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CASE STUDY OF AVITEL POST STUDIOZ LIMITED VS. HSBC PI HOLDINGS (MAURITIUS) LIMITED

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1. INTRODUCTION

- 1.1 Fraud in essence, is understood as an act committed/omitted with an **intention to deceive**.
- 1.2 The Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the Act) does not lay down the law as to arbitrability of fraud.
- 1.3 The same has been explained only through judicial precedents/decisions.
- 1.4 The question of arbitrability of fraud seeks to answer whether the Arbitral Tribunal under the Act can adjudicate disputes that involve an element of fraud.
- 1.5 In the past, the Apex Court has dealt with the question of such jurisdiction in *Swiss Timing Ltd. vs. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677* and *A. Ayyasamy vs. A. Paramasivam (2016) 10 SCC 386*.
- 1.6 Recently, the Hon'ble Supreme Court speaking through Justices R. F. Nariman and Navin Sinha as laid to rest the controversy with regard to Arbitrability of Fraud in the matter of *Avitel Post Studioz Limited vs. HSBC PI Holdings (Mauritius) Limited 2020 SCC OnLine SC 656*, on August 19, 2020.
- 2.2 HSBC also filed a petition under section 9 (Interim measures, etc. by Court) of the Act before the Bombay High Court wherein a learned Single Judge directed Avitel to maintain a balance equal to USD 60 million in its bank account.
- 2.3 This order was challenged by Avitel and the appellate court modified the order partly by reducing the security amount to USD 30 million.
- 2.4 The order of the appellate bench (which was the impugned order dated July 31, 2014) was challenged in this present set of appeal by both HSBC and Avitel.

- The decision also throws light on the position with regard to Effect of pendency of criminal proceedings in the arbitration proceedings as well as the scope of section 17 of the Indian Contract Act, 1872 (Contract Act).

2. FACTS

- 2.1 The brief facts of the case are:
- HSBC and Avitel entered into an agreement whereby HSBC made an investment in the equity capital of Avitel for USD 60 million.
 - The agreement was entered into, relying on the representation of Avitel that they had entered into a contract with British Broadcasting Corporation
- 3.1 The points of argument on behalf of Avitel were:
- There are serious allegations of fraud involved which cannot be made the subject-matter of arbitration.
 - A criminal complaint was filed by HSBC against such allegations of fraud and the same is pending.
 - In an enforcement proceeding in India, the gateway of section 48 (Conditions for enforcement of foreign awards) of the Act have to be met, without which enforcement of foreign award would not be possible.
 - Lastly, one of the members on the Arbitral Tribunal which passed the award was an interested party in the business of HSBC.
- 3.2 The Counsel for HSBC countered all the submissions with the following arguments:

- The twin test for establishing “serious allegations of fraud” were applied and the present case fell outside the purview of the same.
- The award stood reasoned not merely on the grounds of fraud, impersonation and misrepresentation but also on siphoning off and diversion of funds.
- These issues are predominantly civil law issues to be decided inter-parties and the criminal proceedings have no effect on the same.
- As far as allegation of bias is concerned, the award was unanimous and was passed with the consent of all the three members of the Tribunal.

4. FINDING

- 4.1 First the Court dealt with *Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak (1962) 3 SCR 702* and *N Radhakrishnan vs. Maestro Engineers (2010) 1 SCC 72*.
- 4.2 The ratio in *N Radhakrishnan* implied that reference to arbitration may not be made when the party charged with fraud desires the matter to be tried in open court.
- 4.3 The Court distinguished *N Radhakrishnan* on the ground that it failed to deal with *Hindustan Petroleum Corporation Ltd. vs. Pink City Midway Petroleum (2003) 6 SCC 503* which had stated that when an arbitration agreement existed, it was mandatory for the civil court to refer the dispute to arbitration.
- 4.4 The Supreme Court relying on *Afcons Infrastructure Ltd. vs. Cherian Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24* and *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. (2011) 5 SCC 532* dealt with the list of matters/cases that could not be made subject matter of arbitration.
- 4.5 In light of the above judgments, it was observed that mere pendency of criminal proceedings on the same subject matter would not render an otherwise arbitrable dispute not arbitrable.
- 4.6 The Court distinguished between a contract induced by fraud and a contract executed fraudulently and held that only the former lied within the purview of Section 17 of the Contract Act.
- 4.7 The Court supported and upheld the decision of *A. Ayyasamy*.
- 4.8 It was affirmed that unless there are “serious allegations of fraud” or actions “*in rem*”, the disputes may be arbitrable.
- 4.9 The courts must rely on a co-joint reading of Section 8 (Power to refer parties to arbitration) and Section 16 of the Act to infer the intent of the parties to submit their disputes to arbitration.

5. DECISION

5.1 Relying primarily on the Foreign Arbitral Award, the Court held:

- The subject matter was based on civil issues and pendency/failure of criminal proceedings were of no consequence whatsoever.
- The case of fraud in the present case, did not involve “public flavour”, so as to attract the fraud exception.
- Thus, there were no grounds to deny arbitrability of disputes in the present case.
- A prima facie case of “fraudulent inducement” was made out which falls within the purview of section 17 of the Contract Act.
- The essence of providing relief against such fraud would be to ensure that HSBC finds itself in the same financial position (as far as this dispute is concerned) as it was before entering into the contract.
- Thus, the Division Bench was not justified in reducing the measure of damages in the impugned order as HSBC would suffer irreparable loss unless the principal sum of the claim were kept aside for purposes of enforcement of the award.

5.2 The appeal filed by Avitel was dismissed and that filed by HSBC was allowed.

6. CONCLUSION

- 6.1 The judgment clarifies the position as to arbitrability of fraud and also on co-existence of civil and criminal proceedings arising out of the same dispute.
- 6.2 It is clearly inferred from the judgment that commercial fraud or fraud characteristically in the nature of a civil dispute is totally arbitrable and may be adjudicated by an arbitral tribunal but strictly and only in accordance of the terms of the arbitration agreement.
- 6.3 Moreover, pendency of any criminal proceedings is of no consequence to the Arbitrability of the disputes under an Arbitration Agreement.