IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.29 of 2021

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Bhawana Infrabuild Pvt. Ltd. R/o. A-51, Hatwa Raj Ganga, J.C. Road, Patna, Bihar through its Chief Managing Director Sushil Kumar Singh, aged about 43 years, Male, son of Late Punyadeo Narayan Singh, residing at Flat No. 102, Sunrise Rukmini Place Apartment, Magistrate Colony, Kailash Path, P.S. Rajeev Nagar, District- Patna, Bihar.

... ... Petitioner/s

Versus

1. The Patna Municipal Corporation through Municipal Commissioner, Maurya Lok Complex, Buddh Marg, Patna.
3. Patna Smart City Limited through its Managing Director-cum- Municipal Commissioner, Maurya Lok Complex, Buddh Marg, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjay Kumar, Advocate

For the Respondent/s : Mr. Ranjeet Kumar, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

ORAL JUDGMENT

Date : 22-09-2023

The above application is filed under Section 11 of the Arbitration and Conciliation Act 1996, seeking the appointment of an independent arbitrator for resolution of disputes. The agreement relied on is dated 12.06.2019, for construction of Integrated Command Control Center building in SSP office, Patna entered into between the 3rd respondent and the applicant herein. The learned counsel appearing for the respondent submits that there is no contract entered into in the eye of law, especially, since the contract was engineered by a fraud perpetrated by the applicant. The applicant had furnished a fraudulent bank guarantee, as earnest money deposit, which was an essential requirement as per the tender document, based on which the contract was entered into. This vitiates the contract and there is absolutely no cause for referring the question for arbitration, since the termination of contract pursuant to the fraud detected, which vitiates the contract itself; puts the arbitration clause to naught.

2. The learned counsel for the respondent relies on ***Rashid Raza v. Sadaf Akhtar*, (2019) 8 SCC 710**. The learned counsel for the applicant, however, relies on ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*, (2021) 4 SCC 713**. It is contended that going by the decision second cited, there is no infirmity in referring the question for arbitration, especially since it is not one permeating the contract itself.

3. ***Avitel Post Studioz Ltd.*** (supra) followed ***Rashid Raza.*** The three Judge Bench in ***Rashid Raza*** (supra) laid down a test for distinguishing a simple allegation from a serious allegation, the former of which would be referable to arbitration. The test was insofar as determining whether (i) "does the plea of fraud permeate the entire contract and above all, the agreement of arbitration, rendering it void or (ii) whether allegations of fraud touch upon the internal affairs of the parties *inter se* having no implication in the public domain" (sic). Therein an

F.I.R. was lodged by one of the partners alleging siphoning off of funds and various other businesses improprieties. It was held that the case fell under the ambit of simple allegations, as there was no allegation of fraud which would vitiate the partnership deed as a whole or in particular the arbitration clause concerned, appearing in the deed. All the allegations made pertained to the working of the partnership and not to any matter in the public domain. The fraud itself was committed in the course of the working of the partnership and it does not vitiate the partnership itself was the finding.

4. ***Avitel Post Studioz Ltd.*** (supra) drew a distinction between a contract obtained by fraud and performance of a contract being vitiated by fraud or cheating. The latter was found to fall outside the ambit of Section 17 of the Contract Act, for which the remedy of damages would be available and not the remedy of treating the contract itself as void; which remedy would be available in the case of the former. In that decision, on facts it was found that there was fraudulent inducement to enter into a contract under Section 17 of the Contract Act; which makes it voidable and there was an element of siphoning off of funds, which pertains to the actual performance of the contact, attracting the tort of deceit.

However, though there was fraudulent inducement to enter into the contract, on the specific terms of the arbitration clause, it survived as an independent clause; was the finding. The words employed in the arbitration clause permitted resolution of any dispute, controversy or claim, including any question regarding the existence of the contract, validity, interpretation, breach or termination.

5. In the present case it has to be noticed that it is otherwise. The Bank guarantee was to be furnished by the respondent prior to the execution of the contract and it was a condition for entering into the contract. The bank guarantee was furnished on 19.01.2019, on the strength of which the agreement was entered into on 12.06.2019. This permeates the very contract and it was by reason of the fraud employed by the applicant, the respondent was induced into executing the contract, on the belief that the bank guarantee furnished was in order. The fraudulent practice employed by the applicant vitiates the contract itself. The arbitration clause also, as found in clause 25 of the agreement dated 12.06.2019, extracted in the memorandum of the Request Case, dealt with only disputes arising in the performance of the contract. Thus, the cited decision in ***Avitel Post Studioz Ltd.*** (supra) will not be

applicable.

6. Further, it has to be noticed that the fraud perpetrated also has some consequences in the public domain as the respondent is a public sector undertaking. The counter affidavit filed by the respondent clearly indicates that after execution of the contract, the respondent verified with the bank, as to the bank guarantee provided as earnest money deposit. The bank branch, which is alleged to have issued the bank guarantee replied by Annexure-A, which confirms that the bank guarantee had not been issued from Axis Bank, Barbigha Branch. This was duly communicated to the applicant and the agreement itself cancelled.

7. In fact, the applicant admits the fraud perpetrated, but accuses one of its own employees. It is the statement of the respondent in the reply dated 04.01.2023, that the Chief Finance Officer had perpetrated the fraud and he has been terminated for failure to carry out the duty assigned to him. The fact that the applicant was a new company and that the Chief Finance Officer had manipulated and maneuvered the document without any knowledge of the company is not a valid defense to absolve the applicant and distance itself from the fraud perpetuated. If the Chief Finance Officer had been

instrumental in commission of fraud, then it is for the applicant to take appropriate steps against the said officer, but that would not validate the contract, which is permeated by the fraud committed by the applicant.

8. This Court does not find any reason to appoint an arbitrator on the facts coming out from the above case. The request case stands rejected leaving the parties to suffer their respective costs.

(K. Vinod Chandran, CJ)

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AFR/NAFR	
CAV DATE	
Uploading Date	03.10.2023.
Transmission Date	