Only serious allegations of fraud are not arbitrable. Serious allegations arise only if either of the two tests laid down in Ayyasamy—explained in Rashid Raza case and further described in this case-are satisfied.

Update by Prashant Mishra

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Avitel Post Studioz Limited and others v. HSBC PI Holdings (Mauritius Limited)

and

HSBC PI Holdings (Mauritius Limited) v. Avitel Post Studioz Limited and others

Court: Supreme Court of India | **Case Number**: Civil Appeal No. 5145 of 2016 and Civil Appeal No. 5158 of 2016 | **Citation**: 2020 SCC OnLine SC 656 | **Bench**: RF Nariman and Navin Sinha JJ | **Date**: 19 August 2020

A. A summary of conclusions -

Avitel is one of the latest judgements in the line of decisions that consider the question: are allegations of "fraud" arbitrable?

The judgment concludes as follows: –

(a) *N Radhakrishnan* (cited below) is not a binding precedent. *Ayyasamy* (cited below) is an important judgment referred to in *Rashid Raza* (a 3-judge bench decision).

(b) Section 17 of the Indian Contract Act, 1872 ("**ICA**") defines "fraud". But it governs a contract that is obtained by fraud. Fraud in the performance of a contract falls outside Section 17 ICA. But both are subsumed within the expression "fraud" when it comes to the arbitrability of an agreement. If the subject matter of an arbitration agreement falls within the meaning of Section 17 ICA or involves fraud in the performance of the contract, which would amount to deceit, being a civil wrong, the subject matter would be arbitrable.

(c) The same set of facts may lead to civil and criminal proceedings. Still, for that reason, a dispute otherwise arbitrable would not cease to be so (disputes which can be the subject matter of actions under Section 17 ICA or proceedings for tortious deceit).

(d) Arbitration can be refused only where serious allegations of forgery/fabrication in support of the plea of fraud are made as opposed to simple allegations. Serious allegations of fraud arise:

(i) In a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all.

(ii) In cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

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For the interested reader, the background of the case and the reasoning process of the decision is discussed below in detail.

B. The context: the question of arbitrability of fraud was raised in section 9 proceeding for interim relief.

B1. HSBC had invested USD 60 million into Avitel. It later discovered 'fraud', and siphoning-off, and initiated arbitration

In 2011, HSBC invested USD 60 million into Avitel India ("**Avitel**" for all the respondents). The parties had a Share Subscription Agreement ("**SSA**") and a Shareholders Agreement ("**SHA**"), both of which had identical arbitration clauses.[1] The seat of the arbitration was Singapore. The Indian ACA was not to apply except for Section 9 (interim measures by Court).

At the time of the contract, representation had been made by the promoters of Avitel (the Jain family, who were the remaining respondents)[2] that they were at a very advanced stage of finalising a contract with the British Broadcasting Corporation ("**BBC**") to convert the BBC's film library from 2D to 3D. The money invested by HSBC was apparently required by Avitel to purchase equipment for the BBC contract.

Later, HSBC grew suspicious about the Avitel Group's business of digitising films. It discovered, *among other things*, that the purported BBC contract was non-existent, and was set up by the promoters to induce HSBC into investing. It also appeared that USD 51 million had been siphoned off to other companies in which the promoters had a stake.

HSBC commenced arbitration in May 2012 under the rules of the Singapore International Arbitration Centre ("**SIAC**").

B2. HSBC applied to the Bombay High Court under Section 9 to secure the amount in dispute in arbitration. The Single Judge made a direction, but the appellate bench directed Avitel to maintain the deposit at USD 30 million (half of HSBC's investment)

In July 2012, HSBC filed an application under Section 9 in the Bombay High Court for directions to Avitel to deposit security amount to the extent of HSBC's claim in arbitration.

Meanwhile, the jurisdiction of the arbitral tribunal had been challenged by Avitel on the ground that allegations of fraud were not arbitrable. The 3-member tribunal treated that as a preliminary issue and, applying the Singapore law, decided in a "final partial award on jurisdiction" that the allegations were arbitrable.

In the Section 9 ACA petition, in January 2014, a single judge of the Bombay High Court directed Avitel to maintain USD 60 million in the bank account. Avitel appealed, and while the appellate court agreed with HSBC on practically all issues, it directed Avitel to keep the bank account at half the figure of HSBC's investment (i.e. USD 30 million).

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[1] The clause said: "Any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity, interpretation, breach or Termination."

[2] Mssrs. Pradeep Shantiprasad Jain, Siddhartha Pradeep Jain, and Hrishi Pradeep Jain.

