

Mr. Dushyant Chikara vs Fauzia Sultana & Anr on 12 February, 2024

Author: Dinesh Kumar Sharma

Bench: Dinesh Kumar Sharma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 1371/2022

MR. DUSHYANT CHIKARA

FAUZIA SULTANA & ANR.

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA
ORDER

% 12.02.2024

1. By way of the present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the „A&C Act), the petitioner seeks appointment of an Arbitral Tribunal comprising of a Sole Arbitrator to adjudicate the disputes between the parties.

2. Briefly stated, the facts of the present case are that on 08.02.2007, Mr. S.K Zaman husband of respondent No.1 and father of respondent no.2 had borrowed money from the petitioner and further time to time in the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 23/02/2024 at 21:48:24 year 2007-2008 amounting to approximately 1.11 crores for the purpose of investing in certain real estate properties including the subject property. However, an MOU dated 16.07.2012 was executed between Late Sh. S. K. Zaman and the petitioner whereby it was agreed that a lump-sum amount would be paid. Thereafter, the original title deeds and possession of the flat referred to in the MOU were handed over to the petitioner by Mr. S. K. Zaman since he could not pay the outstanding

amount of Rs. 1.50 crores as the lump-sum amount of settlement within a period of three years along with interest @ 12% per annum from the date of MOU as a full and final settlement with respect to the subject property.

3. Learned counsel for the petitioner submits that the MOU dated 16.07.2012 contains the arbitration clause (clause 4) and provides that in case of any dispute, the matter shall be referred to arbitration.

4. Learned counsel for the petitioner further submits that since Late Sh. S. K. Zaman could not pay the aforesaid amount by 2015, he handed over the possession of the subject property along with original title deeds. Subsequently, Late Sh. S. K. Zaman passed away on 30.03.2018 leaving behind the respondents to the present petition as his only legal heirs.

5. Learned senior counsel for the respondent has vehemently contested the petition in reply filed by respondent No.2. It has been stated that the aforementioned MOU is a forged and fabricated document and does not contain the signature of Late Sh. S. K. Zaman.

6. Learned senior counsel for respondent No.2 has further submitted that the coordinate bench of this court in the CS(OS)114/2023 (previously being CS(COMM) No. 543/2020) titled as "Jairaj Developers LLP This is a digitally signed order.

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7. Learned senior counsel for respondent No.2 has stated that Dr. Joy Tirkey, DCP, Crime Branch submitted the status report which was taken into account by the Court and the following order was passed on vide order dated 12.05.2021.

"1. Dr. Joy Tirkey, DCP, Crime Branch has submitted a status report dated 10th May, 2021. The status report is taken on record.

...

3. As per the status report, the MoU dated 16th July, 2012 and the Will dated 09th February, 2018 of S. K. Zaman appears to be forged. The Crime Branch has registered FIR No. 75/2021 dated 25th April, 2021 under Sections 419/420/467/468/471/120B IPC at P.S. Crime Branch, New Delhi and the investigation is ongoing. The status report further records that the original MoU dated 16th July, 2012 and the original Will dated 09th February, 2018 of S.K Zaman be provided to the Investigating Officer for being sent to FSL to verify whether the documents are genuine or forged.

4. ... The investigating Officer is at liberty to seize the original MOU dated 16th July, 2012 and any other documents necessary for investigation from the concerned persons. The Registry shall give the inspection of CS(COMM) 542/2020, CS(COMM) 543/2020, O.M.P.(I) (COMM.) 290/2019 and TEST.CAS. 57/2019 to the Investigating Officer who shall flag the relevant documents This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 23/02/2024 at 21:48:25 containing the admitted signatures of the concerned persons. The original documents containing the admitted signatures of the concerned persons be also released to the Investigating Officer for being sent to the FSL.

5. The Investigating Officer shall send the documents to FSL, Rohini within ten days of the release of the documents. The FSL, Rohini is directed to expedite and make an endeavour to submit the report to the Crime Branch within six weeks. The report of the FSL be placed on record along with the fresh status report.

6. The fresh status report shall also deal with the further investigation to be carried out by the Crime Branch."

[Emphasis Supplied]

8. Learned senior counsel for respondent No.2 has further invited the attention of the Court to the report filed by the Investigating Agency dated 18.07.2021 which reads as follows;

"2. That the FSL report in this case has been obtained vide FSL report No. SFSLDLH/5158/QD/264/21 dated 14.07.2021. FSL has opined that the person who wrote the red enclosed signatures and marked A1 to A33, did not write red enclosed signatures marked Q1 to Q8. Copy of the FSL report is annexed herewith as Annexure A.

3. That according to the FSL, the Memorandum of Understanding dated 16.07.2012, which was purported to have been signed by Sh. SK Zaman, when compared with his admitted signatures, were found to contain his forged signatures.

