IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

NOTICE OF MOTION NO. 665 OF 2019
IN
COMMERCIAL SUIT NO. 621 OF 2017
WITH
NOTICE OF MOTION NO. 569 OF 2017
IN
COMMERCIAL SUIT NO. 621 OF 2017
WITH
COMMERCIAL SUIT NO. 621 OF 2017

Shashisumeet Production Pvt. Ltd. And Ors. ...Applicants / Plaintiffs

Versus

Kuresh R. Kushesh @ Dhiren ...Defendant

WITH
INTERIM APPLICATION NO. 625 OF 2021
IN
COMMERCIAL SUIT NO. 21 OF 2021
WITH
COMMERCIAL SUIT NO. 21 OF 2021

Digitally signed by ASHWINI JANARDAN VALLAKATI
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Date: 2026.06.09 18:10:39 +0530

Kuresh R. Kushesh @ Dhiren ...Applicant / Plaintiff

Versus

Shashi Sumeet Production Pvt. Ltd. And 4 Ors. ...Defendants

Ms. Manorama Mohanty, *a/w Hitanshu Jain, i/b S.K. Srivastav & Co., for the Plaintiff in COMS/621/17 & for Applicant in NMCD/665/19.*

Mr. Piyush Raheja, *a/w Akash Loya, Jyoti Ghag & Shailesh Prajapati, i/b Dua Associates for Defendant in IA/625/21 & for Plaintiff in COMS/621/17.*

CORAM: **SOMASEKHAR SUNDARESAN, J.**
RESERVED ON: **MAY 6, 2026**
PRONOUNCED ON: **JUNE 9, 2026**

Judgement:

Context and Factual Background:

1. Notice of Motion No. 665 of 2019 is an Application filed under Section 8 (***"Section 8 Application"***) of the Arbitration and Conciliation Act, 1996 ("***the Act***") in Commercial Suit No. 621 of 2017 (***"2017 Suit***"). Plaintiff No. 1, Shashi Sumeet Production Ltd. (***"Company"***), and Plaintiff Nos. 2 and 3, Mr. Sumeet H. Mittal, and Mrs. Shashi Sumeet Mittal, (all collectively, "***Plaintiffs***") have sued the Defendant, Kuresh R. Kushesh ("***Defendant***"), seeking a declaratory relief that the Memorandum of Understanding ("***MOU***") dated November 23, 2016 and the Share Subscription cum Shareholder Agreement dated December 21, 2016 ("***Agreement***") are illegal void, *non est* and not binding on the Plaintiffs.

2. The 2017 Suit also seeks a direction to the Defendant to deliver and deposit the alleged MOU and the Agreement with this Court for cancellation and that, upon delivery of the same, they be cancelled by an order and decree of this Court. The other relief sought in the 2017 Suit is a claim for Rs. 3 crores with interest rate 18% and interim reliefs pending the adjudication of

the Suit in the form of an injunction restraining the Defendant from acting in any manner in furtherance of the MOU and the Agreement.

3. The MOU was admittedly a “preliminary document” under which the parties agreed to record “the preliminary terms and conditions of the transaction between them”. In paragraph 6 of the Plaint, the Plaintiffs have further contended that the person who signed on behalf of the Plaintiffs had no authority to sign such a document, but that the Defendant insisted on a full-fledged agreement having to be signed by the Plaintiffs. According to the Plaintiffs, it was always made clear to the Defendant that the final document containing the final contract would be signed by Mr. Sumeet Mittal, Plaintiff No. 2.

4. Paragraph 7 of the plaint sets out the broad terms of the transaction between the parties, namely, that the Defendant would be issued shares in Plaintiff No. 1 Company for a total consideration of Rs. 8.25 crores, which would give him a 15% stake in the equity share capital of the Company. Admittedly, (paragraph 8 of the Plaint) Rs. 60 lakhs was received in cash and Rs. ~1.4 crores was received by cheque against share subscription. According to the Plaintiffs the final agreement had to be signed by the parties and the Plaintiffs contend that the Plaintiffs are not in possession of the Agreement on which the signature of one Mr. Prashant Rathi had been taken.

5. Various SMS exchanges between the parties have been produced in the Plaint in the form of screenshots pasted into the body of the Plaint, to contend that the parties were not *ad idem* on the final contours of the transaction between the parties. According to the Plaintiffs, there were frequent changes in the Defendant's thought process and the Plaintiffs called off the transaction and sought to give a buy back option to the Defendant, offering to return the money that the Defendant had invested, along with interest.

