IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 1st OF APRIL, 2025

ARBITRATION CASE No. 25 of 2023

NAVNEET GARG

Versus

PRAVIN KUMAR DADOO

Appearance:

Shri Vivek Dalal- Advocate for the applicant.

Shri Manoj Munshi- Senior Advocate with Shri Lucky Jain- Advocate for the non-applicant.

ORDER

1. This application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') for appointment of Arbitrator.

2. In brief, the facts of the case are that the applicant Navneet Garg, Kshitij Yadav and Navneet Kuma Dadoo, the non-applicant entered into a LLP partnership firm in the name and style of M/s. Keshav Proteins and Organic LLP on 28.01.2019, from which the other partner Kshitij Yadav retired, and a second partnership deed was executed on 20.03.2019. The partnership deed was also amended on 18.06.2021. The partnership was in respect of business of manufacturing and export of soya products, soya meal, soya crude oil etc. including other commodities.

3. Subsequently, a dispute arose between the remaining partners, and it was alleged by the applicant that the complainant/non-applicant

started playing fraud with the firm by siphoning off of the stock, remitting payment of complainant's personal insurance of around Rs.6 lakh and also by payment of instalment of complainant's personal loan against purchase of residential plot in his and his family members name. It was alleged that the funds were siphoned off in respect of various commodities also.

4. Thus, the applicant also filed a complaint with the Police Station Badgonda for registration of FIR against the non-applicant and his brother Navin Daddu that they have committed cheating, criminal breach of trust, forgery and fraud by siphoning off the stock by theft and appropriating the sale receipts, but the Police did not register the FIR against the non-applicant's brother, and according to the applicant an amount of Rs.9,72,29,940.17/- is due from the non-applicant, and despite approaching the non-applicant for settlement of dues, there is no response from the non-applicant's side. *It is also stated that as on 30.10.2022, an amount of Rs.6,92,33,619.95/- is due and outstanding with the HDFC Bank also.*

5. Thus, with a view to resolve the dispute through arbitration, a notice dated 31.01.2023 was also sent by the applicant to the non-applicant for appointment of Shri Amit Tatke as the sole arbitrator to resolve the dispute between the parties, which was declined by the non-applicant vide their reply dated 04.02.2023. Hence, the present applicant has been filed.

6. Shri Vivek Dalal, learned counsel for the applicant has submitted that an Arbitrator may be appointed to resolve the dispute between the parties, as per Clause No.58 of the partnership deed dated 28.01.2019. Counsel for the applicant has also submitted that it is true that an FIR has also been registered against the applicant, but has nothing to do with the original agreement containing the arbitration agreement, and

the alleged offence has nothing to do with the public at large, and in such circumstances, the arbitrator may be appointed.

7. Counsel for the applicant has also relied upon a decision rendered by this Court in the case ***Navneet Garg Vs. The State of Madhya Pradesh*** passed in **M.Cr.C. No.17717 of 2023 dated 01.05.2023** as also the decisions rendered by the Supreme Court in the case of ***Avitel Post Studioz Limited and others Vs. HSBC PI Holdings (Mauritius) Limited*** reported as ***(2021) 4 SCC 713;*** and in the case of ***Vidya Drolia and others Vs. Durga Trading Corporation*** reported as ***(2021) 2 SCC 1*** in support of his submission that even if a criminal case is pending between the parties, the matter can certainly be referred to the Arbitrator for settlement of disputes.

8. On the other hand, prayer is vehemently opposed by Shri Manoj Munshi, learned senior counsel for the non-applicant, and it is submitted that in the present case, the non-applicant has already filed an FIR No.153 of 2023 under Sections 406, 420, 465 of IPC in respect of the serious fraud committed by the applicant in the partnership firm. It is also submitted that in the complaint filed by the applicant, a *prativedan* was also prepared by the Police stating that no such case of theft as alleged by the applicant is made out, whereas, in the complaint filed by the non-applicant, a status report was filed by the Police on 27.02.2023, on the basis of which the JMFC has directed the registration of FIR against the applicant. It is also submitted that the aforesaid order was challenged by the applicant in the revision as aforesaid, which has also been rejected by the Revisional Court vide its order dated 09.01.2024.

