

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

OP(C).No. 820 of 2015 (O)

OS 500/2013 OF ADDITIONAL MUNSIFF COURT-I, KOZHIKODE.

.....

PETITIONER(S):

1. M/S. G.TEC,
REPRESENTED BY MANAGING PARTNER,
MAHROOF MANALODY, 6/623-A, BHASKAR BUILDING,
C.H. FLY OVER JUNCTION, BANK ROAD, KOZHIKODE-673 013.
2. MAHROOF MANALODY,
S/O.MANALODI ABOOBACKER HAJI, AGED 42,
RESIDING AT SHAKEELA MANZIL, KINASSERI, THOTTUMMARAM,
VALAYANAD AMSOM DESOM, POKKUNNU P.O.,
KOZHIKODE-673 013.

BY SRI.S.V.BALAKRISHNA IYER, SENIOR ADVOCATE.

**ADVS. SRI.P.B.KRISHNAN,
SRI.P.M.NEELAKANDAN,
SRI.P.B.SUBRAMANYAN,
SRI.SABU GEORGE,
SRI.S.NITHIN (ANCHAL).**

RESPONDENT(S):

**KOULATH KAREEM, AGED 42 YEARS,
D/O.LATE V.K. UMMER, PLOT NO.4,
OPPOSITE SWIMMING POOL,
CHEROOTY NAGAR HOUSING COLONY,
PUTHIYARA P.O., KASABA AMSOM DESOM,
KOZHIKODE TALUK AND DISTRICT, PIN-673 004.**

BY ADV. SRI.NIRMAL. S.

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 09-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

rs.

OP(C).No. 820 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS:-

- EXT.P1 DATED 28/05/2004, COPY OF THE AGREEMENT OF PARTNERSHIP
ENTERED INTO BETWEEN THE PETITIONERS AND RESPONDENT.
- EXT.P2 DATED 28/10/2013, COPY OF THE PLAINT IN O.S. NO.500/2013,
MUNSIFF COURT-I, KOZHIKODE.
- EXT.P3 DATED 20/01/2014, COPY OF THE I.A. NO.229/2014 IN
O.S. NO.500/2013, MUNSIFF COURT-I, KOZHIKODE.
- EXT.P4 DATED 07/01/2015, COPY OF THE ORDER IN I.A. NO.229/2014
IN O.S. NO.500/2013, MUNSIFF COURT-I, KOZHIKODE.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

[CR]

B. KEMAL PASHA, J.

.....
O.P.(C) No.820 of 2015
.....

Dated this the 9th day of July, 2015

J U D G M E N T

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(1) Can the disputes involved in this case be resolved by an arbitral tribunal, which is a private forum chosen by the parties or whether they would exclusively fall within the domain of courts being public fora?

(2) Can disputes relating to rights and liabilities which give rise to or arise out of criminal offences resulting from

malpractice in the account books and manipulation of the finance of a partnership firm or offences like forgery, impersonation etc. be referred for arbitration?

(3) Is an arbitration request not accompanied by the arbitration agreement in original or a certified true copy, maintainable?

(4) Can the arbitration clause contained in an agreement entered into after the coming into force of the Arbitration and Conciliation Act, 1996, by making the Arbitration Act, 1940 applicable, is a *non est*?

2. The suit before the court below is one for dissolution of a partnership and for rendition of accounts etc. The plaintiff has instituted the suit by making serious allegations against the defendant, who is the petitioner herein. The plaintiff has gone to the extent of alleging that the petitioner herein had forged the signature of the plaintiff

and had withdrawn various amounts from her bank accounts, that too by committing impersonation. There are further averments and allegations that the accounts were deliberately falsified. It is also specifically alleged that the plaintiff, who was abroad, was deliberately defrauded, cheated and her amounts were withdrawn illegally from the bank through impersonation and forgery, for which she was compelled to file a complaint, on which a criminal case was registered and consequently, the petitioner was placed under arrest and he was remanded. Of course, it seems that no materials were produced or evidence was adduced before the court below to substantiate those allegations.

3. The defendant in the suit, who is the petitioner herein, wanted to get invoked the arbitration clause contained in clause 13(h) of Ext.P1 partnership deed, which says:-

“Any disputes or difference which may arise between the partners or their legal

representatives with regard to construction meaning or effect, of this deed or any part thereof or in respect of account, profit and loss of the business of the rights and liabilities of the partnership under this deed, or of dissolution on winding up is to be referred to arbitrators are to be nominated by party in difference and in case of difference of opinion between the arbitrators, the matters shall be referred to an Umpire whose ruling shall be final and provisions of Arbitration Act, 1940 shall apply.”

4. An application to that effect was filed before the court below by the petitioner by way of Ext.P3 IA.No.229/2014. The court below, after hearing both sides, has dismissed the IA through Ext.P4 order, which is under challenge.

5. Heard learned Senior Counsel for the petitioner and learned counsel for the respondent.

6. The learned Senior Counsel for the petitioner has argued that apart from making some allegations, which are

not even specific instances, the respondent has not produced any documents to substantiate those allegations and, therefore, the court below has committed an error in finding that this is a case in which the disputes involved cannot be subjected to arbitration.

