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RASHID RAZA

v.

SADAF AKHTAR

(Civil Appeal No. 7005 of 2019)

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SEPTEMBER 04, 2019

**[R. F. NARIMAN, R.SUBHASH REDDY AND
SURYA KANT, JJ.]**

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Arbitration and Conciliation Act, 1996: s. 11 – Appointment of arbitrator – Partnership deed between the parties – Partnership dispute – FIR by one of the partners alleging siphoning of funds and various business improprieties – Application u/s. 11 for appointment of arbitrator under the arbitration clause – Dismissal of the application – On appeal, held: There is distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to “simple allegations” – Two working tests are whether the plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain – In view thereof, in the instant case there are simple allegations since there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, the arbitration clause concerned in the said deed – All the allegations pertain to the affairs of the partnership and siphoning of funds therefrom and not to any matter in the public domain – Thus, the disputes raised between the parties are arbitrable and, hence, s. 11 application is maintainable.

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*A. Ayyasamy v. A. Paramasivam and Others (2016) 10
SCC 386 : [2016] 11 SCR 521 – relied on.*

Case Law Reference

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[2016] 11 SCR 521

relied on

Para 5, 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7005 of 2019.

From the Judgment and Order dated 06.12.2018 of the High Court of Jharkhand at Ranchi in Arbitration Application No. 1 of 2018.

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Shivam Singh, Animesh Kumar, Neeraj Shekhar, Shadab Eqbal, A
Sumit Kumar, Ms. Ekta Bharati, Murari Kumar, Advs. for the Appellant.

Shree Prakash Sinha, Rishi Pallav, Rakesh Mishra, Ms. Marina
Wheeler, Ms. Mohua Sinha, Shekhar Kumar, Advs. for the Respondent.

The Judgment of the Court was delivered by

R. F. NARIMAN, J.

1. The present case arises out of a partnership dispute in which
an FIR dated 17.11.2017 was lodged by one of the partners alleging
siphoning of funds and various other business improprieties that were
committed. The FIR is at present under investigation. C

2. An Arbitration Petition dated 02.01.2018 was filed by the
appellant before the High Court under Section 11 of the Arbitration and
Conciliation Act, 1996, seeking appointment of an Arbitrator under the
Arbitration clause which is to be found in the partnership deed between
the parties which is dated 30.01.2015. The High Court, by the impugned
order dated 06.12.2018, has cited our judgment in '*A. Ayyasamy v. A.
Paramasivam and Others*' [(2016) 10 SCC 386] and after extracting
paragraph 26 from the said judgment has held: D

“.....The allegation of fraud that was levelled against the
appellant was that he had signed and issued a cheque of E
Rs.10,00,050 on 17th June, 2010 of Hotel Arunagiri in favour of
his son without the knowledge and consent of the other partners
i.e. respondents. It was a mere matter of account which could be
looked into and found out even by the arbitrator. The facts of the
instant case however are much more complex as the materials on
records disclose. This Court however does not intend to make F
any comments on the merits of the allegations lest it may prejudice
the case of the parties in an appropriate proceeding before
competent court. However, considered in totality this Court is of
the firm view that the nature of the dispute involving serious
allegations of fraud of complicated nature are not fit to be decided G
in an arbitration proceedings. The dispute may require voluminous
evidence on the part of both the parties to come to a finding which
can be only properly undertaken by a civil court of competent
jurisdiction.”

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A 3. Consequently, while purportedly following this judgment, the Section 11 application was dismissed.

 4. Having heard learned counsel for both the sides, it is clear that the law laid down in *A. Ayyasamy*'s case is in paragraph 25 and not in paragraph 26. Paragraph 25 of the said judgment states as follows:

B 25. In view of our aforesaid discussions, we are of the opinion
C 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
D 8 of the Act, finds that there are very serious allegations of fraud
 which make a virtual case of criminal offence or where allegations
E 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
F 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
G 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

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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 fora, 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.

5. 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 paragraph 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.

6. Judged by these two tests, it is clear that this is a case which falls on the side of “simple allegations” as there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, the arbitration clause concerned in the said deed. Secondly, all the allegations made which have been relied upon by the learned counsel appearing on behalf of the respondent, pertain to the affairs of the partnership and siphoning of funds therefrom and not to any matter in the public domain.

7. This being the case, we are of the view that the disputes raised between the parties are arbitrable and, hence, a Section 11 application under the Arbitration Act would be maintainable.

8. The Judgment under appeal is set aside. With the consent of the parties, we appoint Justice Amareshwar Sahay, Retired Judge of the Jharkhand High Court to be the sole arbitrator to resolve all disputes between the parties.

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- A 9. Nothing said in our judgment will affect the investigation that is being conducted pursuant to the FIR.
20. The appeal stands disposed of.

Nidhi Jain

Appeal disposed of.