IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :: 06.01.2021	PRONOUNCED ON :: 03.03.2021

CORAM ::

THE HONOURABLE Ms. JUSTICE P.T. ASHA

OP.No.553 of 2020

Dr. Kavitha Lakshmi
Partner
K.K. Eye Healthcare and Research Centre,
Wife of Dr.S. Kasi,
34, Gandhi Road,
West Tambaram,
Chennai - 600 045. ...
Petitioner

Vs.

Dr. A. Pandian,
Partner,
K.K. Eye Healthcare and Research Centre
S/o. T/V. Annamalai,
1, Eraikutty Street,
New Perungalathur,
Tambaram Taluk,
Chenglepet District,
Pincode 600 063. ...Respondent

Prayer: Petition filed under Section 11 (6) of Arbitration and Conciliation Act, 1996 praying for a) appointing an Arbitrator for the purpose of adjudicating upon the disputes which has arisen between the petitioner and the respondent; b) Award cost of this petition.

For Petitioner : Mr. Vijay Narayan, SC for
Mr. T. Ravichandran

For Respondent : Mr. R. Prabhakaran

ORDER

This petition is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter called the 'Act') for appointing an Arbitrator to adjudicate the dispute that has arisen between the petitioner and the respondent.

2. The facts in brief narrated in the Petition are as follows:

a) The petitioner and the respondent had started a partnership firm under the name and style of K.K. Eye Healthcare and Research Centre. The Partnership Deed was executed on 28.03.2007. The terms of the Partnership Deed would show that the management of the partnership firm was the responsibility of both the partners and the borrowing for the firm was to be made by both parties. That apart, the bank account had to be jointly opened and both partners had to operate the same. As regards the general administration of the firm, the respondent was in charge of the same and the petitioner was in charge of conducting the OP department/IP department and other related activities. The parties had also agreed that in the event of any dispute arising between them, the same would be resolved through arbitration.

b) The petitioner's case is that she had lent the hi-tech equipments which she had purchased in the name of Dr.K.K.Surgical and Paediatric Centre Pvt Ltd., in which she was a Director, for the use of the hospital being run by both of them. The petitioner would contend that though she had purchased the equipment in her individual capacity, she had utilised the same for developing the business of the firm.

c) Meanwhile, certain issues had cropped up between the partners with reference to engaging the services of new staff, investing equipments for the firm, handing over management to third parties, etc.

d) From 06.07.2020, the petitioner would submit that the respondent had started acting in an indifferent manner and had started hiring outsiders for the business of the firm, who were totally unconnected with the firm. The persons so appointed were also handling confidential information of the patients. All of a sudden, the petitioner was served with a notice from the respondent, dated 29.07.2020, in which the respondent had raised several untenable contentions. The petitioner has refuted the same through her lawyer. In fact, in the notice, the respondent had wanted an audit to be conducted, to which, the petitioner had given her no objection. Considering the fact that disputes have arisen between the parties, the petitioner has come forward with a notice dated 07.08.2020 for an appointment of an arbitrator. The respondent had not given any reply for the same, leaving the petitioner with no other alternative except to approach this Court.

3. Respondent's case

a) On receiving notice in the above petition, the respondent has entered appearance and the only defense that has been taken is that serious allegations of fraud are involved in the present case and therefore, parties cannot be relegated to the arbitral process.

b) In the counter the respondent has relied upon the following judgments

(i) A. Ayyasamy vs A.Paramasivam and others, **reported in [*(2016) 10 SCC 386]***

(ii) Rashid Raza vs Sadaf Akhtar, reported in [(2019) 8 SCC page 710].

c) The respondent would therefore contend that in the light of the disputes between the parties including serious issues of fraud the petition under section 11 (6) of the Act has to be dismissed.

4.Submission

a) The learned counsel for the petitioner would submit that in both the judgments that have been relied upon by the respondent to have the petition dismissed, the Supreme court has held that it is only in a case where intrinsic evidence with reference to the fraud has to be let in, only then the parties can be asked to go before the Civil Suit as such issues are non-arbitrable. However, in the instant case, except for making bald allegations of fraud, there is no serious instances that has been set out by the respondent and even the grounds raised by him are simple in nature which can be dealt with by the learned Arbitrator.

b) The respondent had filed his counter but had not argued the matter and there was no appearance on 06.01.2021. Section 11 (13) of the Act enjoins that an application under Section 11 shall be disposed off within a period of 60 days from the date of service of the opposite party. This Court had granted sufficient time to the respondent. Therefore after hearing the counsel for the petitioner this Court had reserved orders take note of the fact that a counter had been filed by the respondent.

