud falls within the ambit of arbitration or if it automatically stands excluded.

Section 19 of the 1899 Act is particularly relevant because it permitted the courts to stay legal proceedings. The stay could be granted in those situations where the parties had agreed to submit their disputes to arbitration, and the courts were satisfied that there was no sufficient reason as to why the matter should not be referred to arbitration. However, the judicial philosophy regarding arbitrability of fraud under the 1899 Act was influenced by a decision that predated its enactment.[16] In *Russel* v. *Russel* ["**Russel**"],[17] the English courts considered whether

8 Natraj Studios (P) Ltd. v. Navrang Studios and Another, (1981) 1 SCC 523.
9 Himangni Enterprises v. Kamaljeet Ahluwalia, (2017) 10 SCC 706.
10 *Id.*
11 Vidya Drolia and Ors. v. Durga Trading Corp., 2019 SCC Online SC 358.
12 *Id.* ¶ 26.
13 *Id.* ¶ 50.
14 *Id.* ¶ 36.
15 LAW COMM'N OF INDIA, REPORT NO. 246, AMENDMENTS TO ARBITRATION AND CONCILIATION ACT, 1996 (2014) [*hereinafter* "Law Commission Report"].
16 Parul Kumar, *Is Fraud Arbitrable? Examining the Problematic Indian Discourse,* 33(2) ARB. INT'L 249, 251 (2017) [*hereinafter* "Parul Kumar"].

allegations of fraud would exclude the operation of an arbitration clause, for the first time. The decision introduced a prima facie test to determine whether disputes could be referred to arbitration or not: the courts shall be entitled to refuse a reference to arbitration if there exists sufficient prima facie evidence to support the existence of fraud.

The decision in *Russel* formed the basis for the Indian courts to determine the competence of an arbitrator to adjudicate disputes concerning fraud. In *Narsingh Prasad Boobna and Others* v. *Dhanraj Mills*[18] ["**Narsingh Prasad Boobna**"], the Patna High Court, in 1943, while adjudicating a case under the Indian Arbitration Act, 1899, held that since prima facie sufficient evidence existed to indicate the existence of fraud, civil courts were better suited to adjudicate the dispute as opposed to an ordinary arbitrator. In 1938, the Madras High Court in *Laldas Lakshmi Das* v. *J.D. Italia* ["**Laldas Lakshmi**"], observed that in cases involving serious allegations of fraud, the party against whom such allegations have been made, has the right to ask the court that matters affecting his integrity should be decided in open court.[19] However, the court also noted that businessmen may not want to clear their character in open court in cases involving allegations of fraud and would rather submit to the jurisdiction of the arbitral tribunal.[20]

In 1929, the division bench of the Bombay High Court while hearing a dispute under the 1899 Act, in *Raneegunge Coal Association Ltd.* v. *Tata Iron and Steel Co Ltd*[21] adopted a completely different approach in contradistinction to *Laldas Lakshmi*, and the subsequent view of the Patna High Court in 1943. The Bombay High Court ruled that mere allegations of fraud would not be reason enough to stay suit proceedings under Section 19 of the 1899 Act without furnishing particulars of the fraud. The court also observed that a party cannot allege fraud merely based on a cause of action of fraud where the real cause of action is *ex contractu*. In doing so, it added heft to the then nascent belief that an arbitral tribunal is competent to adjudicate questions of law which may include but shall not be limited to questions of fraud.[22]

It was not until 1962 that occasion arose for the Indian Supreme Court, in *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhakar Oak*[23] ["**Abdul Kadir**"], to examine the contours of arbitrability of fraud under the Arbitration and Conciliation Act, 1940. In this case, the trial court had declined to refer the parties to arbitration, after holding that allegations relating to fraud excluded arbitration as the mode of dispute resolution. The trial court's decision was reversed by the Bombay High Court, which held that the allegations that arose in the dispute were not allegations of fraud, and even if they were, were still not of a nature that would call upon the courts to refuse a reference to arbitration.