6. The Plaintiffs therefore contend that there was no concluded contract between the parties in the form of the Agreement which is relied upon by the Defendant. According to the Plaintiffs, the Agreement in the possession of the Defendant was obtained by fraud or misrepresentation and that the Plaintiff Nos. 2 and 3, being out of the country, could have never signed the Agreement on December 21, 2016.

7. The Section 8 Application has been filed in reliance upon the arbitration clause contained in the Agreement. The arbitration clause is evidently contained in Clause 25 and sets out that disputes and differences between the parties would be adjudicated by a Sole Arbitrator to be appointed by consent of the parties, failing which the arbitrator shall be appointed by the Court under Section 11 of the Act. Clause 21 of the Agreement also contains an "entire agreement" clause which essentially stipulates that the Agreement

constitutes the entire agreement between the parties with regard to its subject matter and that it supersedes any other agreement between the parties relating to the subject matter.

8. It is against this backdrop that the Section 8 Application has been filed, contending that the disputes covered by the 2017 Suit initiated by the Plaintiffs ought to be referred to arbitration.

9. On an earlier occasion, I put it to the parties to consider if they would proceed to arbitration and resolve their disputes and differences once and for all, without being embroiled in court proceedings. While this was acceptable to the Defendant, the Plaintiffs instructed their Advocate to submit that any reference to arbitration would necessarily be conditional upon the Defendant withdrawing the criminal complaints initiated by him. The parties have filed criminal complaints against each other.

10. Against this backdrop, on May 5, 2026, when the Section 8 Application was listed, and it was considered necessary to examine whether a reference to arbitration would need to be made, without any additional conditions being proposed by the parties. By consent of the parties, the Section 8 Application was taken up for final hearing.

Contentions of the Parties:

11. I have Ms. Manorama Mohanty, Learned Advocate on behalf of the Defendant-Applicant and Mr. Piyush Raheja, Learned Advocate on behalf of the Plaintiffs. Ms. Mohanty would submit that the 2017 Suit entirely revolves around the transactions originally contemplated in the MOU, which culminated in the Agreement. The Agreement containing an arbitration clause, when juxtaposed with the pleadings and prayers in the 2017 Suit, would indicate that the subject matter of the 2017 Suit is nothing but the subject matter of the arbitration clause contained in the Agreement. Therefore, she would contend that the Section 8 Application deserves to be allowed and the parties should be referred to arbitration.

12. In sharp contrast, Mr. Piyush Raheja, Learned Advocate on behalf of the Plaintiffs would submit that there are two fundamental reasons why the Section 8 Application needs to be rejected. *First*, he would contend that the Plaintiffs have made allegations of forgery and fraud, questioning the very existence of the arbitration agreement, and therefore, inherently, the disputes between the parties have been rendered to be non-arbitrable. He would submit that there are two versions of the Agreement with varying signatures. One version is signed by Plaintiff Nos. 2 and 3 only on the first and last page, while the other does not have the signature of the Defendant. Therefore, he

would submit that there is indeed a problem with the Agreement and in fact the Defendant has alleged in his complaint that the Plaintiffs have attempted to indulge in forgery. The Plaintiffs too contend that they were not in India on the date designated on the Agreement and therefore the Agreement is a product of forgery and fabrication.

13. Therefore, Mr. Raheja would rely upon the judgement of the Supreme Court in ***Rajia Begum***[1], and in particular reliance upon Paragraph 15 and Paragraphs 20 to 24 of the judgement, to contend that when an allegation of fraud and forgery or fabrication is made with regard to the very Agreement that contains the arbitration clause, such a dispute would fall outside the realm of arbitrability and ought to be examined as a jurisdictional question by the Courts. Moreover, he would submit that it is settled law that the scope of examination by the Section 8 Court is different from the scope of examination under Section 11 of the Act, and in the former, the Court must determine if the disputes between the parties are indeed arbitrable. Towards this end, he would rely on the decisions of the Supreme Court in ***Hemalatha Devi***[2] and ***Krish Spinning***[3].

