

IN THE HIGH COURT FOR THE STATES OF PUNJAB
AND HARYANA AT CHANDIGARH

FAO No.4746 of 2016 (O&M)

Date of Decision.02.09.2016

Mr. Ravindra Savla

.....Appellant

Vs.

Avitel Post Studioz Ltd. and others

.....Respondents

Present: Mr. Yogesh C. Naidu, Advocate with
Mr. Apanjyot S. Virk, Advocate
for the appellant.

Mr. Karan Bharihoke, Advocate with
Mr. Jasprit Singh, Advocate
for the caveators-respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether Reporters of local papers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

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AMIT RAWAL J.

The appellant is aggrieved of the impugned order dated 03.08.2016 whereby the application under Section 9 of the Arbitration and Conciliation Act, 1996 seeking interim direction calling upon the respondents to ensure that the money to the extent of value i.e. invested at ₹1,81,25,000/-, further ₹5,75,000/- equity shares along with interest @12% out of the funds in the bank account of respondents freezing in terms of the order dated 31.07.2014 passed by Division Bench of Bombay High Court in appeal No.196 of 2014 read with order dated 22.01.2014 passed in arbitration petition No.1062 of 2012, has been dismissed.

Mr. Yogesh C. Naidu, learned counsel appearing for the appellant submitted that the appellant continues to be shareholder of the

submitted that on 25.04.2011, the HSBC PI Holdings (Mauritius) Ltd. (hereinafter called as “HSBC”) being investment holding company for principal investments in Asia Division entered into share subscription agreement and Shareholders Agreement. The HSBC levelled allegation against the respondent company of serious fraud and on 11.05.2012, invoked the arbitration provisions under two agreements bearing No.88 and 89 of 2012. On 14.05.2012, Emergency Arbitrator was appointed as per the provisions of Singapore International Arbitration Centre 2010 Rules. He further submitted that the Emergency Arbitrator on 29.05.2012 passed the interim order ordering freezing of SHA account of the appellant. The HSBC also invoked the original jurisdiction of the Bombay High Court by filing a petition under Section 9 of the Arbitration and Conciliation Act, 1996 and vide order dated 21.01.2014, the High Court restrained the respondent-Company from withdrawing the amount retained by the Corporation Bank in its account to the extent of USD 60 million. The aforementioned order was challenged before the Division Bench in appeal No.196 of 2014, which was partly allowed and the respondent-company was ordered to maintain a balance of USD 30 millions instead of 60 million within four weeks from the date of passing of the order. The respondent company chose to file the appeal before the Hon'ble Supreme Court in SLP bearing No.24961 of 2014, which is said to be pending and status quo order has been issued. The aforementioned order dated 31.07.2014 while searching on the internet came to the knowledge of the appellant in June, 2016 and upon reading the said order, he wrote letter to the respondent-company about his concern and the respondent-company invited the appellant in meeting of Board of Directors held at Mohali on 11.07.2016

wherein the appellant has been branded as “Investor”. During the aforementioned proceedings, documents were provided to the appellant and he was informed about the aforementioned facts. Even a reference was made to the report of Mr. Roger Best that was submitted by HSBC in arbitration proceeding at Singapore where it valued the shares of the respondent-company as nil.

Since the appellant was a shareholder of the company akin to HSBC and on the basis of doctrine of parity, moved an application as noticed above. He submitted that the Principal Court misinterpreted the provisions of law and misdirected itself, rather, failed to appreciate the aforementioned facts on the premise that the petition was not maintainable. In fact, case of the appellant squarely falls within the parameters laid down by Ho'ble Supreme Court in **M/s S.B.P. & Co. Vs. M/s Patel Engineering Ltd.and another (2005) 8 SCC 618.** He further submitted that the Principal Court has committed illegality in observing that there was no fraud played upon the appellant by HSBC. It merely relied upon the finding contained in the orders passed against the respondent-company. The respondent company did not execute the arbitration clause and rather it was unanimously consented that any dispute raised by the appellant, so long as it is arbitrable under law, shall be referred to the Arbitrator in accordance with Indian Laws. In this context, he has drawn attention of this Court to the resolution which is reproduced hereinbelow:-

“.....Mr. Ravindra Savla said that he was not satisfied with the Board's view that the Company would succeed in the matter and asked for return of his invested amounts along with 12% p.a. Interest. The Chairman stated that the amounts were invested by Ravindra Savla was in Equity Shares which was fixed capital of the Company and return of investment amounts

in this matter are not permissible in law.