The Supreme Court, in appeal, laid emphasis on a threshold test for serious fraud. It held that when there are serious allegations of fraud which are made against a party, then the party which has been accused of fraud may desire that the case be tried in a civil court as opposed to via

17 Russel v. Russel [1880] 14 Ch D 471 (Eng.).
18 Narsingh Prasad Boobna and Ors v. Dhanraj Mills, AIR 1943 Pat. 53.
19 Laldas Lakshmi Das v. J.D. Italia, 1938 SCC Online Mad. 175.
20 *Id.* ¶ 2.
21 Raneegunge Coal Association Ltd v. Tata Iron and Steel Co. Ltd, AIR 1929 Bom. 119.
22 Parul Kumar, *supra* note 16, at 253.
23 Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406 [*hereinafter* "Abdul Kadir"].

arbitration.[24] In these circumstances, the 'sufficient cause' requirement as contained in Section 20(4) of the Arbitration and Conciliation Act, 1940 would be met.[25] The court noted that the allegations merely touched upon fraudulent accounting entries and that was not reason enough to warrant interference with the arbitral proceedings.

The Indian Supreme Court's decision in *Abdul Kadir* has been the theoretical underpinning for subsequent decisions of the court in which it has sought to assess the seriousness of fraud, and whether that seriousness can be a basis to decline reference to arbitration.[26]

III. Significant Contemporary Developments: Quartet of Judicial Decisions

The Indian Arbitration Act, 1899 gave way to the Arbitration and Conciliation Act, 1940, and in 1996, the Arbitration and Conciliation Act, 1940 was replaced by the 1996 Act. When the 1996 Act was enacted, two significant activities had taken place. The UNCITRAL Model Law on International Commercial Arbitration was introduced in 1985 and economic liberalization took place in India in 1991. These twin factors necessitated the introduction of a new legislation that was in sync with the global commercial realities faced by India.

Under the 1996 Act, a quartet of major decisions has shaped the understanding of arbitrability of fraud. The first of these decisions came in 2009 with *N. Radhakrishnan* v. *Maestro Engineers and Ors.*[27] ["**N. Radhakrishnan**"], wherein the Supreme Court considered a case that originated under Section 8 of the 1996 Act.[28] Section 8 unambiguously provides that if there is an arbitration clause contained in an agreement, and if that agreement is produced in the original form or via a certified copy, then provided that it has been done at a stage not later than the filing of the written statement, the courts shall relegate the parties to arbitration. Despite such an unequivocal legislative command contained in Section 8, the Supreme Court chose not to refer parties to arbitration since it felt that serious allegations of fraud were at play. In doing so, it was guided by the 1962 decision of *Abdul Kadir* to hold that serious allegations of fraud should be tried by civil courts and should not fall within the ambit of arbitration.

This decision was the first major setback to the Indian arbitration landscape on the issue of arbitrability of fraud under the 1996 Act, for two significant reasons. First, it displayed unwillingness on the part of the courts to engage with the legislative mandate of Section 8 of the 1996 Act, which was extremely different from Section 20(4) of the Arbitration and Conciliation Act, 1940 that was in place when the Supreme Court decided *Abdul Kadir*.[29] Second, this decision displayed a trust deficit on part of the courts when it came to reposing faith in arbitral tribunals to adjudicate certain kinds of disputes.

In 2014, while adjudicating upon a Section 11[30] petition under the 1996 Act the Supreme Court adopted a diametrically opposite view in *Swiss Timing Limited* v. *Commonwealth Games 2010*

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24 *Id.* ¶ 13.
25 *Id.* ¶ 14.
26 Parul Kumar, *supra* note 16, at 256.
27 N. Radhakrishnan v. Maestro Engineers and Ors., (2010) 1 SCC 72 [*hereinafter* "N. Radhakrishnan"].
28 The Arbitration and Conciliation Act, No. 26 of 1996, § 8.
29 Abdul Kadir, AIR 1962 SC 406.
30 The Arbitration and Conciliation Act, No. 26 of 1996, § 11 (India).

