

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS (ISSN 2582 – 6433)

VOLUME I ISSUE III
(SEPTEMBER 2020)

Email – editor@ijlra.com

Website – www.ijlra.com



IJLRA

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

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A WORD FROM THE TEAM

IJLRA: (ISSN: 2582-6433) is proud to complete its *Volume I Issue III*. The current issue consists of articles, short notes, case comments, legislative comments and book reviews, contributed by advocates, academicians, researchers & students from all parts of the country. Each contribution has been thoroughly examined by our editorial team to provide a filtered and quality read.

The fact that law as a subject is dynamic and ever evolving makes it imperative for lawyers, academicians, researchers, and students to stay abreast of recent developments. The same thought process has led us to develop a dedication towards providing all the contributors with a platform to express their original ideas on contemporary issues. With the same endeavour to present view on latest legal developments within and outside country we are successful in presenting diverse selection of stimulating articles.

We strive hard to stick to the core of the Journal's principles, which includes diversity and open discussion from all aspects of law while maintaining highest standards of professional integrity.

The Issue is a culmination of the efforts of several people who must be rightly acknowledged. We would like to place on record our sincere gratitude to all our contributors for their valuable work. We would also like to thank all the members of Editorial Board for their efforts in shortlisting and editing the papers to ensure that the ideas of authors are being expressed in the best possible manner; and finally the members of our technical support team for making this issue reach all our readers by way of an open access system.

We sincerely hope that the present issue will come to the expectations of its readers.

Team IJLRA

A. AYYASAMY V. A. PARAMASIVAM & ORS., CIVIL
APPEAL NOS. 8245-8246 OF 2016

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I. FACTS

A. PARTIES INVOLVED:

The dispute in the present matter had its genesis from a partnership deed dated 1.04.1994 between six members of a family with regard to carrying the business forward of a family Hotel called '*Hotel Arunagiri*'. The owner of the disputed Hotel (Mr. Arunagiri) had five children. The Hotel was divided into 6 parts having an equal share for each member. After his death the Hotel fell to the Children. The Appellant and Respondents are five brothers. The respondents constituting 4 brothers had originally filed a suit against the Appellant for permanent injunction to which the Appellant had approached the Court to enforce the Arbitration clause under the said Partnership Deed enshrined in Cl. (8).

B. BRIEF FACTS:

It was mutually decided by the brothers that the eldest brother i.e. the Appellant was given the charge to handle the business subject to and based on the belief that he will follow and uphold standards and business practices followed by the deceased father ('*Arunagiri*'). The brothers had mutually decided the following:

1. Daily collection from the Hotel will be deposited into a Current Account they had created on every next day maintained with the '*Indian Overseas Bank*', Tirunelveli Junction.
2. 10,000- 15,000 rupees to be kept in cash for emergency purposes at all times.

C. CAUSE OF ACTION:

The cause of action first arose when the respondents alleged that the appellant did not follow any of the said principles.

Further the cause of action arose when allegedly the appellant had fraudulently “*signed and issued a cheque for Rs.10,00,050/- dated 17.06.2010 from the bank account in the name of 'Hotel Arunagiri'*”. The same was done without the knowledge, consensus or consent of the partners. Therefore, there were allegations of misappropriation of money and fraud by the Respondents. Secondly, it was alleged that the Respondents were not allowed to check the book of accounts.

Lastly, the brother-in-law of the Appellant had his house raided by the CBI where 45 lakh rupees were recovered. The brother in law claimed that the money belonged to ‘Hotel Arunagiri’ that according to the Respondents was not a true statement and was made only because the dispute between the partners was common knowledge.

The Partnership deed involved under clause (8) an arbitration clause i.e. to settle disputes by way and means of arbitration. The respondents had filed in the Ist Additional District Munsif Court, Tirunelveli, Madurai (Tamil Nadu) for relief based on the above cause(s) of action. The petitioner on receiving summons moved an application under section of the Arbitration and Conciliation Act, 1996 (hereinafter Arbitration Act) objecting to the maintainability of the suit stating that under the Arbitration act the case needs to mandatorily be referred to an arbitrator. The two lower Courts including the High Court rejected the application stating that, due to the nature of the present dispute, the jurisdiction of the Court is warranted. Therefore, the present petition was heard by the Hon’ble Supreme Court to decide whether the case is to be settled by arbitration or through the normal litigation process.

D. CONTENTIONS ON BEHALF OF THE APPELLANT.

The Appellants had contended before the Hon’ble Supreme Court that as there was an Arbitration clause under the Partnership deed the Court must mandatorily refer the matter to Arbitration in light of Sec. 8 of the Act.

E. CONTENTIONS ON BEHALF OF THE RESPONDENT.

The Respondents argued before the Hon’ble Supreme Court that the matter involved questions of Fraud, Misappropriation of Money and other serious allegations could not be adjudicated upon by the Arbitral Tribunal and must be remedied by the Courts.

