

Calcutta High Court

HON'BLE JUDGE(S): **SABYASACHI BHATTACHARYYA, J**

RAJIA BEGUM V. BARNALI MUKHERJEE

CO - 128 of 2021, decided on 24/09/2021

Arbitration and Conciliation Act (26 of 1996) , 5.8- Reference to arbitration - Rejection - Ground that serious allegation of fraud was involved in adjudication of suit, requiring detailed evidence to be heard by Civil Court itself and not by arbitrator - Dispute arising out of partnership deed between parties - On perusal of pleadings regarding to alleged fraud, it is found well within jurisdiction of Arbitral Tribunal to adjudicate same - No serious question of fraud raised, requiring evidence to be adduced at length - Mere examination of documents, coupled with other circumstantial evidence, would be sufficient to decide lis - Matter referred to arbitrator for adjudication. Contract Act (9 of 1872) , 5.17-

Mere glance at the pleadings regarding to the alleged fraud shows that it is well within the jurisdiction of an Arbitral Tribunal to adjudicate the same, since no serious question of fraud, requiring evidence at length to be adduced, has been raised. The premise of the allegations clearly pleaded and it can be resolved on the examination of the impugned deed itself, in conjunction with other corroborative evidence, if led by the parties. There is no such issue involved in the suit which cannot be decided by an Arbitral Tribunal but has to be decided solely by a civil court, which could have prompted the courts below to refuse reference of the matter to arbitration.

Plain and meaningful reading of the entire plaint, which contain allegations in respect of forgery/fraud, do not give rise to questions of

such serious nature, which involve a criminal element and consequences thereof. Grounds of fraud and forgery, as alleged in plaint, do not make out any such case which would prevent the matter from being decided by Arbitral Tribunal. Mere examination of the documents-in-question, coupled with other circumstantial evidence, would be sufficient to decide question, can very well be done by the Arbitral Tribunal. Arbitral Tribunal has ample powers to appoint experts and to take the assistance of court in taking evidence, if necessary. In view of such wide scope of adjudication and the powers available to an Arbitral Tribunal, the questions raised in the present suit do not create any hindrance at all in referring the matter to an Arbitrator.

Trial Court, in the present case, took into consideration extraneous factors and virtually adjudicated prematurely on whether the impugned reconstitution deed was acted upon and/or executed at all, by taking into consideration surrounding circumstances, which can only be decided at the final trial of the proceeding and not at the stage of deciding an application u/S. 8 of 1996 Act. Trial Court found, prima facie, that the deed, "may not have been acted upon" or "have not come into existence". The Court further finds that the existence of the deed is questionable, on consideration on the insufficient materials placed before the Court, without indicating any particular portion of the pleadings which contend such allegations which denuded the Arbitral Tribunal of the power to decide the dispute, in view of the existence of a specific arbitration clause in the impugned deed. The plea of fraud is not a magic wand which can compel a court to reject an application for reference to arbitration, both the courts below acted without jurisdiction in refusing to refer the matter to arbitration.

(Para 30, 35, 36, 37, 38, 39)

Case Referred :

Chronological Paras

AIR 2016 SC 4675

AIROnline 2019 SC 1046

AIR 2011 SC 2507 : 2011 AIR ~~SCW~~ 3089

AIROnline 2020 SC 929 (Rel. On)

2010 AIHC 3555 (Cal)

(Distg.)AIR2011 Cal91

(Distg.) (2021) 4 SCC

379 (Rel. On)

Name of Advocates

Mainak Bose, soumitra Ganguly, Subhojit Seal, Samit Bhanja for Petitioner; Ratnanko Banerjee, Reetobroto Mitra, Chandra Sekhar Jha, Aditya Kumar for Respondent.

I. SABYASACHI BHATTACHARYYA, J. :-The present challenge under Article 227 of the Constitution of India has been preferred against an order passed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the 1996 Act"), by the Appellate Court, affirming an order passed by the Trial Court rejecting the application of the defendant no. 1/petitioner under Section 8 of, read with Section 5, of the 1996 Act.

2. Both the courts below proceeded on the premise that a serious allegation of fraud was involved in the adjudication of the suit, which required detailed evidence and ought to be heard by the Civil Court itself, not by an arbitrator.

3. The Trial Court also held that it can be prima facie said that the impugned deed dated April 17, 2007 may not have been acted upon or have not come into existence at all. Since the existence of the deed was found to be questionable, the Trial Court held that further adjudication of the matter, taking into consideration cogent evidence, was required, which was to be done by the Civil Court.