Organising Committee[31] ["**Swiss Timing**"]. The apex court appointed a sole arbitrator after expressly rejecting the argument that allegations of fraud would oust the jurisdiction of arbitration tribunal, and also held that the lodging of a criminal case would not bar reference to an arbitration tribunal. The Supreme Court in *Swiss Timing* held that the division bench verdict in *N Radhakrishnan* goes against the ruling in *Hindustan Petroleum Corporation. Ltd.* v. *Pinkcity Midway Petroleums*,[32] wherein the court emphasised on the mandatory language of Section 8 of the Arbitration Act in relation to reference to arbitration and accordingly, held *N Radhakrishnan per incuriam.*

The decision was extremely progressive for two key reasons: *first*, it prevented parties from utilizing criminal remedies to frustrate the initiation of arbitration. *Second*, it specifically recognized the *kompetenz-kompetenz* principle, and held that all objections regarding the jurisdictional ability of the arbitrator can be raised by the aggrieved party under Section 16 of the Arbitration and Conciliation Act, 1996. However, the decision does not hold the field, as it is against the judicial principles for a single judge to declare a larger bench's decision *per incuriam*.

In 2016, the Supreme Court was again considering a case that originated under Section 8 of the 1996 Act, in *A. Ayyasamy* v. *Paramasivam and Ors.*[33] ["**A. Ayyasamy**"]. It clarified the decision in *N Radhakrishnan* and impliedly over-ruled *Swiss Timing.* The apex court created a dual paradigm to adjudge the seriousness of fraud. It held that cases involving allegations of fraud *simpliciter* were capable of being resolved through arbitration, but disputes that dealt with complex fraud were incapable of being resolved via arbitration.[34] In doing so, it stated that mere allegations of fraud that only touched upon the internal affairs of the parties without any spill over effect on the public domain were cases of simple fraud, while situations of complex fraud arose in those cases wherein the allegations of fraud went to the root of the agreement or to the validity of the arbitration clause/agreement itself. After laying down this test, the Supreme Court noted that the case in question was one of alleged simple fraud and it, therefore, appointed an arbitrator.

The rationale of the Supreme Court's division bench decision in *A. Ayyasamy* has now been affirmed by a larger bench of three judges of the Supreme Court in the 2019 judgment of *Rashid Raza* v. *Sadaf Akhtar*[35] ["**Rashid Raza**"]. It is the view of the author that instead of doing away with the distinction between simple fraud and complex fraud, the court has endorsed this duality, and by virtue of it being a decision rendered in a larger composition than *A. Ayyasamy,* it has now become a binding precedent on the subject.

In *Rashid Raza*, while hearing an appeal against a Jharkhand High Court decision[36] that had rejected the Section 11 petition of the petitioner/appellant due to the perceived allegations of serious fraud, it took forward the decision of *A. Ayyasamy* and conceptualized a working two-part test: *first*, whether the plea of fraud permeates the entire contract as well as the arbitration agreement to render it void, and *second*, whether the fraud allegations merely relate to the parties'

31 Swiss Timing Ltd. v. Commonwealth Games 2010 Org. Comm., (2014) 6 SCC 677.
32 Hindustan Petroleum Corp. Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503.
33 A. Ayyasamy v. Paramasivam and Ors., (2016) 10 SCC 386.
34 Amal K. Ganguli, *New Trend in the Law of Arbitration in India,* 60(3) J. INDIAN L. INST. 249, 263-264 (2018).
35 Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710.
36 *Id.*

internal affairs or if they have an implication upon the public domain. After doing so, it held that the disputes in the present case were only of a character that related to allegedly fraudulent accounting entries that were capable of being resolved by taking recourse to arbitration. Similar to *Ayyasamy*, the Supreme Court appointed an arbitrator to adjudicate the disputes that arose between the parties.

It is the view of the author that although it was not expressly considered by the Supreme Court in *Rashid Raza,* its reasoning was perhaps sub-consciously affected by Section 11(6A) of the 1996 Act, which existed when the decision was rendered on September 4, 2019. Further, while this provision has now been repealed by the 2019 Amendment, but for the period that it existed from 2015 till its recent repeal, it restricted the scope of courts in declining references to arbitration. Under the now deleted provision, the courts were limited to examining whether a valid arbitration agreement was in place or not. Its specific repeal may enjoin the courts to undertake this inquiry. This shall not advance the cause of arbitration in India, since the courts may start summarily rejecting arbitration petitions by finding that the disputes are non-arbitrable.[37]

IV. Compulsory Pre-Reference Adjudication on Merits

There exists a clear divergence in terms of the views that the Supreme Court has adopted while dealing with arbitrability of fraud under domestic commercial arbitration and international commercial arbitration.