Mr. Savla stated that he would like to peruse the documents in detail and would not rest content till full justification is made available, if need so arises for redressal of issues involved. He requested that the disputes be decided by an Arbitrator. The Board unanimously consented that that any disputes raised by Mr. Ravindra Savla, so long as they are arbitrable under law, shall be referred to arbitration in accordance with Indian Law. Mr. Ravindra Savla stated that he would examine the papers provided to him and determine his further course of action.....”

He also drawn attention of this Court to paragraphs 8, 7, 13, 14, 15, 17 and 21 of the application and also relied upon judgments of Hon'ble Supreme Court in **Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited and others (2011) 5 SCC 532**; **Fornax Real Estate Limited Vs. M/s Chandigarh Spun Pipe Company, Chandigarh and others 2015(4) LAR 277** and **Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhakar and others AIR 1962 SC 406.**

Per contra, Mr. Karan Bharihoke, Advocate with Mr. Jasprit Singh, Advocate appearing for the caveators-respondents submitted that it has, prima facie, been established that the appellant is opportunist by taking advantage of litigation at the behest of HSBC. He further submitted that provisions of Section 9 of the 1996 Act are for interim relief and can only come to the aid of the final relief, however, the disputes as raised by the appellant are not arbitrable. Even the Award obtained by the HSBC dated 27.09.2014 was biased on various grounds. As the parties had concurrently agreed the application of the Indian Laws, allegations of the fraud are not arbitrable and the Arbitral Tribunal had ordered for cancellation of the shares held by HSBC PI Holdings (Mauritius) Limited. He submitted that

not in the manner and mode as has been tried to be projected by the appellant. The entire arbitration at the best of HSBC was against the public policy and in gross defiance to the principles of natural justice. The element of biasness of the Arbitrator has been pointed out in objections filed under Section 48 of the 1996 Act against the final order. The Arbitral Tribunal ought to have appointed independent expert for valuing the shares of the company. He submitted the principal question to be addressed in the present case is that as to whether the disputes raised by the appellant on the basis of the fraud are arbitrable or not. He also relied upon the judgments of Hon'ble Supreme Court and various High Courts in *Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Company (2010) 8 SCC 24*; *Booz Allen and Hamilton VS. SBI Home Finance Ltd. (2011) 5 SCC 532*; *N. Radhakrishnan Vs. Maestro Engineer (2010) 1 SCC 72*; *Abdul Kadir Shamsuddin Bubere Vs. Mahav Prabhakar Oakand AIR 1962 SC 406*; *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. (1998) 1 SCC 305*; *National Thermal Power Corpn. VS. Singer Company (1992) 3 SCC 551*; *M/s Trojan & Company Vs. Rm. N.N. Nagappa Chettiar AIR 1953 SC 235*; *Dorab Cawasji Warden Vs. Coomi Sorab Warden (1990) 2 SCC 117*; *World Sport Group (Mauritius) Ltd. Vs. MSM Satellite Pvt. Ltd. 2014(11) SCC 639*; *Goldstar Metal Solutions P. Ltd. Vs. Dattaram Gajanan Kavtankar in arbitration appeal No.12 of 2013*; *Dattaram Gajanan Kavtankar Vs. Goldstar Metal Solutions P. Ltd. and others in SLP (Civil) No.16376-16377 of 2013*; *Ram Kishan Mimani and another Vs. Goverdhan Das Mimani and others in AP No.126 of 2010*; *Governdhan Das Mimani and others Vs. Ram Kishan Mimani and another in SLP (Civil) No.20298 of 2010, Ivory Properties and Hotel P.*

& Hotel P. Ltd. Vs. Nusli Neville Wadia in SLP (Civil) No.10059 of 2011;
Himachal Futuristic Communication Ltd. Vs. UOI in OMP No.464 of
2009; P. Anand Gajapati Raju and others Vs. P.V.G. Raju (dead) and
others (2000) 4 SCC 539; Dadu Dayalu Mahasabha, Jaipur (Trust) V.
Mahant Ram Niwas and another (2008) 11 SCC 753; Hindustan
Petroleum Corpn. Ltd. Vs. Pinkcity Midway Petroleums (2003) 6 SCC
503; India Household and Healthcare Ltd. Vs. LG Household and
Healthcare Ltd. (2007) 5 SCC 510; Archetype India Construction
Consultants P. Ltd. Vs. The Bombay Dyeing and Mfg. Co. Ltd. in Arbtn
Appln. No.237 of 2008; Hindustan Lever Employees Union Vs.
Hindustan Lever Ltd. And others 1995 Supp (1) SCC 499; Satish s/o
Raghuvirchand Sood and others Vs. Gujarat Tale Links P. Ltd. and
others in LPA No.102/2013 in WP No.139/2013; Swiss Timing Ltd. Vs.
Commonwealth Games 2010 Organizing Committee (2014) 6 SCC 677;
SMS Tea Estate P. Ltd. Vs. Chandmari Tea Company P. Ltd. (2011) 14
SCC 66; Anil Rai Vs. State (2001) 7 SCC 318; A.V. Papayya Sastry and
others Vs. Govt. of A.P. and others (2007) 4 SCC 221.

