2023 INSC 1081

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1854 OF 2023

SUSHMA SHIVKUMAR DAGA & ANR. ...APPELLANTS

Versus

MADHURKUMAR RAMKRISHNAJI BAJAJ & ORS. ...RESPONDENTS

J U D G M E N T

SUDHANSHU DHULIA, J.

1. The appellants before this Court were the plaintiffs in a civil suit, filed in the year 2021, seeking declaration that the Conveyance Deed dated 17.12.2019 to be declared null and void, and that the registered Development Agreements dated 17.09.2007, 20.11.2007, 30.11.2007, 03.12.2007 and 27.02.2008 stand validly terminated. The respondents/defendants moved an application under Section 8 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as "Arbitration Act") for referring the matter to arbitration by

relying upon the arbitral clause in the two agreements dated 31.03.2007 and 25.07.2008. It was contended that the aforesaid agreements formed the basis of the Conveyance Deed and the Development Agreements which are subject matter of the suit. The Trial Court allowed the application of the defendant and referred the matter for arbitration, vide its order dated 13.10.2021. This order was challenged in Writ Petition No.8836 of 2021 by the appellants / plaintiffs before the Bombay High Court, which was dismissed vide order dated 10.12.2021. Aggrieved by these two orders, the appellants / plaintiffs are now before this Court.

2. The only question to be decided by us here is whether the Trial Court and the High Court have rightly referred the matter to arbitration or the dispute is of such a nature that it is not liable to be referred to arbitration, as there was no arbitration clause in the Conveyance Deed dated 17.12.2019 or if there was, yet the matter in any case is such that it is not arbitrable. The brief facts of the case are as follows:

M/s Emerald Acres Private Limited (respondent no. 2) was incorporated by Late Mr. Shivkumar Daga and his wife, Mrs. Sushma Shivkumar Daga (appellant no.1) on 18.04.2006 to carry

on the business of real-estate development. Subsequently, two Tripartite Agreements were signed between Shivkumar Daga (hereinafter referred to as 'SD'), Madhurkumar Ramakrishnaji Bajaj & Ors. (hereinafter referred to as 'MB') and M/s. Emerald Acres Private Limited (hereinafter referred to as 'EAPL') to develop, trade, and deal with the property and also to acquire such further properties as may be mutually agreed between the parties. Both the Tripartite Agreements dated 31.03.2007 and 25.07.2008 contain the following arbitration clause:

> *"It is agreed between Parties that in the event of any disputes or differences between the Parties hereto in relation to this Agreement or in relation to any matter touching or arising from this Agreement, the parties shall refer such disputes and differences to the arbitration under the provisions of the Arbitration & Conciliation Act, 1996 or any statutory modification thereof."*

3. Shivkumar Daga died on 08.05.2011, bequeathing his assets through a will dated 10.02.2011 to his wife (appellant no. 1) and his son (appellant no. 2), in which a probate petition has already been filed and as per the records before us the case is still pending.

4. The appellants i.e., SD's wife and his son then filed a suit seeking, *inter alia,* a declaration that the Deed of Conveyance dated 17.12.2019 be declared null and void, and that the Development Agreements entered into pursuant to the two Tripartite Agreements be declared validly terminated.

5. The Conveyance Deed dated 17.12.2019 sought to be declared void and the five Development Agreements dated 17.09.2007, 20.11.2007, 30.11.2007, 03.12.2007 and 27.02.2008 sought to be declared as validly terminated by the appellants, all find their source in the two Tripartite Agreements dated 31.03.2007 and 25.07.2008.

6. The first prerequisite for an application under Section 8, of an arbitration agreement being there in the 2007 and 2008 Tripartite agreements cannot be denied, as all the other Development Agreements find their source in the aforesaid two Tripartite Agreements. The Trial Court and the High Court have rightly held that the broad language of the "arbitration clause" in the two Tripartite Agreements dated 31.03.2007 and 25.07.2008 would cover the dispute raised by the appellants before the Civil Court, and hence the case has been rightly referred for arbitration.

7. The role of a 'Court' is now in any case, extremely limited in arbitration matters. The underlying principles of arbitration as contained in the Arbitration and Conciliation Act, 1996, was always to have as little interference as possible by a judicial authority.