It is relevant to note that the decisions in *N Radhakrishnan*, *A. Ayyasamy* and *Rashid Raza* do not adequately consider the scope of Section 27 of the 1996 Act. As per Section 27, an arbitral tribunal may seek assistance in the recording of evidence. It is common knowledge that several arbitral tribunals already record copious amounts of evidence and deal with specialized issues, particularly in infrastructure/construction disputes. Therefore, the argument that issues of fraud require an appreciation of complex evidentiary issues is a red herring, and should be outrightly rejected by courts whenever they deal with issues relating to the arbitrability of fraud.[38] Further, these decisions are not in sync with the Law Commission of India's recommendation that had favoured making issues of fraud expressly arbitrable, and had also suggested legislative amendments to Section 16 of the 1996 Act.[39]

A direct but unfortunate effect of these decisions has been the compounding of the issue of judicial uncertainty *vis-à-vis* the arbitrability of fraud in domestic arbitrations. Though this dual classification of fraud simpliciter and complex fraud appears to be intuitively appealing, its appreciation by the courts is theoretically unsound and practically unworkable. The Law Commission's recommendations in favour of making fraud expressly arbitrable have been incorrectly ignored. Such an approach, in fact, increases judicial intervention in arbitration matters as opposed to decreasing it, and that is not in sync with the statement of the object and

37 Shivam Singh, *Arbitrability of Fraud: A Critique of India's Problematic Jurisprudence,* LIVE LAW (Oct. 31, 2019), *available at* https://www.livelaw.in/columns/arbitrability-of-fraud-a-critique-of-indias-problematic-jurisprudence-148206 [*hereinafter* "Shivam Singh"].

38 Shubham Jain & Prakshal Jain, *Arbitrability of Fraud in India – Is Ayyasamy only about "Seriousness"?*, INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2017/12/arbitrability-fraud-india-ayyasamy-seriousness.html; *Id.*

39 LAW COMMISSION REPORT, s*upra* note 15.

reasons of the 1996 Act. Additionally, it enlarges the scope of discretion in terms of determining arbitrability as opposed to reposing faith in the arbitral tribunal for arriving at this conclusion.

In *National Insurance Co. Ltd.* v. *Boghara Polyfab Pvt. Ltd.*,[40] the Supreme Court held that courts do not have the power to rule upon the question of arbitrability at the stage of reference, and the same is the mandate of the arbitral tribunal under Section 16 of the Arbitration Act. Moreover, this exercise of judicial discretion is practically unworkable because the Supreme Court's understanding of what constitutes serious fraud and what constitutes simple fraud has been wavering. The Supreme Court passed a detailed judgment in *State of Bihar* v. *Divesh Kumar Chaudhary* ["**Divesh Kumar Chaudhary**"],[41] wherein the court considered over 250 anticipatory bail cancellation pleas filed by the State of Bihar and Bihar State Food and Civil Supplies Corporation Limited.

The Supreme Court noted that due to the Paddy Milling Scam, the state exchequer had suffered a financial hit of over 1500 crore rupees due to the well-orchestrated financial wrongdoing and criminal misappropriation of funds. To ensure complete justice, it established five special courts in Bihar and tasked them with the mandate of trying these offences.[42] The Supreme Court's decision clearly reveals that it was convinced about it being a sophisticated fraud requiring detailed investigation and adjudication. Its sequitur should have, therefore, been that the courts would accept the *A. Ayyasamy* dictum that cases of complex fraud are not arbitrable. However, the Supreme Court's decision in the next round of litigation clearly indicates a marked departure. In *Divesh Kumar Chaudhary*, numerous accused persons invoked arbitration clauses in their contracts with the Bihar State Food and Civil Supplies Corporation, which reached the Patna High Court via petitions under Section 11 of the 1996 Act.

