GAHC010049582025

undefined

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./12/2025

SUSHILA DEVI BERIA
W/O- LATE SANTOSH BERIA, R/O- GROUND FLOOR, BERIA BUNGLOW, AAROGYA BHAWAN ROAD, GABRUPATHER, WARD NO. 21, PO PS AND DIST- DIBRUGARH 786001, ASSAM

VERSUS

ASHOK KUMAR BERIA
S/O- LATE NETRAM BERIA, R/O- BERIA HOUSE, 1ST FLOOR, JYOTINAGAR, AROGYA BHAWAN ROAD, GABRUPATHER, WARD NO. 21, PO, PS AND DIST- DIBRUGARH- 786001, ASSAM

Advocate for the Petitioner : MR G N SAHEWALLA, MR M SAHEWALLA,MS. S. TODI,MS G DUGAR

Advocate for the Respondent : MR. BHASKAR DUTTA, SENIOR ADVOCATE, MS L RONGPIPI,MR JITENDRA DAS,MR. SAILENDRA DEKA

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

17.09.2025

Heard Mr. GN Sahewalla, learned Senior Counsel assisted by Ms. G. Dugar, learned counsel for the petitioner. Also heard Mr. S Deka, learned counsel for the respondent.

2] This application has been filed under Section 11(6) of the Arbitration and Constellation Act, 1996 with a prayer for direction to appoint an Arbitrator by the Court to decide and arbitrate on the disputes arising by and between the parties pursuant to the deed of partnership executed between the parties, namely, the petitioner as the second party and the respondent as the first party. This deed was executed on 11th day of January, 2020 for undertaking the business by way of partnership and dealing in the items mentioned at Clause 1 of the said agreement. Clause 17 of the said Agreement provides for resolution of disputes by way of arbitration.

3] During the course of the business between the parties, certain disputes arose between the parties and certain allegations were made by the petitioner against the respondent and criminal complaints have been filed before the appropriate authorities. That apart, Title Suit and Money Suit were also filed before the competent court of civil jurisdiction by the petitioner. Subsequently, both the Money Suit and the Title Suit stood withdrawn, in view of the arbitration clause available. In view of the disputes stated to have arisen between the petitioner and the respondent issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 dated 28.01.2025 calling upon the respondent to concur on nominating the name mentioned in the notice. However, the respondent disputes the contention of the petitioner that the notice was issued on the ground that the same has not been received by the respondent. The learned Senior Counsel for the petitioner on the other hand submits that the same has been sent by post to the respondent at the address available on the records and the same has been delivered as per the postal receipt received from the Postal Department.

4] The counsel for the respondent, however, submits that the notice had never been received. Since there was no reply received from the respondent, the petitioner filed the application under Section 11(6) of the Arbitration and Constellation Act, 1996.

5] Having heard the counsel for the parties, it is seen that although the notice under Section 21 of the Arbitration and Conciliation Act, 1996 is stated to have been issued at the proper address of the respondent, learned counsel for the respondent on instructions submits that the said notice has not been received as the respondent was out of station. Therefore, although a submission was initially made that the stage for appointment of an Arbitrator under Section 11(6) of the Arbitration and Constellation Act, 1996 has not yet arrived as the petitioner never received the notice under Section 21 of the Arbitration and Conciliation Act, 1996 and therefore, there was no refusal by the respondent to appoint the Arbitrator mentioned in the said notice. However, the counsel for the petitioner on instructions fairly submits now that the matter is before the Court, they have no difficulty in accepting the nomination as may be ordered by the Court.

6] Under such circumstances, the learned counsel for the respondent has pressed into service various judgments of the Apex Court in support of its contentions that when allegations of fraud or forgery is made and which goes to the root of the matter, these disputes which may have arisen cannot be resolved by way of arbitration. Be that as it may, the Apex Court has elaborately dealt with the matter in the recent judgment passed in *Managing Director Bihar State Food and Civil Supply Corporation Limited and Another vs. Sanjay Kumar* reported **in 2025 SCC OnLine SC 1604**, and have laid down the guidelines under which ordinarily matters may be referred to arbitration subject to the exceptions mentioned in these guidelines. The said judgment and its relevant paragraphs are extracted below:

21. In view of our decision, it is unnecessary to delve deep on this issue, but sufficient to restate the law on the subject. The position of law as it applies to initiation of arbitral proceedings in the teeth of allegations of criminality involved in the dispute, where criminal proceedings are either pending or to be initiated is considered in several decisions of this Court.12 In A. Ayyasamy v. A. Paramasivam and Ors.13, this Court has considered the matter in detail and laid down certain principles. As the relevant portions of the decision in Ayyasamy (supra) have been extracted in the subsequent decisions of this Court in Ameet Lalchand Shah v. Rishabh Enterprises14, Rashid Raza v. Sadaf Akhtar,15 and Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited16, we are of the opinion that our judgment need not be burdened by extracting excerpts from the judgment all over again. Instead, we seek to restate the principles as follows:-

I. Access to justice for enforcement of rights and obligations is assured by the usual proceedings in the ordinary tribunals. It is for this reason that Section 28 of the Indian Contract Act, 1872 while prohibiting agreements in restraint of legal proceedings saves resolution of disputes through contract, i.e., by arbitration. The conduct of arbitration is governed by the Arbitration and Conciliation Act, 1996.

II. The limits of dispute resolution through arbitration are statutorily incorporated in the Arbitration Act itself. Section 2(3) provides that, "This part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration."18 Disputes that shall not be submitted to arbitration have been recognized in a large number of decisions of this Court.19 Of these, for the present purpose we are concerned with disputes which shall not be submitted to arbitration due to application and operation of criminal laws to the dispute in question.

III. Same set of facts may lead to civil and criminal proceedings. A civil dispute could involve questions of coercion (section 15 of Contract Act), undue influence (section 16 of Contract Act), fraud (section 17 of Contract Act), misrepresentation (section 18 of Contract Act) for example, and such disputes can be adjudicated as civil proceedings for determination of civil or contractual liabilities between the parties. The same set of facts could have their co-relatives in criminal law. The mere fact that criminal proceedings can or have been instituted in respect of the same incident(s) would not per se lead to the conclusion that the dispute which is otherwise arbitrable ceases to be so.

IV. The reason for permitting submission of such disputes to arbitration is well explained in Swiss Timing21 as, "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 the Arbitral Tribunal, and the criminal proceedings result in conviction rendering the underlying contract void, the 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 [...].”

V. For an important policy consideration, our Court has drawn a distinction between “serious fraud” and “fraud simpliciter” to segregate and exclude disputes involving serious fraud from arbitrability22. Disputes involving serious fraud may not be submitted to arbitration as explained, to some extent in Ayyasamy (supra) as they, “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 the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can sidetrack the agreement by dismissing the application under Section 8 and proceed with the suit on merits […]”

VI. “Serious allegations of fraud” is to be understood in the context of facts. In Rashid Raza (supra)23 this Court laid down two tests. 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 mala fide 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.

VII. Disputes involving allegations of serious fraud need more clarity so that there is certainty about the availability of the remedy. At least one instance of serious fraud will be where disputes involving allegations having criminal law implications transcend inter se disputes between the contracting parties and attain public implications, where the ramifications could directly or indirectly affect nonparties and impact, integrity in governance, accountability in public service, distribution of essential commodities, safety and security of the nation for example. Consideration of such disputes have public law implications and shall ‘not be submitted to arbitration’.

VIII. Arbitral Tribunal will be within its jurisdiction to consider allegations of fraud even with respect to the specific terms or clauses in the contract as an arbitration agreement stands independent of the contract and continue to bind and govern the parties even if the contract is terminated or challenged and this question is no more res integra. There is however an exception, the following is its articulation.

IX. However, the allegations of fraud with respect to the arbitration agreement itself stand on a different footing. This position is generally recognized as a dispute which is in the realm of non-arbitrability26. In such cases, the arbitral tribunal will not examine the allegation of fraud but will consider the submission only for the purpose of examining exclusion of jurisdiction. This principle, in its application, can be seen in the judgment of this Court in Avitel.