4. Learned counsel appearing for the petitioner contends that both the courts below acted without jurisdiction in refusing to refer the matter to arbitration within the purview of Section 8 of the 1996 Act. It is submitted that the petitioner had previously filed an application under Section 11 of

the 1996 Act for appointment of arbitrator, before this court, which was dismissed by an order dated March 11, 2021 upon recording that the issue of existence of arbitration agreement was pending before this court in a revisional application, giving liberty to the petitioner to file afresh subject to the revisional court returning any finding on the existence of the arbitration agreement. The said order was passed during pendency of the instant revisional application.

5. Learned counsel for the petitioner contends that both the courts below misinterpreted the principles laid down by the Supreme Court in A. 3 Ayyasamy Vs. A. Paramasivam and others, reported at (2016) 10 SCC 386: **(AIR 2016 SC 4675)**, without examining the allegations of fraud as pleaded in paragraph no. 25 of the plaint. There was no consideration of the seriousness of the allegations of fraud and the courts below, it is argued, proceeded on extraneous facts irrelevant for the consideration of the issue of arbitrability qua fraud.

6. Learned counsel relies on Rashid Raza Vs. Sadaf Akhtar, reported at (2019) 8 SCC 710 : **(AIROnline 2019 SC 1046)** which, referring to A. Ayyasamy (supra), reiterated that there is a distinction between serious allegation of forgery/fabrication and a simple allegation of fraud. In particular, paragraph 25 of A. Ayyasamy (supra) is relied on by the petitioner.

7. Next citing Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others, reported at (2011) 5 SCC 532 : **(AIR 2011 SC 2507)**, learned counsel submits that paragraph 36 of the said report cites instances of non-arbitrable disputes which are to be expressly reserved for adjudication by public fora. The same principle was reiterated by the Supreme Court, it is contended, in the three-judge Bench decision of the Supreme Court in Vidya Drolia and others Vs. Durga Trading Corporation, reported at (2021) 2 SCC 1 : **(AIROnline 2020 SC 929)**.

8. In Vidya Drolia (supra), the Supreme Court laid down and crystallised

the legal principles for determining non-arbitrability. It was clarified that the Arbitration Act does not make any specific provision for excluding any category of dispute, terming them as non-arbitrable, but there are pronouncements which hold that fraud is one of such 4 category where the disputes would be considered non-arbitrable. It was, however, reiterated that mere allegation of fraud is not sufficient but should be of such a nature that makes it a virtual case of criminal offence. In the concurring judgment of Justice Chandrachud, it was specifically held that the allegation of fraud can be made the subject of arbitration and the fact that the allegation of criminal wrongdoing or a statutory violation would not detract from the jurisdiction of the arbitral tribunal to resolve the dispute arising out of a contractual relationship.

9. It is further argued by the petitioner that Sections 26 and 27 of the 1996 Act sufficiently authorise an arbitral tribunal to appoint experts and, if required, to apply to court for assistance in taking evidence.

10. Hence, it is contended that both the courts below acted without jurisdiction in refusing to refer the matter to arbitration.

11. Learned counsel appearing for the plaintiff/contesting opposite party no. 1 supports the orders impugned in the revisional application. It is argued that a civil suit is maintainable under Section 9 of the Code of Civil Procedure to determine and try all suits of a civil nature, unless the authority and jurisdiction of the Civil Court is ousted. Since the purported partnership deed dated April 17, 2007 was alleged to be ex facie barred, being forged and manufactured, a civil suit to challenge such a deed, even if it contains an arbitration agreement, is maintainable, learned counsel for the opposite party No. 1 argues.

12. In support of such proposition, learned counsel places reliance on *Jamuna Transport Corporation Ltd. and Ors. Vs. Ghanashyamdas Baheti and Ors.*, reported at (2010) 4 CHC 488 (Cal) : (2010 AIHC 3555 (Cal)) and *Ghanshyamdas Baheti Vs. Jamuna*

Transport Corporation Ltd., reported at **AIR 2011 Cal 91**. By specifically relying on the language of Section 8 of the 1996 Act, it is argued by the opposite party no.1 that an enquiry into the existence or non-existence of the arbitration agreement at a prima facie level is well within the scope of Section 8 of the 1996 Act.