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B3. The section 9 order travelled to the Supreme Court in two appeals filed each by Avitel and HSBC. By the time it was heard, the final award had been delivered, Avitel's challenge to the award rejected, and HSBC's enforcement petition remained pending.

The order passed by the appellate court was challenged in the supreme court by Avitel and HSBC in separate Special Leave Petitions (later converted to Civil Appeals). Avitel filed the petition in September 2014, presumably challenging the direction to deposit. A few days later, the arbitral tribunal gave the final award in favour of HSBC. Then, HSBC also challenged the order (presumably) so far as it reduced the security deposit amount.

By the time the matter was fully heard, a challenge to the final award had been unsuccessfully made in the Bombay High Court and rejected.[3] In the meanwhile, in April 2015, HSBC had applied to the Bombay High Court to enforce the final award.

C. The court's decision

C1. The question framed by the court[4] and the requirement to examine the 'fraud' argument

Referring to the main test for granting relief under Section 9, the court said: "the only real question" was whether in the enforcement proceedings HSBC had "strong prima facie case", would be caused "irreparable prejudice" if protective orders were not made, and whether the balance of convenience tilted in its favour.

Then it said (presumably accepting the submission of counsel) that it was correct to state that "this *prima facie* case would necessarily depend upon what is the substantive law in India qua arbitrability when allegations of fraud are raised by one of the parties to the arbitration agreement".

Then, the court started its "review of case law on the subject" from paragraphs 5 to 16 (at pages 19 to 51) before it turned to the definition of "fraud" under the Indian Contract Act, 1872, then to the measure of damages, and lastly to the facts of the case.

C2. The court's "review of case law on the subject"

(a) *Abdul Kadir Shamsuddin Bubere* v. *Madhav Prabhaker Oak* | [1962] 3 SCR 702 | **KN Wanchoo,** KC Das Gupta and JC Shah JJ | 20 September 1961

Abdul Kadir was decided under the 1940 Act. Then, Section 20 (4) mandated the court to refer to arbitration a matter which was covered by an arbitration agreement. The condition was: "if no sufficient cause is shown" by the opposing party.

Nariman J, authoring the judgment in *Avitel*, said that the court in *Abdul Kadir* referred to various English judgments[5] and cautioned that "where serious allegations of fraud are made against a party and the party who

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[3]A set-aside application filed under Section 34 was dismissed in September 2015. Then, an appeal made under Section 37 ACA was also dismissed in May 2017.

[4]Section 9 allows a party to seek interim measure *before* or *during* the arbitration, and even *after the award* but before it is enforced in accordance with Section 36. Though, a provision aimed at domestic or India-seated international arbitrations, Section 9 can also be applied, subject to the agreement of the parties, to a foreign seated international arbitration. Usually, interim orders made under Section 9 are subject to the final decision by the tribunal. Here, at the time of final hearing, an interim order was sought after the tribunal's job was over. Nariman J clarified at paragraph 24 of the judgment that "any finding made on facts in this judgment is only *prima facie* for the purpose of deciding the section 9 petition". This means that the declaration of law will bind the Bombay High Court in the enforcement action.

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is charged with fraud desires that the matter should be tried in open court, that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose of a court to take the matter out of the forum which the parties themselves have chosen."

Though he would refer to it later also when discussing the judgments in chronology, Nariman J dealt here itself with an aspect of *N Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72[6] He said: –

(i) In *Radhakrishnan*, the court referred to *Abdul Kadir* and considered its ratio to be that "wherever serious allegations of fraud are raised in a case in which there is an arbitration agreement, they should be tried in a court of law."

(ii) But the Radhakrishnan judgment did not deal with *Hindustan Petroleum Corporation Ltd. Pinkcity Midway Petroleums*, (2003) 6 SCC 503[7] which had concluded that it was mandatory under Section 8 to refer to arbitration a dispute that arises between parties with an arbitration agreement. On the contrary, it relied on *Abdul Kadir*, which was decided under the 1940 Act.

(b) *Afcons Infrastructure Ltd. Cherian Varkey Construction Co. (P) Ltd.* | (2010) 8 SCC 24 | **RV Raveendran** and JM Panchal JJ | 26 July 2010

In *Afcons*, speaking for the 2-judge bench RV Raveendran J had set out in paragraph 27 (SCC version) "categories of cases are normally considered to be not suitable for ADR process having regard to their nature." He included in this list at item (iv) "cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc.", and "cases involving prosecution for criminal offences."