5. Discussion

a) The only objection taken to this petition filed under Section 11 (6) of the Act is that the dispute involves serious allegations of fraud which cannot be dealt with by the learned Arbitrator.

b) The petitioner too places reliance on the very same judgments relied on by the respondent, and which are referred to in paragraph 3 (b) supra. In addition, the petitioner relies on the judgment reported in "[***2020 SCC OnLine SC 656] , Avitel Post Studioz Ltd vs HSBC PI Holdings".***

c) There had been conflicting judgments on the arbitrability of matter where issues of fraud had been put forward by a party. Taking note of these divergent views, the Law Commission in its 246th report has observed as follows in paragraph No.52:

> *"52. The Commission believes that it is important to set this entire controversy to a rest and make issues of fraud expressly arbitrable and to this end has proposed amendments to section 16."*

d) In furtherance to this, the Law Commission had suggested insertion of Sub Section 7, after subsection 16, which was to read as follows:

> *"(7) The arbitral tribunal shall have the power to make an award or give a ruling notwithstanding that the dispute before it involves a serious question of law, complicated questions of fact or allegations of fraud, corruption etc."*

However this suggestion was not incorporated when the Act was amended by Act 3 of 2016. However the Hon'ble Supreme Court has stepped in to render clarity on this controversy in the following judgments.

e) In the judgment, ***A. Ayyasamy vs A.Paramasivam and others*** **reported in [(*2016) 10 SCC 386],*** after relying upon the Law Commission's report and taking into account the divergent views laid down by the Courts, the Hon'ble Supreme Court has observed as follows in Paragraph 25 of the Judgment.

> *"25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the 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 allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the*

appreciation of the voluminous evidence that needs to be produced, the Court can sidetrack the agreement by dismissing application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud touching upon the internal *affairs of the party inter se and it has no implication in the public domain, the arbitration clause need not be avoided and the parties can be relegated to arbitration."*

f) In the judgement, ***Rashid Raza vs Sadaf Akhtar reported in [(2019) 8 SCC page 710]"***, the Hon'ble Supreme Court had broken down the principles laid down in ***Ayyasamy' case*** to draw a distinction between the serious allegations of fraud and forgery as opposed to simple allegations. The two working tests laid down to verify whether the fraud was serious or simple, are:

1. Does this plea permeate the entire contract and above all the agreement of arbitration rendering it void or

2. Whether allegations of fraud touched upon the internal affairs of the party inter se having no implication in the public domain where *the case comes within the character of simple allegation then the arbitration clause shall be followed.*

g) However, when serious allegations of fraud are made requiring the letting in of intrinsic evidence, then, in such case, the matter has to be referred to the Civil Court. The principles laid down in the cases supra was once again reiterated in the recent judgment of the Apex Court in ***Avital Post Studioz Ltd vs HSBC PI Holdings reported [2020 SCC OnLine SC 656]***, where the Learned Judges held as under :

"34. After these judgments, 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 malafide 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.

42. In the light of the aforesaid judgments, paragraph 27(vi) of Afcons (supra) and paragraph 36(i)of Booz Allen (supra), must now be read subject to the rider that the same set of facts may lead to civil and criminal proceedings *and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject matter of such proceeding under section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so."*

h) Coming to the case on hand, on a perusal of the counter, it can be garnered that no serious allegations of fraud have been put forward except for contending that the disputes involves fraud. In these circumstances, there is no substance in the objection raised by the respondent.

5. Accordingly, it is ordered as follows:

(i) Hon'ble Mrs. Justice Chitra Venkataraman Retd.), Former Judge, Madras High Court, 17b/31, IV Main Road, R.A. Puram, Chennai – 600 028, Mobile No. 9840990000, Email id- justicechitravenkataraman@gmail.com, is appointed as the Arbitrator to enter upon reference and adjudicate the disputes inter se the parties.

ii) The learned Arbitrator may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order. It is open to the respondent to raise all legal objections as to the validity of contract.

iii) The learned Arbitrator is at liberty to fix his remuneration and other incidental expenses as per law.

iv) The proceedings may be conducted under the aegis of the Madras

High Court Arbitration Centre and in accordance with the Madras High Court Arbitration Rules.

The Original Petition is, accordingly, allowed, leaving the parties to bear their own costs.

03.**03.2021**

Internet : Yes/No
Index :Yes/No
Speaking / Non-Speaking
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To

1. Hon'ble Mrs. Justice Chitra Venkataraman Retd.),
Former Judge, Madras High Court,
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P.T. ASHA. J,

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P.D. Order in
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