4. That similarly the FSL found that the 'Will' dated 09th February, 2018, which was purported, to have been signed by Sh. SK Zaman, when compared with his admitted signatures, were found to contain his forged signatures."

[Emphasis Supplied] This is a digitally signed order.

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9. Learned senior counsel for respondent No.2 has further stated that therefore there is a categorical opinion of the investigating agency that the signatures of Late Sh. S. K. Zaman on the MOU are forged and fabricated. Learned senior counsel for the respondent No.2 has further invited the attention of the Court to the petition filed by the petitioner under Section 9 of the Act bearing O.M.P.(I) (COMM)290/2019 titled as "Dushyant Chikara v. Fauzia Sultana & Anr." which was dismissed by the coordinate Bench of this Court by a detailed order dated 22.11. 2023. Learned senior counsel for the respondent No.2 also invited the attention of the court to the report dated 14.07.2021 and 25.02.2022.

10. Learned senior counsel for the respondent No.2 has relied upon the judgment of the Hon ble Supreme Court in A. Ayyasamy v. A. Paramasivam and Others (2016 10 SCC 386) wherein it was inter alia held as under:

25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter 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 8 of the Act, finds that there 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. It can be so 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 23/02/2024 at 21:48:25 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 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 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.

11. Learned senior counsel for respondent No.2 has further relied upon This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 23/02/2024 at 21:48:25 Vidya Drolia and Others v. Durga Trading Corporation, with Lindsay International Private Limited v. IFGL Refractories Limited with Creative Infocity Limited v. Gujarat Informatics Limited, (2021) 2 SCC 1 it was inter alia held as under;

61. On the question of non-arbitrability when there are allegations of fraud, Dr A.K. Sikri, J. in A. Ayyasamy [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] observed : (A. Ayyasamy case[A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC p. 407, para 25)

25. ... finds that there 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. It can be so 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. ... Such categories of non- arbitrable subjects are carved out by the courts, keeping in mind the principle of common law that certain disputes 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."

12. Learned counsel for respondent No.2 also submitted that the present This is a digitally signed order.

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is liable to be dismissed.

13. Learned senior counsel for the respondent No.2 has submitted that reliance on Parveen Electricals Private Limited v. Galaxy Infra and Engineering Private Limited (2021) 5 SSC 671 is misconceived as the facts of the case were different in nature.

14. Per contra, learned counsel for the petitioner submits that recently in Cox and Kings Limited v. SAP India Private Limited 2023 SCC OnLine SC 1634, the Hon ble Supreme Court has delineated the jurisdiction of this Court while dealing with the petition under Section 11 of the Arbitration and Conciliation Act, 1996. Learned counsel also submitted that the issue of whether the signatures on the MOU are forged or fabricated cannot be tried by this Court at the stage of the reference. Learned counsel further submitted that this Court at this stage cannot hold a mini-trial to adjudicate the same. Learned counsel has relied upon Parveen Electricals Private Limited v. Galaxy Infra and Engineering Private Limited (2021) 5 SSC 671 as well as the judgment of Bombay High Court in M/s Atul & Arkade Relaty, V I.A. & I.C. Pvt. Ltd & Ors in (Arb. P) 72 of 2013.

15. The present petition has been filed for the appointment of an arbitrator.

The notice was issued to the respondents.

16. The jurisdiction of the Court under Section 11 of the Act as held by the Apex Court is limited to the extent that the court is only required to see whether there is an arbitration agreement and whether an arbitrable dispute exists between the parties reliance can be placed upon M/S Duro Felguera, S.A. vs Gangavaram Port Limited (2017) 9 SCC 729.

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The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 23/02/2024 at 21:48:25. Though, the jurisdiction of this Court is very limited at this stage, however, at the same time, the Court cannot shut its eyes to the documents placed before the Court. There cannot be any doubt to the proposition that if the document on the face of it is forged and fabricated or there is a conclusive finding of any Court of law regarding the authenticity, genuineness and validity of the document, such documents cannot be referred to the arbitration. However, in the present case, there are FSL reports on the record saying that the signatures of late Sh. S. K. Zaman were forged and fabricated. On the contrary, the petitioner has also filed an FSL Report to say that the signatures are not forged. Therefore, this issue is required to be adjudicated.