I have heard learned counsel for the parties and appraised the paper book. It is admitted position that the arbitration between the respondent-company and HSBC was conducted in accordance with the Singapore laws and the respondent-company has filed the objections to the extent of the Award before the Bombay High Court on various grounds. The veracity of the findings regarding enforceability under the Indian Laws is yet to be tested.

Mr. Bharihoke, learned counsel for the respondents has also referred to certain other provisions regarding the lodging of FIR by the

HSBC for fraud and impersonation. He submitted that investigation had

been done by Economic Wing and it found that there was no complete evidence. As I have already observed that the case of the appellant, in my view, is governed by Indian Laws and therefore, the allegations of fraud and impersonation have to be proved in accordance with laws in India. As per the contents of the petition under Section 9, it would apt to reproduce certain paragraphs containing the allegation and the same read as under:-

“8. Upon reading the said orders, the applicant was aghast to note that allegations of serious fraud and misrepresentation had been made by HSBC against the respondents herein. Further, the said allegations had been accepted by the Emergency Arbitrator, appointed by Singapore International Arbitration Centre, by the order dated 28.05.2012. Further the Hon'ble High Court of Bombay by its order dated 31.07.2014 in Appeal No.196 of 2014 has, accepting the aforementioned findings of the Emergency Arbitrator, inter alia, upheld the freezing of the bank accounts of Avitel India held at Corporation Bank and further directed that “.. to deposit the shortfall in Corporation Bank account at Mumbai so as to maintain balance of USD 60 million is substituted by a direction to the appellants to deposit the shortfall in the said account so as to maintain a balance of USD 30 million....

9. Given the aforesaid, the applicant being concerned about the investments made by him and his family members, forthwith wrote a letter dated 04.07.2016 to Avitel India. The applicant, inter alia, expressed its concerns on the serious nature of allegations levelled by HSBC and sought a complete update on the ongoing litigation with HSBC, including the proceedings at SIAC, Bombay High Court, criminal complaint filed by HSBC and any other proceedings in the matter. A copy of the said letter dated 04.07.2016 is annexed hereto and marked as Annexure P3.

13 (c) The representations of the respondents to HSBC with regard to their contracts with BBC and the utilization of funds

to be invested by HSBC were prima facie, false and in fact the alleged contract with BBC never existed.

16. That it may not be out of place to mention here that at no time did were the respondents given the correct picture of facts by the respondents and it is only upon consideration of the orders passed by the Emergency Arbitrator, Tribunal and the Bombay High Court, that the applicant have realized the gravity of frauds perpetrated by the respondents. The entire business of Avitel Group was and has always been subject to the over all control of respondent Nos.1 to 4, who are in full control of the same.

17. That as per the foregoing, the applicant's investments have been brought down to nil valuation as reflected in the Roger Best report submitted by HSBC to the Arbitral Tribunal in Singapore. The said fact coupled with the absence of any fair disclosures by the respondents to the other shareholders including the applicant results in the inescapable conclusion that the applicant is being effected by the fraudulent actions and inactions of the respondents.”

In **Afcons Infrastructure Ltd.'s case** (supra), the Hon'ble Supreme Court held that the categories of the cases normally to be considered to be not suitable for ADRs i.e. cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc. Similar is the view expressed by the Hon'ble Supreme Court in **Booz Allen's case** (supra) holding therein that 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. In **N. Radhakrishnan's case** (supra), the Hon'ble Supreme Court in various paragraphs held that allegations of fraud and serious malpractices on the part of the respondents cannot be considered by the Arbitrator. The Hon'ble

upon its own three Bench judgment rendered in **Abdul Kadir Shamsuddin Bubere Vs. Madhav Prabhaka Oak AIR 1962 SC 406.** I find that pith and substance of the allegation in the petition under Section 9 of the 1996 Act leads to irresistible conclusion that offences of serious fraud and serious malpractices cannot be considered in the arbitral proceedings. As per the ratio decidendi culled out in **World Sport Group (Mauritius) Ltd.'s case** (supra) where the Hon'ble Supreme Court had an occasion to ponder upon New York Convention and in view of the specific arbitration clause, referred the matter to the arbitration even though allegations of fraud were involved. The arbitration clause contained therein provided that the parties shall have right to jury trial with respect of all the issues arising therein and in paragraph 29 held as under:-

"29. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. N. Radhakrishnan v. Maestro Engineers & others (supra) and Abdul Kadir Shamsuddin Bubere V. Madhav prabhakar Oak (supra) were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties."