Nariman J said that these two items, relevant to the context, "require to be explained in light of subsequent decisions". He explained this later in paragraph 15 onwards. See Section 2 (x) of the Update.

(c) *Booz Allen and Hamilton Inc. SBI Home Finance Limited and others*, (2011) 5 SCC 532 [**RV Raveendran** and JM Panchal JJ | decided on 15 April 2011]

Nariman J referred to paragraph 36 (SCC version), where the court in *Booz Allen* had set out what disputes are arbitrable and what not. In the *Booz Allen's* list, item (i) is "disputes relating to rights and liabilities which give rise to or arise out of a criminal offence."

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[5] The *Avitel* court noted two judgments referred in *Abdul Kadir*, that is, *Russel* v. *Russel*, [1880] 14 Ch D 471 and *Charles Osenton & Co.* v. *Johnston*, 1942 A.C. 130 ("Russel was referred for the proposition that the Court will, in general, refuse to send a dispute to arbitration if the party charged with fraud desires a public inquiry, but where the objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved"; see *Avitel* para 5 at pg. 20).

[6] A 2-judge bench decision of Tarun Chatterjee and VS Sirpurkar JJ.

[7] A 2-judge bench of N Santosh Hegde and BP Singh JJ had said relying on *P Anand Gajapathi Raju* v. P*VG Raju* (2000) 4 SCC 539 that "the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator."

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Nariman J considered this also a "broad statement of the law" and explained it in paragraph 15 onwards of *Avitel*.

(d) *Swiss timing Ltd. Commonwealth Games* | (2014) 6 SCC 677 | **SS Nijjar** J | 28 May 2014

The designated judge [8] SS Nijjar J was considering in *Swiss Timing* an application to appoint an arbitrator. The respondent, relying on *N Radhakrishnan*, had resisted the appointment and argued that a criminal case was pending covering the same subject matter. Nijjar J had rejected that argument and appointed an arbitrator holding the issue to be arbitrable.

He said that *N Radhakrishnan* did not lay down the correct law and was *per incuriam* on two grounds: firstly, the judgment in *Hindustan Petroleum*, though referred, was not addressed, and the judgment in *P Anand Gajapathi Raju*, (2000) 4 SCC 539 was not even brought to the notice of the Court.[9] Secondly, Section 16 of the ACA was not considered by the court.

Nijjar J had also noted Section 5 ACA, which provides, Court shall not intervene in the arbitration process except following the provisions of the ACA.

Nariman J said in *Avitel* that though *Swiss Timing* was not binding precedent, its reasoning has "strong persuasive value which [the court is] inclined to adopt". He also contrasted another provision of the 1940 Act (Section 35). He also said that *Abdul Kadir*, on which *N Radhakrishnan* relied, was decided under the now inapplicable 1940 Act which had given court "wide discretion". He, however, also added that the ratio of *Adbul Kadir* was not correctly referred, because under the *Abdul Kadir* rule, "serious allegaitons of fraud are not made out when allegations of moral or other wrongdoing inter parties are made … in particular …discrepancies in account books are the usual subject matter in account suits, which are purely of a civil nature."

(e) *Vimal Kishor Shah Jayesh Dinesh Shah* | (2016) 8 SCC 788 | Jasti Chelameswar and Abhay Manohar Sapre | 17 August 2016

Next, a reference were made to *Vimal Kishor*, in which the court had added a seventh category to the list of six categories of nonarbitrable matters set out in *Booz Allen*, that is, "disputes arising under trust deeds governed by the Trusts Act, 1882."

(f) *A Ayyasamy A Paramasivam* | (2016) 10 SCC 386 | **Dr. AK Sikri** and **Dr. DY Chandrachud** | 04 October 2016

Nariman J started by referring to *Ayyasamy* as "the important judgment". He first reproduced paragraphs 23 to 26 from AK Sikri J's opinion in the judgment where:

(i) Sikri J had referred to paragraphs 50 and 51 of the 246th Law Commission Report which he said "brings into fore that … in cases of serious fraud, courts have entertained civil suits. Secondly, [the Law Commission] has tried to make a distinction in cases where there are allegations of serious fraud and fraud simplicter."

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[8] An application under Section 11 ACA for the appointment of arbitrator used to be filed under the old law before the Chief Justice of the Supreme Court or his designate.

[9] Both judgments, decided pre-2015 amendments, are for the proposition that it is mandatory for a court to refer the matter to arbitration under Section 8. *Cf.* Fn. 7 above.

