IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2024

CORAM:

THE HONOURABLE MR. JUSTICE K. RAJASEKAR

C.M.A. No.1211 of 2022
and C.M.P. No.8622 of 2022

Kandasamy ... Appellant/ Appellant/ Respondent

Vs.

Azhagusamy ... Respondent/ Respondent/ Petitioner

Civil Miscellaneous Appeal filed under Section 37(2) of the Arbitration and Conciliation Act against the fair and decreetal Order dated 03.09.2021 made in Arbitration O.P. No.58 of 2011 on the file of the learned Principal District Court, Namakkal confirming the award dated 26.05.2010 made in ACP No.48 of 2009 passed by the Sole Arbitrator, Namakkal.

For Appellant : Mr. C.A. Ramanan
(For Mr. N. Manoharan)

For Respondent : Mr. P. Mohanraj
(For Mr. P. Rajendran)

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JUDGMENT

This Civil Miscellaneous appeal has been filed by the appellant invoking Section 37(2) of the Arbitration and Conciliation Act, 1996 (Arbitration Act, hereinafter) challenging the Order dated 03.09.2021 made in Arbitration O.P. No.58 of 2011 on the file of the learned Principal District Court, Namakkal Under Section 34 of Arbitration Act, confirming the award dated 26.05.2010 made in ACP No.48 of 2009 passed by the Sole Arbitrator, Namakkal.

2. For the sake of convenience, the parties are referred herein according to their litigative status and rank before the Arbitrator. The brief facts leading to filing of this appeal is as follows:

3. The respondent herein as claimant, had initiated an arbitration proceedings against appellant in ACP No.48 of 2009 before the sole Arbitrator, for recovery of sum of Rs.5,34,333/- with future interest. The appellant had appeared before the Arbitrator and filed a counter, but thereafter, he had not participated in the enquiry, thereby, he was set expate

and an ex-parte award was passed by the sole Arbitrator. Challenging the ex-parte award, the appellant had preferred arbitration original proceedings by invoking Section 34 of the Arbitration Act. In the counter filed by the appellant, he has stated that he had received legal notice dated 27.08.2009, demanding the appellant for repayment of loan amount and he had negotiated with the claimant on 28.11.2009 and repaid a sum of Rs.3,50,000/- and also received the receipt for the payment on the same day. Therefore, the respondent herein is not entitled to claim money from the appellant, but this was not taken note by the learned Arbitrator and without considering the above aspects, the award has been passed by the Arbitrator.

4. The learned counsel appearing for the appellant submits that there was no agreement between the parties regarding the payment of interest and the respondent made specific allegation that, his signature in the promissory note is forged. Therefore, the case falls within the nature of fraud, thereby, the Arbitrator has no power to decide the issue and only the Civil Court has to decide the issues between the parties. Thereby, questioned the jurisdiction of the Arbitrator and also challenged the award of the Arbitrator.

5. Per contra, the learned counsel for the respondent/ claimant submits that the appellant has not adduced any evidence to prove the repayment of loan and after affording sufficient opportunity in the proceedings under Section 34 of Arbitration Act, the learned District Judge has rejected the case of the appellant that, he failed to prove the execution of the receipt of repayment of loan. Further, no other grounds contemplated under Section 34 of the Arbitration Act is made out, therefore prays to dismiss the appeal.

6. I have considered the submissions made on both sides and perused the entire materials available on record.

7. In this appeal, the appellant has not produced the copy of the promissory note before this Court, which is the basis document for deciding the allegation of fraud or liability of appellant to pay interest. The award shows that the promissory note dated 10.07.2007 was marked as Ex.P.2 and the same is also referred by the District Judge in the original proceedings and it has been observed in the award that rate of interest payable for the

repayment of loan is 12% per annum. In the absence of producing the promissory note to show that there is no consensus among the parties to deny the payment of interest, this Court is unable to enter into the question, whether the appellant is liable to pay the interest or not without providing the document Ex.P.2, the appellant is not entitled to contend that he is not liable to pay interest and the same is hereby rejected.

8. The next contention of the appellant is that the promissory note has been fabricated and he has not agreed to resolve the dispute through arbitration. He further submitted that, since his signature is forged in the promissory note, it is the case of fraud committed by the respondent herein, hence, only the Civil Court is entitled to deal with the issue.