In the present case also, there is an absence of express provision to refer dispute involving allegation of fraud to the arbitration.

Mr. Naidu, learned counsel appearing for the appellant also relied upon judgment rendered in **Swiss Timing Limited** (supra) to contend that it is permissible that arbitration and criminal proceedings can run parallel. I have gone through the aforementioned judgment and of the view that the ratio decidendi culled out is that it is mandatory for courts to refer disputes to arbitration, if agreement between the parties provides for reference to arbitration, thus, registering of criminal case as to execution of said contract is not absolute bar to refer disputes to arbitration.

This Court raised a query to Mr. Karan Bharihoke, learned counsel appearing for the respondents with regard to effect of the judgment in **Swiss Timing Limited's case** (supra), which was referred to in the judgment of Bombay High Court in Civil Appeal bearing No.196 decided on 31.07.2014. In response, the learned counsel relied upon judgment of the Hon'ble Supreme Court in **State of West Bengal Vs. Associated Contractors (2015) 1 SCC 32** to contend that in **Swiss Timing Limited's case** (supra), a Single Judge of Hon'ble Supreme Court was acting as a designate of the Chief Justice of India under Section 11 of the 1996 Act and the same could not, therefore, be read as over-ruling or distinguishing the judgments cited above, which are of larger benches. He further submitted that in terms of the judgment in **State of West Bengal's case** (supra), the ratio decidendi culled out in **Swiss Timing Limited's case** (supra) cannot be treated as precedent as the aforementioned judgment in **State of West Bengal's case** is rendered by Bench of three Hon'ble Judges of Supreme Court. There is merit in the submission of learned counsel appearing for the

respondents that the serious allegation of fraud and impersonation are non-arbitrable. It is not, therefore, possible to agree with the submissions made by learned counsel for the appellant that on the basis of the orders passed by the Bombay High Court, the appellant would have also an arbitrable dispute. With humility, I am unable to agree with the view taken by the Bombay High Court. I cannot remain oblivious of the fact that as per Indian Laws, the dispute based upon the allegation of serious fraud are not arbitrable, thus, no reasons are warranted to interfere with the impugned order.

During the course of hearing, learned counsel for the respondents has relied upon the objections filed in the arbitration case against the arbitration award but since the matter is sub judice, I refrain myself to comment upon. Assuming for the argument sake that the final relief sought for return of the invested amounts with interest and cancellation of share, there is no merit in the contentions of the appellant, for, I am of the view that such matters are governed as per the provisions of Companies Act, 2013, in essence, at the best it can be violation of the aforementioned Act. A similar matter was dealt with by Hon'ble Supreme Court in *Hindustan Lever Employees' Union Vs. Hindustan Lever Ltd. and others 1995 Supp(1) SCC 499* wherein the Hon'ble Supreme Court in paragraph 49 made reference to another judgment in *Bacha F. Guzdar Vs. CIT AIR 1955 SC 74* to hold that the share holder has no interest in the assets of the company while the company is in existence. It is only at the stage of liquidation of the company, a share holder would have an interest. The settled law in *Booz Allen's case* (supra) has been followed in the case laws cited above by the counsel appearing for the respondents and the well

recognized examples of non-arbitrable disputes included the disputes relating to rights and liabilities which give rise to or arise out of criminal offences are again recognized and held to be non-arbitrable. In my view, therefore, the remedy of arbitration sought by the appellant in the instant case is barred by implication, in view of the provisions of Companies Act.

For the foregoing reasons, I am of the view that primarily the appellant is trying to make out a case of parity with the case of HSBC, which is already a matter sub judice before the Competent Court but as the facts narrated above, I am of the view that the prima facie allegation of fraud, as already noticed above, would not fall in the realm of arbitrable dispute and therefore, rightly so, the Court below has declined the grant interim relief as sought. I do not intend to differ with the order under challenge. No ground for interference is made out.

The appeal is dismissed.

(AMIT RAWAL)
JUDGE

September 02, 2016
Pankaj*

Whether reasoned/speaking Yes/No

Whether reportable Yes/No