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(ii) In Sikri J's view, "it thus follows that where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters."[10]

(iii) However, Sikri J added that "where there are allegations of fraud simplicter and such allegations are merely alleged, we are of the opinion that it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal."

(iv) Then, *Swiss Timing* was distinguished, saying that it was not precedent and could not have deemed "to have overruled the proposition of law laid down in *N Radhakrishnan*."

(v) Then, in paragraph 25, Sikri J set out what the law was: "it is only in those cases where … very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can side-track the agreement by dismissing the application under Section 8 and proceed with the suit on merits."

After Sikri J's judgment, Nariman J reproduced paragraphs 40, 45.1 and 45.2, and 56 of Chandrachud J's separate concurring opinion. Nariman J said that Chandrachud J had "cautioned against the use of *N Radhakrishnan* as a precedent and distinguished it."[11]

Nariman J then dealt with counsel's argument that Sikri J did not refer to paragraph 52 of the Law Commission report. The argument was that the Law Commission had, in light of the *N Radhakrishnan* judgment, recommended an amendment to Section 16 ACA giving the arbitral tribunal express enabling power to deal with questions of fraud; since the Parliament did not accept the proposal, *N Radhakrishnan* continued to be a binding decision.

He rejected the argument and also dealt with the value of *N Radhakrishnan* as precedent [see, also fn. 10 of the Update]. He said:

[10] At paragraph 50 of the Report, the Law Commission had started by noting that "the issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue" and that "here exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable." It then criticized the *N Radhakrishnan* judgment for misapplying the English case of *Russel* v. *Russel*. At paragraph 51, the Commission further noted that "a distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable". Then, it made a reference to two Supreme Court decisions including *Swiss Timing*. Then, at paragraph 52, which Sikri J did not refer to, the Commission said that it "believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to section 16". The suggested amendment was to give the tribunal an express enabling power to make the award "notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc." Avitel's counsel "took exception to Sikri J's judgment" on the point. His argument was that "*N Radhakrishnan* "not having been legislatively overruled, cannot now be said to be in any way deprived of its precedential value, as Parliament has taken note of the proposed section 16(7) in the 246th Law Commission Report, and has expressly chosen not to enact it". But, the argument was rejected. Nariman J reasoned that: "Parliament may also have thought that section 16(7), proposed by the Law Commission, is clumsily worded … [and] may have left it to the courts to work out the fraud exception".

[11] A close reading of the paragraphs from Chandrachud J's judgement shows he had concluded that N Radhakrishnan "does not subscribe to the broad proposition that a mere allegation of fraud is good enough … it is only when there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out … may come into existence".

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

(ii) "Quite apart from what has been stated by us in paragraph 9,[12] the development of the law by this Court cannot be thwarted merely because a certain provision recommended in a Law Commission Report is not enacted by Parliament."

(iii) "*Dehors* any such provision, the ratio in *N Radhakrishnan*, being based upon a judgment under the 1940 Act (*Abdul Kadir*), and without considering sections 5, 8 and 16 of the 1996 Act in their proper perspective, would all show that the law laid down in this case cannot now be applied as a precedent for application of the fraud mantra to negate arbitral proceedings."

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

(g) *Ameet Lalchand Shah Rishabh Enterprises* | (2018) 15 SCC 678 | Ranjan Gogoi and **R Banumathi** JJ | 03 May 2018

Next, Nariman J referred to *Ameet Lalchand*, where relying on *Ayyasamy*, the court rejected the argument that allegations of misrepresentation and inducement to pay higher price could not be arbitrated.

(h) *Rashid Raza Sadaf Akhtar*, (2019) 8 SCC 710 | **RF Nariman**, R Subhash Reddy and Surya Kant JJ | 04 September 2019

Then, Nariman J referred to *Rashid Raza*, a decision authored by himself. In *Rashid Raza*, Nariman J had said that "two working tests" were "laid down in para 25" of *Ayyasamy*: (1) does this (fraud) plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties *inter se* having no implication in the public domain."

C3. The court's conclusions post-review of the case laws

In the passage, the court referred to *Rashid Raza*, it also stated its conclusions and noted that "after these judgments it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise":

(a) "The first test is satisfied only when it can be said that the arbitration clause or agreement itself cannot be said to exist in a clear case in which the court finds that the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all".

[12] The *Swiss Timing* reasoning, and Section 35 of the 1940 Act; *cf.* the section on *Abdul Kadir* above.

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(b) "The second test can be said to have been met in cases in which allegations are made against the State or its instrumentalities of arbitrary, fraudulent, or malafide conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain".