9. The Hon'ble Apex Court in ***A. Ayyasamy vs. A. Paramasivam and others [2016 10 SCC 386]*** has held that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is observed in paragraph nos.14 to 18, 22, 23 and 25 as follows:

*"**14.** In the instant case, there is no dispute about the*

arbitration agreement inasmuch as there is a specific arbitration Clause in the partnership deed. However, the question is as to whether the dispute raised by the Respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the Courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The Courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. Following categories of disputes are generally treated as non-arbitrable1:

(i) patent, trademarks and copyright;
(ii) anti-trust/competition laws;
(iii) insolvency/winding up;
(iv) bribery/corruption;
(v) fraud;
(vi) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

***15.** 'Fraud' is a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment. Fraud can be of different forms and hues. Its ingredients are an intention to deceive, use of unfair means, deliberate concealment of material facts, or abuse of position of confidence. The Black's Law Dictionary defines 'fraud' as a concealment or false representation through a statement or conduct that injures another who relies on it. However, the moot question here which has to be addressed would be as to whether mere allegation of fraud by one party against the other would be sufficient to exclude the subject matter of dispute from* *arbitration and decision thereof necessary by the civil court.*

16. *In* ***Abdul Kadir Shamsuddin Bubere*** *v.* ***Madhav Prabhakar Oak*** *MANU/SC/0363/1961 : AIR 1962 SC 406, serious allegations of fraud were held by the Court to be a sufficient ground for not making a reference to arbitration. Reliance in that regard was placed by the Court on a decision of the Chancery Division in* **Russell** *v.* **Russell** *(1880) 14 Ch D 471. That was a case where a notice for the dissolution of a partnership was issued by one of the partners, upon which the other partner brought an action alleging various charges of fraud, and sought a declaration that the notice of dissolution was void. The partner who was charged with fraud sought reference of the disputes to arbitration. The Court held that in a case where fraud is charged, the Court will in general refuse to send the dispute to arbitration. But where the objection to arbitration is by a party charging the fraud, the Court will not necessarily accede to it and would never do so unless a prima facie case of fraud is proved.*

17. *The aforesaid judgment was followed by this Court in* ***N.Radhakrishnan*** *while considering the matter under the present Act. In that case, the Respondent had instituted a suit against the Appellant, upon which the Appellant filed an application Under Section 8 of the Act. The applicant made serious allegations against the Respondents of having committed malpractices in the account books, and manipulation of the finances of the partnership firm. This Court held that such a case cannot be properly dealt with by the arbitrator, and ought to be settled by the Court, through detailed evidence led by both parties.*

18. *When the case involves serious allegations of fraud, the dicta contained in the aforesaid judgments would be understandable. However, at the same time, mere allegation of fraud in the pleadings by one party against the other cannot be a ground to hold that the matter is incapable of settlement by* *arbitration and should be decided by the civil court. The allegations of fraud should be such that not only these allegations are serious that in normal course these may even constitute criminal offence, they are also complex in nature and the decision on these issues demand extensive evidence for which civil court should appear to be more appropriate forum than the Arbitral Tribunal. Otherwise, it may become a convenient mode of avoiding the process of arbitration by simply using the device of making allegations of fraud and pleading that issue of fraud needs to be decided by the civil court.* *The judgment in* ***N. Radhakrishnan*** *does not touch upon this aspect and said decision is rendered after finding that allegations of fraud were of serious nature.*

....

22. *The Law Commission has taken note of the fact that there is divergence of views between the different High Courts where two views have been expressed, one is in favour of the civil court having jurisdiction in cases of serious fraud and the other view encompasses that even in cases of serious fraud, the Arbitral Tribunal will Rule on its own jurisdiction. It may be pertinent here to reproduce the observations of the Law Commission as contained in paragraphs 50 & 51 of the 246th Law Commission Report, which are as under:*