9. Counsel for the non-applicant has also relied upon the same decision rendered by the Supreme Court in the case of ***Vidya Drolia***

(Supra), on the which the counsel for the applicant has also relied upon, and it is submitted that no case for interference is made out.

10. Heard. So far as the decision rendered by the Supreme Court in the case of ***Avitel Post Studioz Ltd.(Supra)*** is concerned, the same has already been taken into account by the subsequent decision rendered by the Supreme Court in the case of ***Vidya Drolia (Supra)*** is concerned, the same deals with the effect of fraud in a case for appointment of arbitrator, the relevant paras of the same, read as under:-

> "73. A recent judgment of this Court in *Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.* [*Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] has examined the law on invocation of "fraud exception" in great detail and holds that *N. Radhakrishnan* [*N. Radhakrishnan* v. *Maestro Engineers*, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in para 34 of the judgment in *Avitel Post Studioz Ltd.* [*Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] , which quotes observations in *Rashid Raza* v. *Sadaf Akhtar* [*Rashid Raza* v. *Sadaf Akhtar*, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] : (*Rashid Raza case* [*Rashid Raza* v. *Sadaf Akhtar*, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , SCC p. 712, para 4)
>
> > "*4.* The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are : (*1*) does this 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."
>
> to observe in *Avitel Post Studioz Ltd.* [*Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] : (SCC para 35)
>
> > "*35.* … it is clear that serious allegations of fraud arise only if either of the two tests laid down are satisfied and not otherwise. 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. 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 mala fide 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."

74. The judgment in *Avitel Post Studioz Ltd.* [*Avitel Post Studioz Ltd.* v. *HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post-contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.

xxxxxx

76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (*1*) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (*2*) When cause of action and subject-matter of the dispute affects third-party rights; have *erga omnes* effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (*3*) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (*4*) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

However, the aforesaid principles have to be applied with care and caution as observed in *Olympus Superstructures (P) Ltd.* [*Olympus Superstructures (P) Ltd.* v. *Meena Vijay Khetan*, (1999) 5 SCC 651] : (SCC p. 669, para 35)

> "*35.* … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (*Keir* v. *Leeman* [*Keir* v. *Leeman*, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter

> (*Soilleux* v. *Herbst* [*Soilleux* v. *Herbst*, (1801) 2 Bos & P 444 : 126 ER 1376] , *Wilson* v. *Wilson* [*Wilson* v. *Wilson*, (1848) 1 HL Cas 538] and *Cahill* v. *Cahill* [*Cahill* v. *Cahill*, (1883) LR 8 AC 420 (HL)])."
>
> **77.** Applying the above principles to determine non-arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralised forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trade marks are exclusive matters falling within the sovereign or government functions and have *erga omnes* effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have *erga omnes* effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are non-arbitrable."

(Emphasis Supplied)

11. Having considered the rival submissions and on perusal of the documents filed on record, including the decisions rendered by the Supreme Court as aforesaid, this Court finds that admittedly, in the partnership firm between the parties, a serious dispute has arisen regarding the misappropriation of the commodities worth crores of rupees, and a criminal case has also been registered against the applicant by the Police Station Badgonda, Indore at the instance of the respondent, whereas, a similar complaint lodged by the applicant against the respondent in respect of the same commodities has met with dismissal by the police.

12. It is found that the FIR has been lodged at the instance of the respondent alleging the theft or siphoning of the same material by the applicant on which the HDFC Bank also has a charge. Thus, it cannot be said that the alleged offence was purely private in nature, and there was no public element involved. The Supreme Court has also observed

in the case of ***Vidya Drolia (Supra)*** that, *"*Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, *violations of criminal law are offences against the State and not just against the victim*".

13. In the facts and circumstances, this Court is of the considered opinion that the appointment of the Arbitrator would not be expedient in the present case, as both the parties are alleging fraud against each other, and now the matter would be tried in the criminal Court, also touching upon the same issues which will be tried by the arbitrator, if appointed, *i.e.*, as to who has committed the fraud and against whom.

14. In such circumstances, the application being devoid of merits, is hereby ***dismissed***.

(SUBODH ABHYANKAR)
JUDGE

Bahar