13. By placing reliance on A. Ayyasamy (supra) and Vidya Drolia (supra), learned counsel for the opposite party no. 1 argues that the court will refuse to refer to arbitration and proceed with a suit on merits when there are serious allegations of fraud that make a virtual case of criminal offence or where there are serious allegations of forgery and fabrication of documents or where fraud permeates the entire contract so as to question the validity of the contract itself.

14.Learned counsel argues that, in the suit from which the present revision arises, the plaint case of fraud and forgery is ex facie evident with regard to execution of the partnership deed of April 17, 2017 on several grounds.

15.Since the whole partnership deed is under challenge in the suit and there is prima facie evidence of fraud, forgery and fabrication of the partnership deed, which necessarily implies that no valid arbitration agreement exists, since the arbitration clause itself perishes with the 6 partnership deed, the performance of justice would not be served by a reference to arbitration.

16.Hence, it is contended that the courts below rightly refused the petitioner's prayer for reference to arbitration.

17.It is further contended on behalf of the plaintiff/opposite party no. 1 that the suit has already been set down for ex parte hearing by an order dated November 20, 2018, as no written statement has been filed by the defendant no. 1/ petitioner.

18.It is submitted that the present challenge has been preferred to avoid the consequences of ex parte hearing and to confer upon the defendant no. 1/ petitioner the right to file a written statement in the teeth of the order dated November 20, 2018 fixing the suit on the ex parte board.

19. It is well-settled that, in order to adjudicate an application under Section 8 of the 1996 Act, the court has to ascertain whether, prima facie, no valid arbitration agreement exists, before deciding the issue of reference of the parties to arbitration.

20. Section 8 (1) of the 1996 Act, as amended in 2016 with retrospective effect from October 23, 2015, reads as follows:

"8. Power to refer parties to arbitration where there is an arbitration agreement.-(!) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement 7 on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

"

21. The allegations made in the plaint and the stand taken by the petitioner in her application under Section 8 of the 1996 Act reveal the basic features of the factual premise of the suit.

22. As per both the parties, a partnership deed was entered into between the opposite party nos. 1 to 3 was entered into on December 1, 2005.

23. The plaintiff pleads that, on October 7, 2010, a reconstituted deed was executed whereby one Satyajit, the husband of the opposite party no. 1, Barnali Mukherjee, was inducted in the partnership, while opposite party no.2 (the husband of the petitioner, Rajia) and opposite party no.3, one Raihan Iqbal, retired from the partnership. Consequently, the opposite party no. 1 and her husband Satyajit became the only partners in the firm.

24. On August 3, 2010, a company called Riddhi Gold Private Limited was formed by the opposite party no.1 and her husband, Satyajit, on March, 2011. Allegedly, the said company took over the business of the partnership in respect of SENCO Gold Jewellery.

25. However, according to the defendant no.1/petitioner, prior to the

execution of the reconstituted deed dated October 7, 2010, a previous reconstituted deed had been entered into by the partners of the firm on April 17, 2007, whereby the defendant no.1/petitioner and one 8 Bela Rani (the mother-in-law of the plaintiff/opposite party no.1, Bamali) were inducted as partners in the firm. Consequently, it is contended by the petitioner, on and after April 17, 2007, the opposite party nos. 1 to 3 as well as the petitioner and the said Bela Rani became partners of the firm. Further, the petitioner and Bela Rani, the newly inducted partners by dint of the reconstitution deed dated April 17, 2007, were not parties to the purported reconstitution deed dated October 7, 2010, although the petitioner's husband, opposite party no.2, had apparently signed therein.

26. Hence, in the absence of the petitioner and Bela Rani, the other partners, the purported reconstitution deed dated October 7, 2010, entered into between the original partners, that is, the opposite party nos. 1 to 3, was vitiated and bad in law.

27. In view of such rival contentions, the courts below proceeded on the premise that the matter should be heard by the civil court and not referred to arbitration, since serious allegations of fraud were involved for adjudication.

28. A perusal of the entire plaint shows that the ingredients of allegations of fraud/forgery have been pleaded, particularly, in certain paragraphs thereof, which are set out below:

"18) The defendant no. 1 claims rights as a partner of the partnership firm allegedly brought into existence by an alleged Deed of April 17, 2007, which is a manufactured document, brought into existence to extract unjust enrichments at the expense of the plaintiff.

20) The said document being a forged document, the alleged arbitration agreement contained thereunder is naturally also forged and does not bind the plaintiff.

21) The manifold interpolations and manipulations made in the forged document of April 17, 2007 clearly indicates that such document has been

prepared in haste and with the aid of persons accustomed to prepare such document.

