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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

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ARB-487-2022 (O&M)
Date of Decision:03.12.2024

M/s Nysa Communications Pvt. Ltd.

... Petitioner

Vs

Maharishi Dayanand University and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL

Present: Mr. Amit Kaushik, Advocate and
Mr. Pankaj Katia, Advocate for the petitioner.

Mr. Amit Rao, Advocate
Mr. Nikhil Lather, Advocate for
Mr. Anurag Goyal, Advocate for the respondents.

SUVIR SEHGAL, J. (ORAL)

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act”) for appointment of an Arbitrator.

2. Counsel for the petitioner submits that two separate Memorandums of Understanding dated 15.10.2010, Annexures P-1 and P-2, were entered into between the parties for computerization of all departments, branches, offices of the respondent-University. He submits that clause M of both the agreements provides that any dispute between the parties shall be settled by mutual consultation and

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in case, settlement is not arrived at, it shall be referred to an Arbitrator. Counsel asserts that the work was concluded in June, 2015, but the respondents released part payment under the agreements. A dispute arose between the parties and legal notice dated 25.09.2020, Annexure P-5, which was followed by notice dated 04.10.2022, Annexure P-6, was served upon the respondents invoking the arbitration clause, before approaching this Court.

3. Short reply by way of an affidavit has been filed on behalf of respondents No.1 to 3, wherein it has been stated that the petitioner did not fulfill the contractual obligations and failed to complete the work under the contract. A stand has been taken that there were many discrepancies in the work and a vigilance inquiry was initiated vide memo dated 12.11.2018, Annexure R-1. Counsel for the respondents states that various complaints were received against the petitioner regarding breach of secrecy and infringement of procedures . It has been claimed that petitioner has indulged in tampering and forgery of the university record and FIR No.314 dated 02.11.2015 has been registered against some employees for offences under Sections 420, 467 and 468 of IPC. By way of a subsequent affidavit, respondents have apprised the Court that the vigilance inquiry is underway. Counsel for the respondent has placed reliance upon the judgement of the Supreme Court in *N. Radhakrishnan Versus Maestro Engineers and others, 2010 (1) SCC 72* to urge that as there are serious



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allegations of fraud, matter cannot be referred to an Arbitrator. Respondents have also made a reference to the judgement of the Supreme Court in **A. Ayyasamy Versus A. Paramasivam and others, 2016 (10) SCC 386**, to support the argument that in case of serious allegation of fraud, matter deserves to be tried by a Civil Court and not by an Arbitrator.

4. I have heard counsel for the parties and considered their respective submissions.

5. Both the judgements referred to by the counsel for the respondents have been dealt with by the Supreme Court in the subsequent judgements. In **Swiss Timing Limited Versus Organising Committee, Commonwealth Games 2010, Delhi, (2014) 6 SCC 677**, Supreme Court held that the judgement in **N. Radhakrishnan's** case (supra) is per incuriam as some of the statutory provisions were not brought to the notice of the Court. Holding that the objection regarding allegation of fraud deserves to be summarily rejected, Supreme Court observed as under:-

“28. To shut out arbitration at the initial stage would destroy the very purpose for which the parties had entered into arbitration. Furthermore, there is no inherent risk of prejudice to any of the parties in permitting arbitration to proceed simultaneously to the criminal proceedings. In an eventuality where ultimately an award is rendered by arbitral tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, necessary



plea can be taken on the basis of the conviction to resist the execution/enforcement of the award. Conversely, if the matter is not referred to arbitration and the criminal proceedings result in an acquittal and thus leaving little or no ground for claiming that the underlying contract is void or voidable, it would have the wholly undesirable result of delaying the arbitration. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.”

6. **A. Ayyasamy’s** case (supra) came up for consideration before the Supreme Court in **Avitel Post Studioz Limited and others Versus HSBC PI Holdings (Mauritius) Limited, (2021) 4 SCC 713.** Apex Court noticed the twin test laid down by the Courts in the earlier judgements and came to the conclusion that unless either of the two tests are satisfied, the dispute can be decided by the Arbitrator. Relevant observations of the Supreme Court are reproduced below:-

“34. In a recent judgment reported as [Rashid Raza](#) (supra), this Court referred to Sikri, J.’s judgment in [Ayyasamy](#) (supra) and then held:

“4. The principles of law [laid down](#) in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to “simple



*allegations”. Two working tests **laid down in** para 25 are: (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.”*

35. *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.”*

7. Adverting to the facts of the present case, it deserves to be noticed that the case of the respondents is that the investigation into the allegation levelled against the petitioner is pending for the last more than six years. It is evident that as of today, the allegations is merely on paper and even the investigation into them has not been concluded. Neither of the two tests laid down by the Supreme Court are satisfied. This court, therefore, is of the view that irrespective of



the outcome of the investigation, the dispute between the parties deserves to be referred for adjudication to an Arbitrator in terms of the arbitration clause in the Memorandums of Understanding, Annexures P-1 and P-2.

8. Accordingly, petition is allowed. Mrs. Justice Sabina, (Retd.) former Acting Chief Justice of the Himachal High Court, House No.1842, Sector 34-D, Chandigarh, Mobile No. 9780008138, is requested to act as an Arbitrator to adjudicate the dispute between the parties, subject to compliance of statutory requirements.

8. Parties are directed to appear before the learned Arbitrator on date, time and place fixed by the Arbitrator at her convenience.

9. Needless to mention, parties will be at liberty to raise all the claims/defences/counter claims/pleas before the Arbitrator. Any observation made hereinabove will not be binding on the learned Arbitrator.

10. A request letter along with a copy of this order be sent to Mrs. Justice (Retd.) Sabina.

03.12.2024
pooja saini

(SUVIR SEHGAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No