

ALLEGATIONS OF FRAUD, CRIMINAL CASES AND ARBITRABILITY

In many cases, even though arbitration clauses are there in the contract, parties raise issues like fraud, forgery etc., and contend to the courts that matter is not arbitrable since the contract is vitiated or since it has become a criminal matter. The present article examines the Indian view in such matters. Arbitration and Conciliation Act, 1996 which is the procedural law of India, (The Act) does not make any specific provision excluding any category of disputes terming them to be non-arbitrable. But there are several judgements laying down the scope of judicial intervention, in cases where there is an arbitration clause with unambiguous message that in such an event judicial intervention would be very limited and minimal. But section 34 and 48 of the act provide that an arbitral award may be set aside if the court finds that the “subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.” Hence, the combined reading of sections 5, 16, 34 and 48 of the Act, when read together, it can be understood that there can be some disputes that cannot be settled by way of an arbitration. In the case of *India Household and Health care Limited*¹ the Supreme Court of India refused to refer the matter to arbitration since the officers of the Respondent were convicted in Korea for criminal conspiracy in entering into the underlying contract and also because of the injunction granted by the Madras High Court in a suit filed by the Respondent seeking to grant injunction restraining the petitioner from using the underlying contract. In addition to such criminal issues, in the case of *Booz Allen*² when the Supreme Court held that the classes of actions that operates in rem which are rights exercisable against the world can be adjudicated only by courts and public

¹ *India Household and Health care Ltd Vs LG Household and Healthcare Limited* (2007) 5 SCC 510.

² *Booz Allen & Hamilton Inc v. SBI Home Finance Ltd.*, (2011) 5 SCC 532: (2011) 2 SCC (Civ) 781

tribunals and not by the arbitrators. In the said Booz Allen case, the Supreme Court set down certain examples of non-arbitrable disputes such as (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 and child custody; (iii) matters of guardianship; (iv) insolvency and winding up; (v) testamentary matters, such as the grant of probate, letters of administration and succession certificates; (vi) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute; and (vii) disputes relating to trust, trustees and beneficiaries arising out of a trust deed.

The above said judgement did not deal with issues relating to allegations of criminal wrong doing including fraud. But later the Supreme Court of India in N. Radhakrishnan case³ while dealing with the powers of a civil court under section 8 of the act, relying on the judgement of the Supreme Court in Abdul Kadir⁴ held that, where serious allegations of fraud are made against a party, the matter should not be referred to arbitration and it should be decided by the civil court. The judgement in N. Radhakrishnan case does not lay down the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration, hence the above said judgement got misread by parties and courts to contend that if there are allegations of fraud, the matter cannot be referred to arbitration. In Swiss Timing Ltd⁵ case, the single judge of Supreme Court of India while dealing with the issue of fraud in an application filed under section 11 of the act treated the judgement in N. Radhakrishnan Case as per incuriam. The said Swiss timing case brought in an interesting proposition that unless the arbitration agreement is void or voidable, the court cannot deny a reference to arbitration because it is a matter of

³ N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72

⁴ Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak, AIR 1962 SC 406

⁵ Swiss Timing Ltd. V. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677 : (2014) 3 SCC (Civ) 642

contract and the interference of Courts is minimal. It also said that initiation of a criminal case cannot be a reason for denying arbitration. The said case also cited with another Judgment of Supreme Court in the matter of Nussli Switzerland⁶ in which the Arbitrator was appointed with the consent of both the parties. Another Supreme Court judgment in the case of Guru Granth Saheb⁷ the Supreme Court of India refused to stay the civil suit, due to the criminal cases. But later in State of West Bengal⁸ case, it was clarified that Swiss Timing Ltd was a Judgement rendered while dealing with section 11(6) of the act and section 11 essentially confers powers on the Chief Justice of India or the Chief of the High Court as a designate to appoint an arbitrator, which power has been exercised by another Hon'ble Judge as a delegate of the Chief Justice. This power of appointment of an arbitrator under section 11, by the court notwithstanding the fact that it has been held in SBP⁹ case, as a judicial power, cannot be deemed to have precedential value and therefore it cannot be deemed to have overruled the proposition of law laid down in N. Radhakrishnan case.

Finally, in the case of A. Ayyasamy¹⁰, the Supreme Court of India held that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the Supreme Court while dealing with section 8 of the act finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where such complex issues can be decided only by the civil court on the appreciation of 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. It was further held that it can be also be done so in those cases where there are allegations of forgery/ fabrication of documents in support of the plea of fraud where fraud is alleged against the arbitration

⁶ Nussli Switzerland Vs Common wealth Games 2010 organising Committee (2014)6SCC 697

⁷ Guru Granth Saheb Sthan Meerghat, Varanas Vs Ved Prakash (2013) 7 SCC 622

⁸ State of West Bengal v. Associated Contractors, (2015) 1 SCC 32

⁹ SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618

¹⁰ A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386

provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning there by in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause of the or the validity of the arbitration clause itself. The reverse position thereof would be that where there are simple allegations of fraud touching upon the internal affairs of the parties inter say and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration. Therefore, while dealing with an application under section 8 of the act, the enquiry of the court should be viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. It further held that when a case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict meticulous inquiry into the allegations of fraud is needed and only when the court is satisfied that the allegations are of serious and complicated nature that would be more appropriate for the court to deal with the subject matter rather than relegating the parties to arbitration, then alone an application under section 8 can be rejected.

Hence, as of now as per the law settled by Courts in India mere allegation of fraud is not sufficient to ignore the arbitration agreement and Courts have to convince themselves whether the case can be decided by way of arbitration or not as per the guidelines provided by the Supreme Court in Ayyasamy case. Moreover, the criminal cases touching the sustainability of the arbitration agreement have also been reasons for courts in India refusing the reference to arbitration. The above said approaches of Indian Courts are limiting the power of the arbitration agreements and enhancing the scope of judicial scrutiny at the time of exercising the powers of the courts under S.8 & 11 of the Act, which is not a progressive situation.