> ***50.*** *The issue of arbitrability of fraud has arisen on numerous occasions and there exist conflicting decisions of the Apex Court on this issue. While it has been held in Bharat Rasiklal v. Gautam Rasiklal MANU/SC/0978/2011 : (2012) 2 SCC 144 that when fraud is of such a nature that it vitiates the arbitration agreement, it is for the Court to decide on the validity of the arbitration agreement by determining the issue of fraud, there exists two parallel lines of judgments on the issue of whether an issue of fraud is arbitrable. In this context, a 2 judge bench of the Supreme Court, while*

adjudicating on an application Under Section 8 of the Act, in Radhakrishnan v. Maestro Engineers MANU/SC/1758/2009 : 2010 1 SCC 72 held that an issue of 28 fraud is not arbitrable. This decision was ostensibly based on the decision of the three judge bench of the Supreme Court in Abdul Qadir v. Madhav Prabhakar MANU/SC/0363/1961 : AIR 1962 SC 406. However, the said 3 judge bench decision (which was based on the finding in Russel v. Russel [1880 14 Ch.D. 471]) is only an authority for the proposition that a party against whom an allegation of fraud is made in a public forum, has a right to defend himself in that public forum. Yet, following Radhakrishnan, it appears that issues of fraud are not arbitrable.

***51.** A distinction has also been made by certain High Courts between a serious issue of fraud and a mere allegation of fraud and the former has been held to be not arbitrable (See Ivory Properties and Hotels Private Ltd. v. Nusli Neville Wadia MANU/MH/0028/2011 : 2011 (2) Arb LR 479 (Bom);C .S. Ravishankar v . C.K. Ravishankar MANU/KA/1302/2011 : 2011 (6) Kar L J 417). The Supreme Court in Meguin GMBH v. Nandan Petrochem Ltd. 2007 (5) R.A.J. 239 (SC), in the context of an application filed Under Section 11 has gone ahead and appointed an arbitrator even though issues of fraud were involved. Recently, the Supreme Court in its judgment in Swiss Timing Ltd. v. Organising Committee, Arb. Pet. No. 34/2013 dated 28.05.2014, in a similar case of exercising jurisdiction Under Section 11, held that the judgment in Radhakrishnan is per incuriam and, therefore, not good law.*

***23.** A perusal of the aforesaid two paragraphs brings into fore that the Law Commission has recognized that in cases of serious fraud, courts have entertained civil suits. Secondly, it has tried to make a distinction in cases where there are allegations of serious fraud and fraud simplicitor. It, thus,* *follows that those cases where there are serious allegations of fraud, they are to be treated as non-arbitrable and it is only the civil court which should decide such matters. However, where there are allegations of fraud simplicitor and such allegations are merely alleged, we are of the opinion it may not be necessary to nullify the effect of the arbitration agreement between the parties as such issues can be determined by the Arbitral Tribunal.*

....

24. *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."*

9. Admittedly, in this case, the appellant though claimed that he has not executed the promissory note, he has come with the case in his

counter that, he has repaid the amount as promised in the promissory note, and the same is totally contrary to the plea of forgery or fraud made by the appellant herein. After taking the stand that, he has settled the entire amount as per the promissory note after issuance of demand notice by the respondent herein, he cannot contend that his signature in the promissory note is forged. Therefore, the appellant is estopped from once again stating that he is disputing the promissory note. As observed by the Apex Court in judgment cited supra, the plea of fraud is made without any substance and the same is made only for avoiding the Arbitration proceedings and to delay and defeat the right. In the proceeding under Section 34 of the Arbitration Act, though lack of jurisdiction of the Arbitrator is a valid ground to set aside the award, the same has not been established, hence, this argument is not sustainable and the same is liable to the rejected.

10. Before the Arbitrator, the bilateral agreement dated 18.07.2007 entered between the parties was produced and it contains arbitration clause and parties agreed to resolve their dispute through sole Arbitrator. Records also shows that, notice of appointment of the Arbitrator also issued to the appellant and the appellant had appeared before the

Arbitrator on notice and subsequently, remained exparte. Based on bilateral agreement, Arbitration was taken place and there is no reasons placed on record to challeng the judgement of the Arbitrator. This Court also perused the said agreement, which mandates the parties to resolve their dispute through sole Arbitrator, hence the contention that there is no agreement for arbitration is not valid and the same is hereby rejected.

11. In the result, this Civil Miscellaneous Appeal is dismissed. Consequently, connected civil miscellaneous petition stands closed. No cost.

06.12.2024

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Index:Yes/No
Speaking Order:Yes/No
Neutral Citation Case: Yes/No

To:

1. The Principal District Judge,
   Namakkal.

2. The Section Officer,
   V.R.Section,

High Court, Chennai.

K. RAJASEKAR, J.

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C.M.A. No.1211 of 2022

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