7. *Per contra*, the learned counsel for the respondent has argued that serious allegations have been levelled against the petitioner by the respondent in the plaint itself and that itself is sufficient to find that the dispute involved cannot be referred for arbitration. It is also contended that the petitioner, who wanted to get the arbitration clause invoked, has not produced the original arbitration agreement or its certified copy as contemplated under Section 8(2) of the Arbitration and Conciliation Act, 1996 read with Rule 4(d) of the Kerala Arbitration and Conciliation (Court) Rules, 1997. It is further argued that the arbitration clause itself has to be treated as a *non est* as what was mentioned in the so-called arbitration clause is

that the Arbitration Act, 1940 should be applied in case of such arbitration.

8. The learned Senior Counsel has relied on the decision in **Swiss Timing Limited Vs. Organising Committee, Commonwealth Games 2010, Delhi [AIR 2014 SC 3723]** rendered by a learned Single Judge of the Supreme Court wherein it was held in paragraph 29:-

“In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of

the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.”

9. Further, the learned Senior Counsel has relied on the decision in ***Booz-Allen & Hamilton Inc. Vs. SBI Home Finance Ltd. & Others [2011 SAR (Civil) 471]***, wherein it was also held in paragraph 21:-

“The term 'arbitrability' has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the arbitral tribunal, are as under: (i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the

parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts). (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement. (iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the

pleadings before the arbitral tribunal.”

Arbitral tribunals are private fora chosen voluntarily by the parties to the dispute to get the disputes adjudicated in place of courts and tribunals, which are public fora constituted under the General law of the country. It is true that every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of arbitral tribunals is excluded either expressly or by necessary implication.

10. In paragraph 22 of **Booz-Allen** (*supra*), it was further held-

“The well recognized examples of non-arbitrable disputes are : (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, child custody; (iii) guardianship matters; (iv) insolvency and winding up

matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.”

Based on the decision noted *supra*, learned Senior Counsel has canvassed an argument that unless and until basic materials are furnished by the respondent to oppose a valid claim for reference to an arbitration, the said claim forwarded by the petitioner ought not to have been denied by the court below.

11. The learned Senior Counsel has further relied on the decision in ***M/s.Sundaram Finance Ltd. and another Vs. T.Thankam [2015 SAR (Civil) 527]***, wherein it was held-

“Once an application in due compliance of Section 8 of the Arbitration

*Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance of the procedure under the special statute. The general law should yield to the special law - **generalia specialibus non derogant**. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court.”*

12. Learned counsel for the respondent has relied on the decision in ***N.Radhakrishnan Vs. Maestro Engineers***

and Others [(2010) 1 SCC 72], wherein it was held in paragraph 26-

“In the present dispute faced by us, the appellant had made serious allegations against the respondents alleging them to commit malpractices in the account books and manipulate the finances of the partnership firm, which, in our opinion, cannot be properly dealt with by the arbitrator. As such, the High Court was justified in dismissing the petition of the appellant to refer the matter to an arbitrator. In this connection, it is relevant to refer to the observation made by the High Court in its impugned judgment:

“The above decision squarely applies to the facts of the present case. In the present case as well there is allegation of running rival firm, interference with the smooth administration of the firm. As already stated since the suit has been filed for declaration to declare that the revision petitioner is not a partner with effect from

18-11-2005, and for consequential injunction restraining the petitioner from disturbing the smooth functioning of the first respondent firm, the issue relates to the causes which compelled the respondents to expel the revision petitioner from the partnership firm and the necessity to reconstitute the firm by entering into a fresh partnership deed. Therefore such issues involve detailed evidence which could be done only by a civil court.....”

13. On going through **N.Radhakrishnan** (*Supra*), it seems that the Apex Court has taken the view in that case where the appellant had levelled serious allegations against the respondents alleging them of malpractice in the account books and manipulation of the finance of the partnership firm, the dispute involved could not be subjected to arbitration. In **N.Radhakrishnan** (*supra*), the Apex Court had followed the decision rendered by the High Court of Judicature at Madras in **H.G. Oomor Sait Vs. O.Aslam Sait**

[(2001) 3 CTC 269 (Mad)], wherein it was held:-

“Power of civil court to refuse to stay of suit in view of arbitration clause on existence of certain grounds available under the 1940 Act continues to be available under the 1996 Act as well and the civil court is not prevented from proceeding with the suit despite an arbitration clause if dispute involves serious questions of law or complicated questions of fact adjudication of which would depend upon detailed oral and documentary evidence.

The civil court can refuse to refer matter to arbitration if complicated question of fact or law is involved or where allegation of fraud is made.

Allegations regarding clandestine operation of business under some other name, issue of bogus bills, manipulation of accounts, carrying on similar business without consent of other partner are serious allegations of fraud, misrepresentation,

etc...., and therefore application for reference to arbitrator is liable to be rejected.”