14. *Second*, Mr. Raheja would contend that the Defendant has abandoned his right to commence and pursue arbitration under the Agreement because

*1 Rajia Begum v. Barnali Mukherjee – **2026 SCC OnLine SC 135***
*2 M. Hemalatha Devi v. B. Udayasri – **(2024) 4 SCC 255** [para 47]*
*3 SBI General Insurance Co. Ltd. v. Krish Spg. – **(2024) 12 SCC 1** [para 111 and 112]*

he too has filed Commercial Suit No. 21 of 2021 ("***2021 Suit***"). Although this was filed much after the 2017 Suit has been filed, Mr. Raheja would submit that it indicates that the Defendant has abandoned his right to arbitrate and must now stick to the suit, thereby rendering the Section 8 Application being liable to rejection. He would submit that the 2021 Suit seeks a positive declaration of validity of the Agreement and specific performance of the Agreement. The 2021 Suit, Mr. Raheja would contend, also arraigns other Defendants who have no privity of contract with the Defendant and therefore, the Section 8 Application in the 2017 Suit ought to be dismissed with costs.

15. Ms. Mohanty would submit that her instructions are to continue and persist with the Section 8 Application and withdraw the 2021 Suit.

Analysis and Findings:

16. Therefore, the core issues that fall for consideration are:

(i) Whether in view of the allegations of fraud, the disputes are not arbitrable; and

(ii) Whether in view of the 2021 Suit having been filed, despite instructions not to pursue the 2021 Suit, the Section 8 Application must necessarily be dismissed.

Implications of Fraud Allegation:

17. On the first issue, it is now well settled law that a mere allegation of fraud in a bilateral situation where there is no public fraud with implications on society at large (*in rem*) would not make a dispute non-arbitrable. Mr. Raheja's contention that every page is not signed by the Plaintiffs No. 2 and 3 and that Plaintiff No. 2 was not in the country on the date embossed on the agreement do not lend support to a dismissal of the Section 8 Application. There is no requirement for every page of an agreement to be signed. Indeed, there is a signature on the Agreement by Plaintiff No. 2. That Agreement has an arbitration clause. Merely because the Plaintiffs seek to bring to bear another instrument that does not even have the Defendant's signature, it would not cast a cloud over the Agreement actually signed by the Plaintiffs.

18. The law declared on implications of alleged fraud on arbitration agreements has evolved across judgements. Clearly, the law on arbitral tribunals being empowered to deal with allegations of fraud has been distilled and articulated in very clear terms since the earlier position obtaining from ***N. Radhakrishnan***[4], where the Supreme Court took the view that where fraud was alleged in the books of accounts and records of a partnership firm, it fell in the domain of the Courts to repel a Section 8 Application.

4 N. Radhakrishnan v. Maestro Engineers – (2010) 1 SCC 72

19. However, the law has since moved on from that position. The principle that rights *in rem* cannot be adjudicated by arbitration, which is essentially a forum privately created by parties enjoying mutual rights and obligations *in personam*, has been applied to consideration of fraud in relation to disputes amenable to arbitration. Where the fraud alleged is against society at large (*in rem*) as opposed to fraud within the scope of implementing the contract or inducing a contract, which contract contains an arbitration clause, the issue of fraud would indeed be arbitrable.

20. In ***Ayyasamy***[5], the Supreme Court held that the mere allegation of fraud would not dispel arbitrability. It is only in cases where it is found that allegations are very serious that the Section 8 Court may ignore the arbitration agreement and continue with the proceedings. Even the existence of the arbitration agreement itself having been obtained by fraud was kept within the ambit of potential non-arbitrability.

21. The clear position in law is emphatically summarised and set out by a three-judge bench of the Supreme Court in ***Deccan***[6], repelling the case for not being referred to arbitration, where it was argued that an arbitral tribunal could not be called upon to cancel three written instruments, and that when

5 A. Ayyasamy v. A. Paramasivam – ***(2016) 10 SCC 386***
6 Deccan Paper Mills Co. Ltd. v. Regency Mahavir Properties – ***(2021) 4 SCC 786***

there is a serious allegation of fraud, the arbitrator's jurisdiction gets ousted. The following extract is noteworthy:-