Section 5 of the Arbitration Act reads as under:

> ***5. Extent of judicial intervention.—*** *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*

Major amendments were made in the Arbitration Act in the year 2015, *inter alia*, both in Section 8 and Section 11 of the Act, in order to further reduce any chances of judicial interference and now the amended Section 8 of the Arbitration Act reads as under:

> ***8. Power to refer parties to arbitration where there is an arbitration agreement.*** *— (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any*

> *court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.*
>
> *(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.*
>
> *Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that court.*
>
> *(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.*

The amendments in Section 8 and Section 11 of the Arbitration Act were based on the following recommendations made in the 246th Report of the Law Commission of India, 2014:

> *"33. It is in this context, the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the nature of intervention*

> *is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie."*

Note to the clause for amendment of Section 8 by the Arbitration and Conciliation (Amendment) Bill, 2015 reads as under:

> *Clause 4 of the Bill seeks to amend Section 8 of the principal Act to specify that the judicial authority shall refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists. A proviso below sub-section (2) is inserted to provide that where the original arbitration agreement or certified copy thereof is not available with the party who apply under sub-section (1), and is retained by the other party, such party shall file a copy of the arbitration agreement along with application under sub-section (1) praying to the court to call upon the other party to produce the original arbitration agreement or its duly certified copy before the court.*

The basic purpose for bringing an amendment in Section 8 (as well as Section 11 of the Arbitration Act) was to minimise the scope of judicial authority in matters of arbitration, except on the ground where *prima facie,* no valid arbitration agreement exists.

8. In the present case, the 2007 as well as the 2008 Tripartite Agreement, forms the basis for all subsequent agreements, conveyance, etc. The arbitration clause is also very wide in its scope, as we have already seen. At the sake of repetition, the 2008 Tripartite Agreement states that *"any dispute, in relation to these agreements or in relation to any matter touching or arising from this Agreement, shall be referred to arbitration."* The contention of the appellants therefore that the dispute raised in the civil suit is non- arbitrable is also not correct. The dispute relates to a property which is the subject matter of the two tripartite agreements dated 31.03.2007 and 25.07.2008.

9. In the Tripartite Agreement dated 31.03.2007 the intention of the parties was clearly to acquire and develop properties, which was indeed done through the development agreements (sought to be declared as validly terminated by the appellants). Clause 11 of the Tripartite Agreement dated 31.03.2007 reads as under:

> *"SD and MB have in due course agreed to develop, further trade and deal with the Property and also to acquire such further properties as may be mutually agreed between the Parties and any such further acquisitions that may be made through a Special Purpose Vehicle viz. the Company wherein MB and SD shall have equity in the proportion of 90:10."*

10. It is true that in ***Booz Allen and Hamilton Inc.*** *v.* ***SBI Home Finance Limited and Others,*** **(2011) 5 SCC 532** this Court had set apart cases where the dispute was totally non-arbitrable, such as matrimonial disputes, guardianship dispute, or even we may add disputes relating to consumers, which are governed by an entirely different Parliamentary legislation known as Consumer Protection Act, 2019:

> *"35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration*
>
> *unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy.*

> *Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes."*

11. Thereafter, this Court in ***Vidya Drolia*** *v.* ***Durga Trading Corpn.*****, (2021) 2 SCC 1,** laid down a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable. These were:

> *"(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> *(2) When cause of action and subject-matter of the dispute affects third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.*
>
> *(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.*
>
> *(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s)."*

Nevertheless, the case before the Civil Court does not fall in any of the categories, visualised in either ***Booz Allen*** (supra) or ***Vidya Drolia*** (supra) referred above.

12. In ***Vidya Drolia*** *(supra)*, this Court has held that Court will only decline reference under Section 8 or under Section 11 of the Act in rare cases where the Court is certain that either the arbitration agreement is non-existent, or the dispute is itself "manifestly non-arbitrable". This was reiterated by this Court in ***NTPC Ltd.*** *v.* ***SPML Infra Ltd. (2023) 9 SCC 385***.

13. In ***BSNL*** *v.* ***Nortel Networks (2021) 5 SCC 738***, this court had held that reference to the Arbitral Tribunal can be declined by the Court, only if the dispute is non-arbitrable. For example, consumer disputes which are entirely different nature of disputes, statutorily protected under a special legislation. ***(Smt. M. Hemalatha Devi & Ors. v. B. Udayasri 2023 INSC 870***).