C4. "Deal[ing] with the broad statement of the law in Afcons and Booz Allen"

At this stage, Nariman J addressed what he said was a "broad statement of the law" in *Afcons* and *Booz Allen*. The following references in the judgments "must now be understood in the sense laid down in *Ayyasamy* and *Rashid Raza*:

(i) Paragraph 27(iv) of *Afcons* which included in the list of non-arbitrable matters "cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion, etc."

(ii) Paragraph 27 (vi) and 36 (i) of *Booz Allen* which included in the list of non-arbitrable matters involving prosecution for criminal offences.[13]

Nariman J said it was important to remember that "the same set of facts may have civil as well as criminal consequences", and he referred to a number of cases on the point. Then he concluded that "in the light of the aforesaid judgments":

(i) Paragraph 27(vi) of *Afcons* and Paragraph 36(i) of *Booz Allen* must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings;

(ii) And if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.

C5. The meaning of fraud

Now, the court turned to the meaning of "fraud" under the ICA. Nariman J set out Section 17 of ICA, which defines fraud, and Section 19 ICA, which makes a contract voidable at the option of one party where consent to an agreement is caused by fraud.

He referred to a few other provisions of the ICA. He said that "a distinction is made between a contract being obtained by fraud and performance of a contract (which is perfectly valid) being vitiated by fraud or cheating". The latter, he said, would fall outside the ICA, and the remedy for damages would be available under the law of tort or deceit (not the remedy of rescinding the contract).

C6. The measure of damages for fraudulent representation

[13] Item (i) of Para 36 in *Booz Allen* refers to: "disputes relating to rights and liabilities which give rise to or arise out of criminal offences".

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Next, the court discussed "the measure of damages for fraudulent misrepresentation by which a party to the contract is induced to enter into the contract" and referred to *Smith New Court Securities Ltd.* v. *Scrimgeour Vickers (Asset Management) Ltd.*, [1996] 4 All ER 769. The House of Lords referred in this case to the four points set out in a decision of the Queen's Bench in *Doyle* v. *Olby (Ironmongers) Ltd.*, [1969] 2 All ER 119.[14]

Nariman J referred to the opinion of Lord Browne-Wilkinson, saying that his judgment provides "a useful summary of the principles that apply in assessing the damages payable where the plaintiff has been induced to enter into a contract by a fraudulent misrepresentation". He also referred to the judgment of Lord Steyn and specifically a passage in which Steyn also set out the principles.

C7. Does HSBC have a case?

Finally, the court turned to the facts of the case (from paragraph 20 onwards). Nariman J referred to several findings of the tribunal. The tribunal had concluded that: –

(a) The respondents engaged in a deliberate and dishonest scheme to induce HSBC to invest.

(b) HSBC invested because it had been told verbally, in writing and in the SSA itself that Avitel was about to sign a contract with the BBC for the BBC to use the services of Avitel India. This was false. Not only had a contract not been negotiated, let alone signed with the BBC, but the BBC had no knowledge of it.

(c) The misrepresentations and deception of Avitel included the arrangement of a meeting between a representative of HSBC and a person who was falsely held out by Avitel and purported to be the Chief Technical Officer of the BBC, and who corroborated the misrepresentations. The representations were made prior to the conclusion of the agreements. They were made knowingly to be untrue and were fraudulent.

Nariman J concluded that though the issues raised and answered by the award are the subject matter of civil as opposed to criminal proceedings, the fact that a separate criminal proceeding was sought to be started and may have failed is of no consequence whatsoever.

He concluded that there is no such fraud as would vitiate the arbitration clause in the SSA, which was an independent clause. Further, he noted, any finding that the contract itself is either null and void or voidable as a result of fraud or misrepresentation does not entail the invalidity of the arbitration clause, which is extremely wide.

He also concluded that the impersonation, false representations made, and diversion of funds are all inter parties and had no "public flavour" to attract the "fraud exception".

[14] "First, that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (i.e. caused by) entering into the transaction. Second, that in assessing such damages it is not an inflexible rule that the plaintiff must bring into account the value as at the transaction date of the asset acquired: although the point is not adverted to in the judgments, the basis on which the damages were computed shows that there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it. Third, damages for deceit are not limited to those which were reasonably foreseeable. Fourth, the damages recoverable can include consequential loss suffered by reason of having acquired the asset."

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He accordingly said HSBC had a *prima facie* case, the balance of convenience was in its favour, and irreparable loss would be caused to it unless at least the principal sum was kept aside for enforcement of the award in India.

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