II. ISSUES FRAMED:

The Court based on the Contention of both parties framed the following issues:

FACTUAL:

1. *Whether there is a valid arbitration agreement?*
2. *Whether the present arbitration agreement covers the disputes?*

LEGAL:

3. *Whether the present disputes are capable of being adjudicated and settled by arbitration?*
4. *What is the extent of Judicial Intervention in the Pre-Arbitral Stage?*

III. ANALYSIS

A. FACTUAL ISSUES

1. Whether there exists a valid Arbitration Agreement

A valid arbitration agreement is the first and foremost requirement to be scrutinised by the Courts before proceeding to arbitration. The Court in the case analysed the Arbitration Clause in the Partnership deed in light of Section 7 of the Arbitration Act.

Section 7 of the Arbitration Act “*Arbitration agreement.—(1) In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*”¹

It is clear as per Clause (8) of the partnership deed according to case facts there is an arbitration clause which “*stipulates resolution of disputes by means of arbitration.*” Section 7 includes “*an arbitration clause in a contract*” as a valid arbitration agreement for the purpose of the act.

¹ Section 7, Arbitration and Conciliation Act, 1996.

2. *Whether the present arbitration agreement covers the dispute?*

In *United Insurance India Co. Ltd. v. Hyundai Engineering and Construction Co. Ltd. & Ors.*,² it was held,

“It can also lay the postulate in which situations the arbitration clause cannot be given effect to. If a clause stipulates that under certain circumstances there can be no arbitration, and they are demonstrably clear then the controversy pertaining to the appointment of arbitrator has to be put to rest.”

Settling the law, that if the nature of the dispute is specifically excluded out of the purview of Arbitration then the same shall be adhered to.

According to the facts of the case the Arbitration Clause in the deed stipulates “*resolution of disputes*”. The arbitration clause does not specifically exclude any dispute out of the purview of arbitration. Therefore, the Court held that the present dispute is covered by the arbitration clause.

B. LEGAL ISSUES

There are two pertinent legal issues that the Court discussed in the present case based on the relief asked for by the Respondents, which have been grey areas in the subject of Arbitration in India. Firstly, The Respondents alleged that the present dispute cannot be adjudicated by an Arbitral Tribunal. Secondly, the matter must be heard by the Court. The relief warrants the answer to the following legal issues.

1. *Whether the present disputes are capable of being adjudicated and settled by arbitration?*

1a. Whether certain disputes are excluded from the Jurisdiction of Arbitration i.e. Non-Arbitrable Matters.

The arbitration act does not mention any category of disputes which are non arbitrable³. The dictum laid down by the Courts is that Arbitration is a private dispute resolution settlement mechanism as chosen by the parties in place of Courts.⁴ Any dispute that can be settled by the

² *United Insurance India Co. Ltd., v. Hyundai Engineering and Construction Co. Ltd. & Ors.*, CIVIL APPEAL NO. 8146 OF 2018.

³ *A. Ayyasamy v. A. Paramasivam & Ors.*, CIVIL APPEAL NOS. 8245-8246 OF 2016; *M/s. Swatantra Properties Pvt. Ltd. v. M/s Airplaza Retail Holding Pvt. Ltd.*, 2018 (5) AWC 5168.

⁴ *Id.*

Court can come to the tribunal.⁵ Yet, some agreements or disputes whether contractual or not are excluded from the jurisdiction of Arbitration expressly or by necessary implication by the Legislature and made exclusively for the Courts to adjudicate upon such as matters of public policy.⁶

The Supreme Court has time and time again classified certain disputes as non arbitrable. The law was laid down in *Booze-Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*⁷, in which the Court enumerated the three facets of arbitrability being:

“1. Whether the nature of dispute is such that it can be settled by a private fora (i.e. Arbitral Tribunal) or it expressly or by necessary implication falls within the jurisdiction of the public fora (i.e. Courts)

2. Whether the disputes are under the agreement covered by arbitration

3. Whether the parties have referred the dispute to arbitration.”

In the present case the Court identified certain categories as non-arbitrable such as:

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

In *M/S Swatantra Properties (P) Ltd. vs M/S Airplaza Retail Holdings Pvt.*⁸ the categories laid down in *Booze-Allen* (supra) were reiterated:

“(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

(iii) matters of guardianship;

(v) testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

(vi) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.”

⁵ *Id.*

⁶ *M/s. Swatantra Properties Pvt. Ltd. v. M/s Airplaza Retail Holding Pvt. Ltd.*, 2018 (5) AWC.

⁷ *Booze Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.*, (2011) 5 SCC 532

⁸ *M/s. Swatantra Properties Pvt. Ltd. v. M/s Airplaza Retail Holding Pvt. Ltd.*, 2018 (5) AWC.

1B. WHETHER THE PRESENT DISPUTE IS NON-ARBITRABLE?

The Respondents alleged that the Appellant has acted fraudulently against them; the moot issue therefore is whether 'fraud' can be adjudicated and settled by the arbitral tribunal?

The two Lower Courts in the present case relied upon the case of *N. Radhakrishnan v. Maestro Engineers*⁹ to declare that serious allegations of fraud must be settled by the Civil Courts only.