14. In any case, Section 16 of the Arbitration Act gives immense powers to the Arbitral Tribunal, including power to rule on its own jurisdiction. Section 16 of the Arbitration Act reads as under:

> *"16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral*

tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

> *(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."*

15. All jurisdictional issues including the existence and the validity of an arbitration clause can be gone into by the Arbitral Tribunal. In other words, the Arbitral Tribunal is competent to decide on its own competence. This aspect has been dealt with in a recent judgment of this Court in ***Uttarakhand Purv Sainik Kalyan Nigam Ltd.*** *v.* ***Northern Coal Field Ltd. (2020) 2 SCC 455***. This is what has been stated:

> *"7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent*

step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [Dresser Rand S.A. v. Bindal Agro Chem Ltd., (2006) 1 SCC 751. See also BSNL v. Telephone Cables Ltd., (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to PSA Mumbai Investments Pte. Ltd. v. Jawaharlal Nehru Port Trust, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(a) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference

> *stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator."*

16. The purpose behind giving these powers to the Arbitral Tribunal is to minimise judicial interference in arbitration matters. In ***Weatherford Oil Tool Middle East Ltd.*** *v.* ***Baker Hughes Singapore PTE 2022 SCC OnLine SC 1464***, this court had observed that a bare perusal of Section 16 of the Arbitration Act would indicate that the arbitration clause in a contract would be an independent agreement in itself and the arbitrator is empowered to decide upon its existence and validity.

17. After the 2015 amendment, primarily the court only has to see whether a valid arbitration agreement exists. Additionally,

the clear non-arbitrability of cases, such as where a party to the agreement is statutorily protected, such as a consumer "has also to be seen by the Court" (***Booz Allen supra***). Short of the narrow field stated above, the scope of judicial scrutiny at the stage of Section 11 (6) or Section 8 is extremely limited.

Objections will nevertheless be raised both on Section 8 and Section 11 applications. These objections can be genuine, such as where there is no arbitration clause or where the matter is itself non-arbitrable, but often these objections could be only to wriggle out of the statutory commitment of parties to a defined process of redressal mechanism.

18. In the present case there are broadly three objections of the appellants on the Section 8 application moved by the respondents which has already been allowed by the two courts below. The first objection regarding the absence of an arbitration clause in the Conveyance Deed dated 17.12.2019 and the development agreements has already been discussed in detail in the preceding paragraphs.

19. The second is that the suit filed by the appellants is for cancellation of a document relating to immovable property i.e. land and it therefore amounts to an action *in rem* and hence

arbitration is not the remedy. This question however, is no more *res integra*. Elaborate analysis on this aspect has been done by this Court in the case of ***Deccan Paper Mills v. Regency Mahavir Properties, (2021) 4 SCC 786***, therein this court after referring to all the relevant precedents and the case laws has held that whether it is a suit for cancellation of a deed or a declaration of rights rising from the deed, it would only be an action in *personam* and not *in rem*. The decision of the Division Bench of Andhra Pradesh High Court in ***Aliens Developers (P) Ltd. v. Janardhan Reddy, 2015 SCC Online Hyd 370***, was held to be wrong wherein it was held that a suit under Section 31 of Specific Relief Act amounts to an action *in rem* and this adjudicatory function can only be done by the Competent Civil Court and the powers cannot be exercised by an Arbitrator. The basic foundation of the Court for holding that a Section 31 suit for cancellation of a document amounts to an action *in rem* was held to be wrong. The entire scope and ambit of the Specific Relief Act, 1963 was considered and in ***Deccan Paper Mills (supra),*** the anomalies in law for holding such to be an action *in rem* were discussed and it was held that a relief sought under the Specific Relief Act is nothing but an action in *personam*.

20. The third objection is regarding fraud. The plea of fraud raised by the appellants in their objection to the Section 8 application has never been substantiated. Except for making a bald allegation of fraud there is nothing else. This Court has consistently held that a plea of fraud must be serious in nature in order to oust the jurisdiction of an Arbitrator. In ***Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710,*** this Court laid down two conditions which must be satisfied before the Court can refuse to refer the matter to the Arbitrator, a forum consciously decided by parties in an agreement. The first is whether the plea permeates the entire contract and above all, the arbitration agreement, rendering it void or secondly, whether the allegation of fraud touches upon the internal affairs of the parties *inter se* having no implication in the public domain. The allegations must have some implication in public domain to oust the jurisdiction of an Arbitrator, if an allegation of fraud exists strictly between the parties concerned, the same will not be termed to be as a serious nature of fraud and hence would not be barred for arbitration.

21. In the present case, therefore there is absolutely no ambiguity that both the Tripartite Agreements dated 31.03.2007 and 25.07.2008 contain an arbitration clause, which forms the

basis of all subsequent agreements including the agreements sought to be declared as validly terminated by the appellants and the conveyance deed sought to be declared as null and void. Both the trial court as well as the High Court have given a correct finding on facts as well as on law. We find no scope for interference in the matter. This appeal hence has no force, and is hereby dismissed.

No order as to costs.

.....J.
[ANIRUDDHA BOSE]

.....J.
[SUDHANSHU DHULIA]

New Delhi.
December 15, 2023.