In *Sadhna Kumari* v. *Bihar State Food and Civil Supplies Corporation Limited*[43] ["**Bihar State Food and Civil Supplies Corporation Ltd**"], the Patna High Court held that these matters were ripe for adjudication by arbitration and declined the Respondent's plea that the cases were incapable of resolution via arbitration. The decision was then assailed by the Bihar State Food and Civil Supplies Corporation Limited in the Supreme Court.[44] A plea was taken that the Patna High Court's decision gave a complete go-by to the principles enunciated in the *N. Radhakrishnan* and *A. Ayyasamy* case. Reference was made to the Supreme Court's own decision in *Divesh Kumar Chaudhary* to buttress the argument that the apex court's observation about it being a wide-ranging fraud constituted a bar upon the Patna High Court to appoint arbitrators in these matters. The Supreme Court was, however, unmoved by this contention and upheld the Patna High Court's impugned decision.[45] It is noteworthy that the same bench[46] of the Supreme Court considered the cases of *Divesh Kumar Chaudhary* and *Bihar State Food and Civil Supplies Corporation Ltd.*

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40 National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd., (2009) 1 SCC 267.
41 State of Bihar v. Divesh Kumar Chaudhary, (2018) 16 SCC 817.
42 Shivam Singh, *supra* note 37.
43 Sadhna Kumari v. Bihar State Food and Civil Supplies Corporation Limited, AIR 2017 Pat. 120.
44 Bihar State Food and Civil Supplies Corporation Ltd. and Ors v. Sadhana Kumari, SLP Civil No. 450/2018, Jan. 29, 2018 (SC).
45 Shivam Singh, *supra* note 37.
46 Coram: J. Adarsh Kumar Goel and J. Uday Umesh Lalit.

Notwithstanding the implied over-ruling of *Swiss Timing* by *A. Ayyasamy*, this decision of the Supreme Court brought itself closer to the decision of *Swiss Timing* and away from the verdict of *A. Ayyasamy*. In doing so, the Supreme Court did two clear things. *First*, it indicated an ideological alignment with the proposition in *Swiss Timing* that criminal prosecution should not be used as a tool to nix arbitration proceedings. *Second*, and more importantly, it showed an unwillingness to engage with the classification of simple fraud and complex fraud as enunciated in the *A. Ayyasamy* decision.

If fraud is made expressly arbitrable in keeping with the recommendation of the Law Commission, even then, a party that is objecting to the arbitrability of fraud shall have two remedies before it. These remedies can be availed at the pre-award stage and at the post-award stage.[47] The first remedy at the pre-award stage would be under Section 16 of the 1996 Act wherein a party can specifically object to an arbitrator's competence to hear a dispute involving elements of fraud. Further, referring the matters to arbitration, as opposed to declining references, would have a key advantage as it would be in sync with the commercial arbitration principle of *kompetenz-kompetenz* , which dissuades the courts from undertaking a preliminary test on arbitrability, especially when the same plea can also be raised before the arbitrator.

The second remedy would arise at the post-award stage under Section 34(2)(b)(ii) of the 1996 Act. An affected party may claim that the existence of fraud vitiates the award as it is in conflict with India's public policy.[48] The Supreme Court in cross-appeals arising in an international commercial arbitration case of *Venture Global Engineering LLC* v. *Tech Mahindra*[49] dealt with the question of whether fraud, if found to have been played by a party during the arbitration proceedings, will result in vitiating the arbitral proceedings, including the award, since it is contrary to public policy under Section 34 of the 1996 Act. The apex court bench of two judges differed with each other and the case was referred to a larger bench of three judges. While Justice Chelameswar held that the trial court had been unable to show how the award was induced by fraud, Justice Sapre took a different view and held that material non-disclosures by one party constituted fraud and it would render the proceedings void ab-initio.[50] This case has been placed before a larger bench of three judges and an authoritative pronouncement on this issue remains awaited.

The Indian Supreme Court in *World Sport Group (Mauritius) Ltd.* v. *MSM Satellite (Singapore) Pte Ltd.*,[51] had been fairly categorical in holding that even if issues of fraud were to arise in foreign-seated arbitrations, they would be arbitrable.[52] It specifically declined to accept the argument that the courts in *Abdul Kadir* and *N Radhakrishnan* had rejected references to arbitration when there

47 Janhavi Sindhu, *Fraud, Corruption and Bribery- Dissecting the Jurisdictional Tussle Between Indian Courts and Arbitral Tribunals*, 3(2) INDIAN J. ARB. L. 23–24 (2015) [*hereinafter* "Sindhu"].