X. The burden of proof is on the party who raises the plea.

XI. When a plea of non-arbitrability is raised, the Court will examine it as a jurisdictional issue only to enquire if the dispute has become non-arbitrable due to one or the other reason as indicated by us hereinabove.

……..

23. Section 11 of the Act has perhaps been the only provision which would have been interpreted and re-interpreted by the Supreme Court for the longest time ever. After two decades of its interpretation commencing from 1996, Parliament intervened and supplied sub-section (6A) to Section 11 of the Act as per which the consideration by a referral court shall be confine(d) to the examination of the existence of an arbitration agreement.

24. Even after the introduction of sub-section (6A), it took almost a decade for us to have clarity and certainty till the seven judges bench decision of this Court in the case of Interplay Between Arbitration

Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, In Re29 was delivered.

27. The curtains have fallen. Courts exercising jurisdictions under Section 11(6) and Section 8 must follow the mandate of sub-section (6A), as interpreted and mandated by the decisions of this Court and their scrutiny must be "confine(d) to the examination of the existence of the arbitration agreement".

……..

28. We have examined the matter in detail. There is an arbitration agreement. The matter must end here. While we agree with Mr. Ranjit Kumar submissions that his client has much to say, let all that be said before the arbitral tribunal. It is, as we have said elsewhere, just as necessary to follow a precedent as it is to make one.

29. All the issues raised by Mr. Ranjit Kumar, senior counsel are kept open for being raised and contested before the arbitral tribunal. The issues that we have not taken up and left it to the arbitral tribunal are jurisdictional issues, involving barring of the arbitral proceedings due to limitation or for the reason that they are non-arbitrable. These issues shall be taken up as preliminary issues and the arbitral tribunal will consider them after giving opportunity to all the parties.

7] Having considered the submissions and the judgments cited at the Bar, it is seen that although the allegations of fraud or forgery as had been alleged by the petitioner, it is, however, not disputed by the respondents that the partnership agreement dated 11.01.2020 was executed by and between the petitioner and the respondent or that certain disputes had arisen by and between the parties during the course of their business and therefore, in terms of Clause- 17 of the Deed of Partnership, any dispute that may have arisen should be referred for arbitration. Learned counsel for the parties also accept the position in law as laid down by the Apex Court in Managing Director Bihar State Food and Civil Supply Corporation Limited (supra). It is also not in dispute that the allegations of fraud are not in respect of the arbitration agreement. It is also no longer res-integra that the Arbitral Tribunal is competent to decide on its jurisdiction. Consequently, it will be open for the parties to urge all grounds before the Tribunal including the question of jurisdiction.

8] Under such circumstances, considering the fact that although a notice under Section 21 of the Arbitration and Conciliation Act, 1996 has been issued but the same has been stated have not been received by the respondent as he was stated to be out of station, relegating the petitioner to issue a fresh notice and permitting the respondent to submit a reply will further delay the matter when the parties have otherwise agreed to resolve their dispute by reference to arbitration, in terms of Clause-17 of the Partnership Deed executed by and between the petitioner and the respondent on 11.01.2020.

9] This Court therefore under the powers conferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 considers it appropriate to refer this matter to arbitration.

10] Accordingly, considering the submissions made by the learned counsel for the parties and pleadings available before the Court, the Court considers it appropriate to appoint an arbitrator to decide the dispute and differences between the parties. The court therefore consider it appropriate to appoint Smt. Chaya Rani Goswami, AJS, retired District and Sessions Judge, Assam to act as the sole Arbitrator and decide and arbitrate on the disputes and differences that has arisen between the parties in connection with the Partnership Agreement dated 11.01.2020 executed between them.

11] This appointment however is subject to the written declaration to be furnished under Section 12(1) (b) of the Arbitration and Conciliation Act.

12] Let the parties may appear before the prospective arbitrator and place a copy of this order before the prospective sole Arbitrator, namely, Smt. Chaya Rani Goswami, AJS, retired District and Sessions Judge, Assam on 20.09.2025 and which appointment will be continued upon receipt of a written declaration by the prospective arbitrator under Section 12(1) (b) of the Arbitration and Conciliation Act, 1996 and if the same issued, the order of confirmation can be passed.

13] List the matter again on 23.09.2025.

JUDGE

Comparing Assistant