23) The plaintiff states that it is crystal clear from the documents annexed hereinabove that the alleged deed dated April 17, 2007 is a forged, fabricated and manufactured and it should be declared to be and void and be set aside and not given any effect too.

25) The plaintiff submits that the alleged deed dated April 17, 2007 was never executed nor accepted and from mere perusal of the said alleged deed, numerous instances of forgery can be clearly seen prima- facie. The alleged deed dated April 17, 2007 is a forged, fabricated and manufactured document and has been used to usurp the hard earned money of the plaintiff and to defraud her. The numerous instances of fraud and forgery committed by the defendant are mentioned herein below:

- a) The Notarial Certificate attached to the said alleged deed contains only 3 names instead of 5 names and there is no deed number mentioned therein;
- b) "Signature of the continuing....." on top of the first page of the alleged deed near the forged signatures appears to have been inserted at a later date and time;
- c) Bela Rani Mukherjee (since deceased) was completely bed ridden due to serious ailments and was not in a position to sign any such alleged document, which fact as transpires was not known to the defendants;
- d) Age of the plaintiff on the first page of the alleged deed has been struck off and wrong age was written thereon, which is unreservedly impossible as the age of the plaintiff can only 10 increase and cannot be get reduced which is evident from the deed dated 01.12.2005;
- e) The fonts appearing on the second page of the alleged deed contains two different type fonts and there is no gap between the two paragraphs which again goes on to show that the alleged deed of April 17, 2007 is a forged, fabricated and a manufactured document;
- f) On the third page of the alleged deed, the paragraph numbers are

strangely struck off and nothing can be clearly made out as to why such a thing was done;

g) There is a mention of a deed dated 01.04.2005 on the fourth page of the alleged deed, but no deed with such date either was ever executed or existed, neither any partnership was ever established with the plaintiff, Bela Rani Mukherjee (since she deceased) and the defendant no.3 as it mentions in the 1 line; the

h) Again, in the 5 and 14 line on fourth page of the alleged deed, it states that Bela Rani Mukherjee (since deceased) and the defendant no. 1 expressed their desire to retire from the partnership business and relinquish their rights in the said firm, which is utterly contrary to the stand of the defendant no.1 in her application under Section 9;

i) Paragraph no.5 appearing on the fifth page of the alleged deed is struck off as it is verbatim of that of the deed of 01.12.2005, which was the actual admitted partnership deed;

j) In paragraph no.7 on the sixth page of the alleged deed, "16.04.2007" is struck off and "17.04.2007" is inserted in place thereof without any justification thereto;

k) The Advocate who has identified the alleged deed, has put his signature at the bottom of the eighth page and wrote "16.04.2007" below his enrolment number which has been mischievously suppressed by the defendant no.1 in the Section 9 proceedings.

Aforesaid are the various instances of forgeries, fabrication and manipulations amongst others made by the defendants in the alleged deed dated April 17, 2007. 11

27) The legality and validity of the agreement is under serious doubts as no such agreement had ever been executed by the Plaintiff and the question of the agreement continuing to have a valid subsistence will be conflicting with justice."

29. **The** relief pertaining to such allegation is contained in prayer (a) of the plaint, which seeks a decree declaring the alleged deed of retirement- cum-admission dated April 17, 2007 to be and void and for a direction for the said deed to be delivered up and cancelled. The other prayers of prohibitive injunction and mandatory injunction and ancillary reliefs are all consequential to relief (a).

30.A mere glance at the pleadings regarding to the alleged fraud shows that it is well within the jurisdiction of an Arbitral Tribunal to adjudicate the same, since no serious question of fraud, requiring evidence at length to be adduced, has been raised. The premise of the allegations were based on the ingredients stated in paragraph no.25, all of which can be resolved on the examination of the impugned deed itself, in conjunction with other corroborative evidence, if led by the parties. There is no such issue involved in the suit which cannot be decided by an Arbitral Tribunal but has to be decided solely by a civil court, which could have prompted the courts below to refuse reference of the matter to arbitration.