The Supreme Court on appeal did not uphold the decision of the High Court. The Court held that *N. Radhakrishnan* (supra) is *per incuriam* as the existing precedents on the matter were not taken into consideration while passing the judgement.

In *Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums*¹⁰, wherein this Court in Para 14 observed:

"If in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator. In the instant case the existence of an arbitral clause in the Agreement is accepted by both the parties as also by the courts below. Therefore, in view of the mandatory language of section 8 of the Act, the courts below ought to have referred the dispute to arbitration."

In *P. Anand Gajapathi Raju & Ors. Vs. P.V.G. Raju (Dead) & Ors.*¹¹ it was held that,

"In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is peremptory. It is, therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement."

Lastly, in *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*¹², it was an application u/s. 11 of the act was being heard the Court clearly held that allegations of fraud can be settled by the Arbitral Tribunal.

⁹ *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72

¹⁰ *Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums* 2003 (6) SCC 503

¹¹ *Anand Gajapathi Raju & Ors. Vs. P.V.G. Raju (Dead) & Ors.* (2000) 4 SCC 539

Placing reliance on the above-mentioned cases the Court held that the present dispute can be settled and adjudicated upon by Arbitral Tribunal.

2. What is the extent of Judicial Intervention in Pre-Arbitral Stage?

A very important aspect was also discussed in the case i.e. the Extent of Judicial Intervention in pre-arbitral stage. The Court in this held that the language of Section 8 is very clear that unless the arbitration agreement prima facie is not valid the Court must always send the case to arbitration.¹³ Section 16 of the act gives wide powers to the Tribunal to decide on its own jurisdiction; therefore the validity of an arbitration agreement is to be decided by the Tribunal itself.¹⁴ In *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr*¹⁵ it was held ,

“bearing in mind the very object with which the Arbitration and Conciliation Act, 1996 has been enacted and the provisions thereof contained in Section 16 conferring the power on the Arbitral Tribunal to rule on its own jurisdiction, including ruling on any objection with respect to existence or validity of the arbitration agreement, we have no doubt in our mind that the civil court cannot have jurisdiction to go into that question.”

The doctrine of severability runs throughout the Arbitration Act and the Court has time and again held that the arbitration cl. must be read separately from the Main Contract implying that the invalidity of the contract does not ipso-facto make the arbitration cl. invalid.¹⁶ The duty of the Court is to at the first instance unless the arbitration agreement is void ab initio constitute an arbitral tribunal.¹⁷

In the case discussed the Court did not intervene and sent the case to arbitration as prima facie the arbitration cl. was valid and the Tribunal has the power by virtue of the act to decide upon its own jurisdiction. The Court further also held that u/s 34 and 48 any arbitral award could be challenged if the Court found that, ‘*subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force.*’ It is clear that the intent of the legislature was to at the first instance proceed with arbitration and challenge the maintainability at the appeal stage.

¹² *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee* (2014) 6 SCC 677

¹³ Section 8, Arbitration and Conciliation Act, 1996.

¹⁴ Section 16, Arbitration and Conciliation Act, 1996.

¹⁵ *Kvaerner Cementation India Ltd. v. Bajranglal Agarwal & Anr.*, (2012) 5 SCC 214.

¹⁶ *A. AYYASAMY V. A. PARAMASIVAM & ORS.*, CIVIL APPEAL NOS. 8245-8246 OF 2016

¹⁷ Section 11(6A), Arbitration and Conciliation Act, 1996; refer to: *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engineering Ltd.*, CIVIL APPEAL No. 3631 of 2019 (SC).

Therefore, the Court held that the intervention of Judiciary at the pre-arbitral stage must be minimal and the tribunal has the power to adjudicate on the present matter.

With respect to International Law the Court analysed the Arbitration Act, 1996 as prevalent in the U.K. which does not mention any subject either as to be construed outside the purview of arbitration. U/s 8 of UNCITRAL Model Law, the Court can take up the matter from the Arbitral Tribunal only if it finds that the arbitration agreement is null and void. The Supreme settled the position of law with regard to severability of the main contract vis-à-vis the arbitration cl. Both run separately and the Arbitral Tribunal possesses the power to decide whether the agreement is null and void or not, the challenge to the same will necessarily happen after the award.

IV. CONCLUSION

*The Court in the case has recognised the importance of speedy resolution via arbitration and the intention of parties to enter into arbitration. Yet, they have reiterated that certain matters are reserved by the Legislature for Courts of law and cannot be subject to Arbitration. By virtue of the Amendment Act 2015 the Legislature has added S. 11(6A) where the court is empowered to constitute an arbitral tribunal of checking the mere existence of the Arbitration Agreement rather than judging its validity. The amendment act has reaffirmed the broad powers of the Arbitral Tribunal.*¹⁸

¹⁸ Government of India, LAW COMMISSION OF INDIA Report No. 246 “Amendments to the Arbitration and Conciliation Act 1996”, August, 2014.