14. When dealing with the matter, the nature of the allegations levelled against the petitioner by the respondent in the plaint have to be considered. In this case, it has been alleged that the petitioner has cheated and defrauded the respondent deliberately while she happened to be abroad. According to her, amounts from her bank accounts were withdrawn by employing impersonation and by committing forgery. Further, a parallel business was set up by siphoning the funds invested by the respondent in the said business through falsification in the accounts. It has also been alleged that on her complaint, the petitioner had to undergo incarceration in a criminal case registered against him. Even without any formal proof of those allegations, it is evident that such serious allegations are there against the petitioner. Proof of those matters is yet another aspect.

When the respondent has gone to the extent of alleging that the petitioner was incarcerated in the case registered on her complaint, it cannot be said that the said allegation cannot be believed without any further formal proof. Normally, a person would not be dare enough to make such a wild allegation, if it is false, as such a false allegation would result in grave consequences; both civil as well as criminal as against the person imputing such false allegations. Therefore, it has come out that very serious allegations are there within the meaning of item No.1 noted in **Booz-Allen** (*supra*) by the Apex Court as an example of non arbitrable dispute.

15. The other aspect pointed out by the learned counsel for the respondent is that the petitioner has failed to produce before the court below the original of the arbitration agreement or its certified copy within the meaning of Section 8(2) of the Arbitration and Conciliation Act, 1996 read with Rule 4(d) of the Kerala Arbitration and Conciliation (Court)

Rules, 1997. As per Section 8(1), when an action is brought before a judicial authority, which is the subject of an arbitration agreement, and if a party so applies, not later than when submitting his first statement on the substance of the dispute, for getting the arbitration clause invoked, that application has to be allowed. As per Section 8(2) of the Act, such an application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof. Rule 4(d) of the Kerala Arbitration and Conciliation (Court) Rules, 1997 says that every application to the court under the Act shall be accompanied by the arbitration agreement in original or true copy, duly certified by the Advocate or a Notary Public.

16. In ***N.Radhakrishnan*** (*supra*), it was held in paragraph 27-

“Even assuming that a dispute subsists and an arbitrator is appointed, still

the appellant cannot absolve himself from the mandatory requirement of filing an original copy of the deed.”

17. In ***Atul Singh and others Vs. Sunil Kumar Singh and others [(2008) 2 SCC 602]***, it was held-

“There is no whisper in the petition dated 28.2.2005 that the original arbitration agreement or a duly certified copy thereof is being filed along with the application. Therefore, there was a clear non-compliance with sub-section (2) of Section 8 of the 1996 Act which is a mandatory provision and the dispute could not have been referred to arbitration. Learned counsel for the respondent has submitted that a copy of the partnership deed was on the record of the case. However, in order to satisfy the requirement of sub-section (2) of Section 8 of the Act, Defendant 3 should have filed the original arbitration agreement or a duly certified copy thereof along with the petition filed by him on 28.2.2005, which he did not do. Therefore, no order

for referring the dispute to arbitration could have been passed in the suit.”

It seems that the aforesaid statutory mandates have not been complied with in this case, and the arbitration request forwarded under Section 8(1) before the court below through the IA is accompanied by the arbitration agreement in original or true copy, duly certified by the Advocate or a Notary Public. On that score also, the IA seems to be not maintainable.

18. Another aspect pointed out by the learned counsel for the respondent is that the arbitration clause itself as contained in clause 13(h) of Ext.P1 has to be treated as a *non est* as the parties had agreed to have recourse to the provisions of the Arbitration Act, 1940. The said Act is a repealed one. As per Section 85(2) of the Arbitration and Conciliation Act, 1996-

“Notwithstanding such repeal,-

(a) the provisions of the said enactments shall apply in relation to arbitral

proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act be deemed respectively to have been made or issued under this Act.”

19. The learned counsel for the respondent has invited the attention of this Court to the decision in ***Rajan Kumar Verma and another Vs. Sachchidanand Singh [AIR 2006 PATNA 1]***, wherein it was held that in such a case no arbitration can be done on the basis of the agreement which is inoperative.

20. I would like to view the said matter in a different perspective. It seems that the parties, at the time of

entering into the partnership deed, wanted to incorporate the arbitration clause for getting their disputes resolved through the means of arbitration and that was the reason why clause 13(h) was incorporated in Ext.P1. At the same time, instead of incorporating the name of the statute as Arbitration and Conciliation Act, 1996, what was incorporated is the Arbitration and Conciliation Act, 1940. True that at the time of such incorporation in Ext.P1, the said Act stood repealed. Even when the party had mentioned that they wanted to have recourse to the provisions of Arbitration and Conciliation Act, 1940, in such a context, it has to be read as Arbitration and Conciliation Act, 1996 when the parties had deliberately incorporated an arbitration clause in Ext.P1. It can only be viewed as a mere misquoting of the name of the statute. By merely naming the statute applicable as Arbitration Act, 1940, it cannot be said that the arbitration clause itself is inoperative. The arbitration clause is operative and the law that has to be

applied is the one under the Arbitration and Conciliation Act, 1996.

21. From all the above, this Court is of the view that there is absolutely nothing to interfere with Ext.P4 order passed by the court below.

This O.P.(Civil) fails and is dismissed.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/09/07

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PA to Judge