

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7838 OF 2011

Deccan Paper Mills Co. Ltd. .. Petitioner
vs.
Regency Mahavir Properties & Ors. .. Respondents

Mr. R. V. Govilkar with Mr. V. B. Tapkir for Petitioner.
Mr. P. K. Dhakephalkar – Senior Advocate and Mr. Rajesh Dattar
for Respondent No. 1.
Mr. R. D. Soni i/b. Ram & Co. for Respondent No. 2.

CORAM : M. S. SONAK, J.
DATE: 18 MARCH 2015

P.C. :-

1] This petition impugns the order dated 19 July 2011 made by the 6th Addl. Judge, Small Causes Court, Pune, allowing the application made by the respondent no. 1, under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the subject matter of the suit to arbitration.

2] Mr. Govilkar, the learned counsel for the petitioner made the following submissions in support of the petition:

(A) That this is a case where the agreement which contains the arbitration clause was procured by means of a fraud. Therefore, in the light of the law laid down by the Hon'ble Apex Court in the case of *N. Radhakrishnan vs. Maestro*

*Engineers & Ors.*¹, the application under Section 8 of the said Act could not have been granted. Further relying upon the decision of the Hon'ble Apex Court in the case of *SBP & Co. vs. Patel Engineering Ltd. & Anr.*², the learned counsel submitted that the judicial authority deciding an application under section 8 of the said Act should not act in a mechanical manner, but is obliged to decide as to whether the subject matter of the dispute is capable of being decided in arbitration;

(B) That the decision of the Hon'ble Apex Court in the case of *Swiss Timing Limited vs. Organising Committee, Commonwealth Games*³, which is rendered by the learned Single Judge of the Hon'ble Apex Court, is contrary to the law laid down by the Hon'ble Apex Court in the case of *N. Radhakrishnan* (supra) which was a decision rendered by the Bench comprising of the two Learned Judges of the Hon'ble Apex Court. Accordingly, this Court should follow law laid down in the case of *N. Radhakrishnan* (supra) in preference to the decision in the case of *Swiss Timing Limited* (supra);

(C) That there is a conflict between the decision of the Division Bench in the case *Avitel Post Studioz Ltd. & Ors. vs. HSBC PI Holdings (Mauritius) Ltd.*⁴ and the decision in the

1 (2010) 1 SCC 72

2 (2005) 8 SCC 618

3 Arbitration Petition No. 34 of 2013 decided on 28.05.2014.

4 Appeal No. 196 of 2014 in Arbitration Petition No. 1062 of 2012 decided on 31.07.2014

case of *Satish s/o. Raghuvirchand Sood & Ors. vs. Gujrat Tale Links Pvt. Ltd. & Ors.*⁵, on the issue as to whether question of fraud in execution of an agreement, can at all be referred to arbitration. In view of such conflict, this Court ought to place the matters before the Hon'ble the Chief Justice for constitution of a Larger Bench. In the alternate, Mr. Govilkar submitted that this Court ought to follow the law laid down in the case of *Satish Sood* (supra).

3] The first contention of Mr. Govilkar, is almost entirely based upon the law laid down by the Hon'ble Apex Court in the case of *N. Radhakrishnan* (supra). However, in the later case of *Swiss Timing Limited* (supra), the Hon'ble Apex Court at paragraph 21 has observed thus :

*“21. This judgment was not even brought to the notice of the Court in **N. Radhakrishnan (supra)**. In my opinion, judgment in *N. Radhakrishnan* (supra) is per incuriam on two grounds : Firstly, the judgment in **Hindustan Petroleum Corpn. Ltd. (supra)** though referred has not been distinguished but at the same time is not followed also. The judgment in **P. Anand Gajapathi Raju & Ors. (supra)** was not even brought to the notice of this Court. Therefore, the same has neither been followed nor considered. Secondly, the provision contained in Section 16 of the Arbitration Act, 1996 were also not brought to the notice by this Court. Therefore, in my opinion, the judgment in **N. Radhakrishnan***

5 2013 (5) ALL MR 780

(supra) does not lay down the correct law and cannot be relied upon.”

4] In view of the same, it is not possible to accept the first contention of Mr. Govilkar. Similarly, it is also not possible to accept the second contention of Mr. Govilkar, in view of the law laid down in the case of *Avitel Post Studioz Ltd.* (supra). The Division Bench of this Court, in paragraph 38 has observed thus :

“38] In the aforesaid regard, we must note that though the decision in Swiss Timing (supra) has been delivered by a Single Judge of the Supreme Court, nevertheless, the same is after taking into consideration the earlier decision in N. Radhakrishnan (supra). There are two specific reasons indicated as to why in its opinion, the decision in N. Radhakrishnan (supra) is 'per incuriam'. In such circumstances, it is not open for us to follow the dictum in N. Radhakrishnan (supra) even if we were to agree with Mr. Kirpal that the said decision lays down absolute proposition that issues of fraud are per se non-arbitrable.”

5] In so far as the third contention of Mr. Govilkar is concerned, it is true that the Division Bench of this Court in the case of *Avitel Post Studioz Ltd.* (supra), did not notice the decision of the Division Bench in the case of *Satish Sood* (supra). However, that by itself would not make a difference. This is because when the decision in the case of *Satish Sood* (supra) was rendered on 26 July 2013, the Hon'ble Apex Court had not delivered its judgment in the case of

Swiss Timing Limited (supra). The same was in fact delivered on 28 May 2014. In this view of the matter, it is neither possible to follow the decision of the Division Bench in the case of *Satish Sood* (supra) nor to urge a Reference before a Larger Bench.

6] Accordingly, it is not possible to entertain the present petition. The petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)

Chandka