> *6. We have, in our **judgment in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., laid down the law on invocation of the "fraud exception" in some detail**, which reasoning we adopt and follow. The said judgment indicates that given the case law since N. Radhakrishnan, it is clear that **N. Radhakrishnan, as a precedent, has no legs to stand on**. **If the subject-matter of an agreement between the parties falls within Section 17 of the Contract Act, 1872, or involves fraud in the performance of the contract, as has been held in the aforesaid judgment, which would amount to deceit, being a civil wrong, the subject-matter of such agreement would certainly be arbitrable.** Further, we have also held that **merely because a particular transaction may have criminal overtones as well, does not mean that its subject-matter becomes non-arbitrable**. We have no doubt that Shri Navare is right in his submission that there is no averment that the agreement dated 20-5-2006 and the deed of confirmation dated 13-7-2006 were not entered into at all, as a result of which the arbitration clause would be non-existent. **Further, it is equally clear that the suit is one that is inter partes with no "public overtones", as has been understood in paras 34 and 35 of Avitel, as a result of which this exception would clearly not apply to the facts of this case**.*
>
> ***[Emphasis Supplied]***

22. This emphatic declaration of the law by a larger bench of the Supreme Court leaves no manner of doubt on how the allegation of fraud made in this case should be assessed for its impact on the operation of Section 8 of the Act. Evidently, the Supreme Court has ruled that fraud in inducing a party into executing a contract as set out in Section 17 of the Indian Contract Act, 1872,

or fraud in the performance of a contract, would be in the nature of a civil wrong and is eminently arbitrable.

23. Merely on the ground that there are "criminal overtones" or because a party claims that there are "public overtones", the dispute would not become non-arbitrable. The Agreement having been signed by both, the Plaintiffs as well as the Defendant, and that instrument having an arbitration clause, all other contentions about the evidentiary value of facts in relation to the existence of the bargain in the Agreement squarely fall in the domain of the Arbitral Tribunal.

24. The reliance upon ***Rajia Begum*** is of no consequence to the facts of this case and is distinguishable. Noticing multiple judgements on the facet of fraud and arbitrability, the Supreme Court, on facts found substantial and cogent material to cast serious doubt on the genuineness of an admission deed. In that case, the Section 9 Court had expressed a strong *prima facie* finding against the existence of an admission deed, based on which, interim protection was declined. The denial of interim relief was challenged and a Special Leave Petition ("***SLP***") against such denial was also dismissed by the Supreme Court leading to finality of the *prima facie* assessment by the Section 9 Court that the existence of the arbitration agreement was itself in grave doubt. Therefore, it was held by the Supreme Court that this was a relevant

consideration for the Section 8 Court and the Section 11 Court when considering whether or not to refer the parties to arbitration.

25. In the facts of that case, both the trial Court and the first Appellate Court also returned concurrent findings that allegations of fraud in that case were serious and the original copy of the admission deed was not even produced before the Writ Court, which in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India, dislodged the two concurrent findings on the existence of an arbitration agreement, and ignored the view of the Section 9 Court, firmed up by the Supreme Court. It is in this context that interference by the Writ Court was held to be incorrect by the Supreme Court.

26. I am also not satisfied that the date embossed on the Agreement being a date on which the Plaintiff No. 2 was not in India too would not turn the needle against the Section 8 Application. Commercial parties' conduct and that too the conduct of those in a largely informal industrial sector such as film-making, must be viewed from a commercial lens. Often, commercial parties sign an instrument that is already signed by the counterparty. If a party is not in the country, such party would tend to sign on coming back, and not care to emboss the date against the signature. It is highly likely that Plaintiff No. 2 signed the Agreement when he was in the country, while the

date embossed on the instrument is a date on which he was not here. This is a matter of evidence and can well be examined by the Arbitral Tribunal. This facet is not of an order necessitating rejection of the Section 8 Application.

27. That apart, for all the denial of the existence of the Agreement, admittedly, monies have been received by the Plaintiffs, which is consistent with the very instrument whose existence they now seek to deny. The Plaintiffs want a bargain, different from the executed instrument and seek a refund of monies with interest. Therefore, the contention that the Agreement was not executed and the bargains therein were not contracted, does not inspire confidence.

28. Therefore, there being no *prima facie* case in support of the non-existence of the arbitration agreement, the aforesaid ground in opposition to the Section 8 Application must fail.

