IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

117 CR-2934-2021 (O&M)

Date of decision: 24.11.2021

M/S SAMRITI PRODUCTS PVT. LTD. THROUGH ITS DIRECTOR

..Petitioner

Versus

M/S DOLAT MERCHANT BANKING AND FINANCIAL SERVICE PVT LTD. THROUGH ITS DIRECTOR ..Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sahil Goel, Advocate for the petitioner.

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ANIL KSHETARPAL, J (Oral)

The petitioner is a plaintiff in a suit for recovery of Rs.13,80,070/-. The defendant entered appearance on 29.05.2018 and the case was adjourned to 31.07.2018. On that day, an application under Section 8 of the Arbitration and Conciliation Act, 1996, was filed for referring the parties to arbitration. Undisputedly, there is an agreement between the parties which provide for the resolution of disputes through an arbitral Tribunal. The trial Court, taking note of the aforesaid fact, allowed the application. The petitioner has filed the present petition assailing the correctness of the said order passed by the learned Civil Judge on 27.10.2021. The Civil Court has allowed the application and directed the parties to get their dispute resolved/adjudicated through the arbitrator.

Learned counsel representing the petitioner contends that since the plaintiff has taken a plea of fraud, therefore, the Court has erred in allowing the application. He relies upon the judgment passed by the Hon'ble Supreme Court in **A. Ayyasamy vs. A. Paramasivam and ors., (2016) 10 Supreme Court Cases 386, decided on 04.10.2016.**

This Court has considered the submission of the learned counsel, however, finds no merit therein. The petitioner claims to be a leading manufacturer and supplier of milk products, who intended to raise funds for growth and expansion plan of the company. The defendant company promised to provide the services to the plaintiff for raising funds. Now, the plaintiff claims that the defendant company has played a big fraud with the plaintiff by introducing bogus companies. In the considered view of the Court, such matter can be adjudicated by the Arbitrator who is the chosen forum between the parties for resolving disputes. It is apparent that the allegations of fraud are not of such a nature which cannot be adjudicated upon by the Arbitrator. Further, the alleged fraud has not been committed for the end of including the arbitration clause but the alleged fraud pertains to matters subsequent. Thus, the validity of the arbitration clause is not affected. Furthermore, it is only when the case involves serious allegations of fraud that the Court may not refer the parties to the arbitrator and decide the matter, itself. The Hon'ble Supreme Court in **A. Ayyasamy (supra),** itself, has held as under:-

> 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. While dealing with such an issue in an application under Section 8 of the Act, the focus of the Court has to be on the question as to whether jurisdiction of the Court has been ousted instead of focusing on the issue as to whether the Court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non- arbitrable subjects are carved out by the Courts, keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, Courts, i.e. public for a, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act, should be on the aforesaid aspect, viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected.

45. The position that emerges both before and after the decision in N. Radhakrishnan is that successive decisions of this Court have given effect to the binding precept incorporated in Section 8. Once there is an arbitration agreement between the parties, a judicial authority before whom an action is brought covering the subject matter of the arbitration agreement is under a positive obligation to refer parties to arbitration by enforcing the terms of the contract. There is no element of discretion left in the court or judicial authority to obviate the legislative mandate of compelling parties to seek recourse to arbitration. The judgment in N. Radhakrishnan has, however, been utilised by parties seeking a convenient ruse to avoid arbitration to raise a defence of fraud.

45.1 First and foremost, it is necessary to emphasise that the judgment in N. Radhakrishnan does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration. More often than not, a bogey of fraud is set forth if only to plead that the dispute cannot be arbitrated upon. To allow such a plea would be a plain misreading of the judgment in N. Radhakrishnan. As I have noted earlier, that was a case where the appellant who had filed an application under Section 8 faced with a suit on a dispute in partnership had raised serious issues of criminal wrongdoing, misappropriation of funds and malpractice on the part of the respondent. It was in this background that this Court accepted the submission of the respondent that the arbitrator would not be competent to deal with matters "which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation". Hence, it is necessary to emphasise that as a matter of first principle, this Court has not held that a mere allegation of fraud will exclude arbitrability. The burden must lie heavily on a party which avoids compliance with the obligation assumed by it to submit disputes to arbitration to establish the dispute is not arbitrable under the law for the time being in force. In each such case where an objection on the ground of fraud and criminal wrongdoing is raised, it is for the judicial authority to carefully sift through the materials for the purpose of determining whether the defence is merely a pretext to avoid arbitration. It is only where there is a serious issue of fraud involving criminal wrongdoing that the exception to arbitrability carved out in N. Radhakrishnan may come into existence.

45.2 Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the

> context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. Parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. Parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

In view thereof, no ground to interfere in the impugned order is made out.

Dismissed.

All the pending miscellaneous application(s), if any, are also disposed of.

24.11.2021 **(ANIL KSHETARPAL)**
ashok **JUDGE**
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No