31. In *Vidya Drolia (supra)*, the latest legal position on the ambit of the civil court's jurisdiction at the reference stage was laid down. 12

32. In particular, reference may be made in this context to *N.N. Global Mercantile Private Limited vs. Indo Unique Flame Limited and others*, reported at (2021) 4 SCC 379, a three-Judge Bench decision of the Supreme Court relied on by the petitioner, where it was specifically laid down that the ground, that allegations of fraud are not arbitrable, is a wholly archaic view, which has become obsolete and deserves to be discarded. However, it was held that the criminal aspect of fraud, forgery or fabrication, which would be visited with penal consequence and criminal sanction, can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law. The Supreme Court further held that all civil or

commercial disputes, either contractual or non-contractual, which can be adjudicated upon by a civil court, in principle, can be adjudicated and resolved through arbitration, unless it is excluded, either expressly by statute or by necessary implication. The civil aspect of fraud, it was held, is to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud pertains to the validity of the underlying contract and impeaches the arbitration clause itself.

33. The definition of "fraud", as given in Section 17 of the Contract Act, 1872 was referred to in such regard.

34. The judgments of this Court cited by the plaintiff were primarily on the scope of jurisdiction of a civil court. Such judgments have to be read in the context of N.N. Global (supra), which crystallized the latest law holding the field of arbitration.

35. **In** the context of the present case, a plain and meaningful reading of the entire plaint, in particular, the paragraphs of the plaint referred to in paragraph no. 28 above, which contain allegations in respect of forgery/fraud, do not give rise to questions of such serious nature, which involve a criminal element and consequences thereof.

36. The grounds of fraud and forgery, as alleged in paragraph 25 of the plaint and its sub-clauses, do not make out any such case which would prevent the matter from being decided by Arbitral Tribunal. Mere examination of the documents-in-question, coupled with other circumstantial evidence, would be sufficient to decide the question, can very well be done by the Arbitral Tribunal.

37. **In** fact, the Arbitral Tribunal has ample powers under Sections 26 and 27 of the 1996 Act, respectively to appoint experts and to take the assistance of court in taking evidence, if necessary. In view of such wide scope of adjudication and the powers available to an Arbitral Tribunal, the questions raised in the present suit do not create any hindrance at all in

referring the matter to an Arbitrator.

38. It is well-settled that Section 16 of the 1996 Act, pertaining to the competence of an Arbitral Tribunal to rule on its own jurisdiction, sufficiently empowers the Tribunal to rule on any objection even with regard to the existence or validity of the arbitration agreement. In view of the blanket powers conferred on the Arbitral Tribunal under Section 16 of the 1996 Act itself, there arises no question of any 14 incompetence on the part of the Arbitral Tribunal to decide on the disputes which have fallen for consideration in the present lis.

39. Moreover, the Trial Court, in the present case, took into consideration extraneous factors and virtually adjudicated prematurely on whether the impugned reconstitution deed was acted upon and/or executed at all, by taking into consideration surrounding circumstances, which can only be decided at the final trial of the proceeding and not at the stage of deciding an application under Section 8 of the 1996 Act. The Trial Court found, prima facie, that the deed dated April 17, 2007, "may not have been acted upon" or "have not come into existence". The Court further finds that the existence of the deed is questionable, on consideration on the insufficient materials placed before the Court, without indicating any particular portion of the pleadings which contend such allegations which denuded the Arbitral Tribunal of the power to decide the dispute, in view of the existence of a specific arbitration clause in the impugned deed dated April 17, 2007. The plea of fraud is not a magic wand which can compel a court to reject an application for reference to arbitration, particularly in the context of the ratio as laid down in N.N. Global (supra), which also considers the previous relevant judgments in the field. None of the judgments cited by the plaintiff/opposite party no. 1 militate against the above view, as finally crystallized in N.N. Global (supra).

40. In such view of the matter, both the courts below acted without jurisdiction in refusing to refer the matter to arbitration under Section 8 of the 1996 Act. As such, the revisional application succeeds.

41. Accordingly, C.O. No. 128 of 2021 is allowed, thereby setting aside the

judgment and order dated September 25, 2020 passed by the Additional District Judge, First Court at Suri, District- Birbhum in Miscellaneous Case No.21 of 2018, affirming Order No.7 dated September 6, 2018 passed by the Civil Judge (Junior Division), Sadar Court, Suri in Title Suit No.71 of 2018. Title Suit No. 71 of 2018 and the disputes involved therein are hereby referred to arbitration. The parties shall be at liberty to approach the Arbitral Tribunal, as and when appointed, with appropriate pleadings and documents, for the Arbitral Tribunal to adjudicate the matter on merits, independently and in accordance with law, without being prejudiced in any manner by any of the observations made herein.

42. CAN 1 of 2021 is disposed of accordingly.

43. There will be no order as to costs.

44. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

Petition Allowed