48 Siddharth S. Aatreya, *Venture Global v. Tech Mahindra – Complicating the Public Policy Debate under Indian Arbitration Law*, INDIACORPLAW (Oct. 31, 2019), *available at* https://indiacorplaw.in/2018/09/venture-global-v-tech-mahindra-complicating-public-policy-debate-indian-arbitration-law.html.

49 Venture Global Engineering LLC v. Tech Mahindra Ltd., (2018) 1 SCC 656.

50 Anchit Oswal, *Impact of fraud on arbitral award: Indian Supreme Court at divergence,* SCC ONLINE BLOG (Oct. 31, 2019), *available at* https://www.scconline.com/blog/post/2018/02/01/impact-fraud-arbitral-award-indian-supreme-court-divergence/.

51 World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte Ltd., (2014) 11 SCC 639.

52 Shivam Singh, *supra* note 37.

were serious issues of fraud that required adjudication. It did so by holding that both, *Abdul Kadir* and *N Radhakrishnan,* were domestic arbitration cases and in deciding the present dispute under Section 45 of the Arbitration and Conciliation Act, 1996, it shall not rely upon domestic arbitration disputes.[53] This decision in some manner mirrors the rationale of *Bharat Aluminum Co.* v. *Kaiser Aluminium Technical Services Inc.*[54] ["**Bharat Aluminium Co.**"] which had overruled *Bhatia International* v. *Bulk Trading SA.*[55] In *Bharat Aluminum Co.*, the Supreme Court clearly held that Part I of the 1996 Act would apply to domestic arbitrations and Part II would apply to international commercial arbitrations.

The author is of the view that adopting two approaches in dealing with arbitrability of fraud in foreign seated arbitration and domestic arbitrations decelerates the steps being undertaken by India to emerge as an arbitration-friendly jurisdiction. To minimize judicial intervention in arbitration disputes, it is entirely conceivable that parties may simply have arbitration clauses that have a foreign destination as a seat of arbitration.[56] Although it is unlikely that this will take place in contracts wherein the agreed sum is a small amount, it is quite likely to occur if the parties have deep pockets and the contractual sum is a large one.

V. Conclusion

The dual classification of simple fraud and complex fraud as conceptualized by the Supreme Court in *A. Ayyasamy* and followed in *Rashid Raza* is not in sync with the best global practices.[57] The US Supreme Court in *Henry Schein Inc.* v. *Archer and White Sales Co.* ["**Henry Schein Inc.**"].[58] has unanimously endorsed the idea that arbitrability, as a threshold issue, must be decided by the arbitrator and not by a civil court.[59] It further held that even if a party were to plead that the reference to arbitration is "wholly groundless", the principle of *kompetenz-kompetenz* demands that the decision on this plea should be returned solely by the arbitrator as it is competent to rule upon its own jurisdiction.[60]

The formulation in *A. Ayyasamy* and *Rashid Raza* has not ensured predictability of outcomes, as can be seen by the discordant note struck in *Divesh Kumar Chaudhary* and *Sadhana Kumari.* A far more apt course of action would be to accept the 246th Law Commission Report and make all frauds expressly arbitrable by making amendments to Section 16 of the Arbitration and Conciliation Act, 1996. Such a move would provide a fillip to arbitration in India, and also closely mirror the trend seen in robust developed economies such as the United States, which after the *Henry Schein Inc.* decision have adopted an approach that reposes faith in arbitral tribunals, and erases the trust deficit that most Indian courts tend to display towards arbitrators.

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53 Sindhu, *supra* note 47, at 37.

54 Bharat Aluminum Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.

55 Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105.

56 Shivam Singh, *supra* note 37.

57 Fiona Trust and Holding Corporation v. Yuri Privalov [2007] UKHL 40 (Eng.); Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967); Shivam Singh, *supra* note 37.

58 Henry Schein Inc. v. Archer and White Sales Co., 139 S. Ct. 524 (2019) (U.S.).

59 Kingshuk Banerjee & Ritvik Kulkarni, *Reconsidering the Arbitrability of Tenancy Disputes in India,* BAR AND BENCH (Oct. 31, 2019), *available at* https://www.barandbench.com/news/reconsidering-the-arbitrability-of-tenancy-disputes-in-india.

60 Shivam Singh, *supra* note 37.