Implications of 2021 Suit:

29. The second issue is about the implication of the Defendant having filed the 2021 Suit. The Section 8 Application gained no traction and to precipitate matters, the 2021 Suit has been filed. However, the 2021 Suit is not being pressed, which is clearly within the entitlement of the Defendant. The question to ask is whether the mere filing of the 2021 Suit would automatically

constitute an abandonment of the arbitration agreement by the Defendant. I am in respectful agreement with the view expressed by the Delhi High Court in a judgement by *Sanjiv Khanna J* (as he then was) in the case of ***Ministry of Sound***[7], from which, the following extracts are self-explanatory:

> *23. **The two decisions relied upon by the plaintiff on the question of abandonment/waiver of rights**, namely, Bharati Televentures (supra) and Raj & Associates versus VSNL reported in 113 (2004) DLT 318 **are distinguishable**. In both cases **the parties had earlier invoked jurisdiction of civil courts ignoring the arbitration clause**. In the case of Raj & Associates (supra), the plaintiff therein had filed a writ petition which was disposed of granting liberty to the plaintiff to initiate civil or arbitration proceedings and indisputably the plaintiff had filed a civil action for recovery of the dues instead of pursuing the path of arbitration. **The defendant inspite of being fully conscious of the arbitration clause, resisted the civil suit and filed their counter claim. An arbitration clause, it is well settled does not bar/prohibit filing of a civil suit. The contesting party always has option to continue with the civil proceedings and give up the right to enforce the arbitration clause**. If the contesting party files an application under Sections 8 or 45 of the Act, the parties are relegated to arbitration. Plaintiff takes a risk when he invokes jurisdiction of a civil court inspite of an arbitration clause. Thereafter, it is a wish and will of the defendant which determines whether civil proceedings should continue or the parties should be relegated to arbitration if conditions of the sections 8/45 of the Act are satisfied. **Once, however, parties have consented and allowed civil proceedings to continue they cannot subsequently invoke the arbitration clause and make the dead clause alive after the same has been ignored and not invoked**. In the case of Bharati Televentures (supra) it was held that **once a party has invoked jurisdiction of a civil court, it cannot subsequently rely upon the***

7 Ministry of Sound International Ltd. v. Indus Renaissance Partners Entertainment Pvt. Ltd. – ***2009 SCC OnLine Del 11***

> ***arbitration clause***. *Once jurisdiction of the civil court is invoked by a party it tantamounts to abandonment of the arbitration Clause.* ***These decisions are distinguishable for the reason that in the present case, the defendant nos. 1 and 2 had invoked the arbitration clause by filing the present application. and have been pressing the present application. Subsequent to filing of the present application, defendant nos. 1 and 2 did file a civil suit but the said suit has been withdrawn. If the defendant nos. 1 and 2 had filed a civil suit and thereafter subsequently filed the present application under Section 8/45 of the Act, the situation would have been different. Filing of the civil suit in the present case will not amount to abandonment or waiver of the right to invoke arbitration***.
>
> ***[Emphasis Supplied]***

30. While the arbitrability of disputes relating to intellectual property rights may have also undergone changes and evolved – also on the principle of distinguishing between *in rem* adjudication as opposed to *in personam* disputes, on the facet of whether the mere filing of a Suit, the arbitration agreement would come to an end, the law is clearly articulated in ***Ministry of Sound***. In the instant case too, the Section 8 Application was first filed and the matter remained in limbo. The 2021 Suit has been filed much later and is also being withdrawn. This places the current matter square on the same framework as the law declared in ***Ministry of Sound***. There has been no traction in the Section 8 Application or in the 2021 Suit. Therefore, where the road forks, and the Defendant has clearly chosen to persist with the Section 8 Application, the same treatment given by *Sanjiv Khanna J* in Ministry of

Sound could commend itself for acceptance and application to the facts of the matter in hand.

31. Therefore, in my opinion, the Section 8 Application deserves to be ***allowed*** and the parties are referred to arbitration. Considering that nearly a decade has gone by and having regard to the trenchant opposition to arbitration by the Plaintiffs in the 2017 Suit, an Arbitral Tribunal is hereby constituted in the following terms:

A] Ms. Karishma Rao an advocate of this Court, is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

Office Address:- 11C, 1st Floor, Examiner Press Building, Dalal Street, Fort, Mumbai 400 001

Email ID: karishma01@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from the date of upload of this order. The Applicant shall provide the contact and communication

particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be

subject to any final Award that may be passed by the Tribunal in relation to costs.

32. The 2021 Suit is ***disposed of*** as withdrawn. Refund of Court fees is permitted in accordance with the rules.

33. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]