17. In Parveen Electricals Private Limited (supra) the Apex Court has inter alia as under;-

.....This is a case which eminently cries for the truth to come out between the parties through documentary evidence and cross-examination. Large pieces of the jigsaw puzzle that form the documentary evidence between the parties in this case remained unfilled. The emails dated 22-7-2014 and 25-7-2014 produced here for the first time as well as certain correspondence between

Sbpdcl and the respondent do show that there is some dealing between the appellant and the respondent qua a tender floated by Sbpdcl, but that is not sufficient to conclude that there is a concluded contract between the parties, which contains an arbitration clause. Given the inconclusive nature of the finding by CFSL together with the signing of the agreement in Haryana by parties whose registered offices are at Bombay and Bihar qua works to be executed in Bihar; given the fact that the Notary who signed the agreement was not authorised to do so and various other conundrums that arise on the facts of this case, it is unsafe to conclude, one way or the other, that an arbitration agreement exists This is a digitally signed order.

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18. In M/s Atul & Arkade Relaty, V I.A. & I.C. Pvt. Ltd & Ors. (Supra), it was inter alia held as under;
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59. The aforesaid stand of the Applicant is, in a sense, compatible with two diverse possibilities. One, it may lend credence to the defence of the Respondents that the thumb impression, rubber stamp and circular embossed seal, were not affixed on the Joint Venture Agreement by Mr. Rajendra Parekh and the Respondent Companies, as alleged by the Applicant. Two, it may explain away the allegations of fraud in the sense that the Joint Venture Agreement was indeed executed on 28th March, 2007 and, thereafter, the thumb impressions, seals and the stamps were impressed thereon. Which of the two is preponderately probable is a matter for adjudication.

60. Either way, the issue revolves around the execution of the Joint Venture Agreement

70. is imperative to note that the allegations of fraud do not pertain to the acts to be performed by the public authorities or the record to be maintained by the public authorities. They are essentially in the context of the execution of the Joint Venture Agreement. It would be necessary to note, at this juncture, that criminal proceedings alleging offences having been committed in the course of the transaction, including in respect of the agreement in question, have already been initiated by the Applicant and the Respondents. The criminal aspect of fraud, forgery and fabrication would, thus, be adjudicated in the proceedings which have already been initiated.

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19. The consistent law is that it is mandatory for courts to refer disputes to arbitration, if the agreement between parties provides for reference to arbitration. Mere registration of criminal case in relation to the agreement concerned on grounds such as fraud, corruption or collusion against members of both parties, is not an absolute bar to refer the disputes to arbitration. It has been held that to shut out the arbitration at the initial stage itself would destroy the very purpose for which the parties had entered into arbitration and that there is no inherent risk of prejudice to any of the parties in permitting the criminal proceedings to simultaneously proceed with the arbitration. In *Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677 wherein court *inter alia* held as under;

27. However, it would not be possible to shut out arbitration even in cases where the defence taken is that the contract is voidable. These would be cases which are covered under the circumstances narrated in Section 12 -- unsoundness of mind; Section 14 -- absence of free consent i.e. where the consent is said to be vitiated as it was obtained by coercion (Section 15), undue influence (Section 16), fraud (Section 17) or misrepresentation (Section 18). Such a contract will only become void when the party claiming lack of free consent is able to prove the same and thus rendering the contract void. This indeed is the provision contained in Section 2(j) of the Contract Act. In exercising powers under Section 11(6) of the Arbitration Act, the Court has to keep in view the provisions contained in Section 8 of the Arbitration Act, which provides that a reference to arbitration shall be made if a party applies not later than when submitting his first statement on the substance of the dispute. In contrast, Section 45 of the aforesaid Act permits the Court to decline reference to arbitration in case the Court finds that the agreement is null and void, inoperative or incapable of being performed.

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28. 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, 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. Therefore, I am of the opinion that the Court ought to act with caution and circumspection whilst examining the plea that the main contract is void or voidable. The Court ought to decline reference to arbitration only where the Court can reach the conclusion that the contract is void on a meaningful reading of the contract document itself without the requirement of any further proof.

20. I consider that though the FSL reports are there to say that the signatures of Sh. S. K. Zaman on documents are forged and fabricated. At the same time, the petitioner is also relying upon an expert report to say that signatures are not forged. In any case, it requires adjudication from a competent Court of law. At best, at this stage, both the parties are relying upon their reports. There has to be a finding on the record to authenticate the same. I consider that the view taken by the Bombay High Court seems to be a plausible one and particularly in view of Parveen Electricals Private Limited v. Galaxy Infra and Engineering Private Limited (supra) and Cox and Kings Limited v. SAP India Private Limited (supra)

21. Considering the same the matter be referred to the arbitral tribunal with This is a digitally signed order.

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i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.

ii) Mr. I.A. Ansari, Former Chief Justice, High Court of Patna, Mobile No.9973999900 is appointed as sole Arbitrator to decide all the disputes and differences between the parties arising out of the MOU dated 16.07.2012

iii) The learned Arbitrator shall first decide as a preliminary issue as to whether the MOU is a legal and valid document and whether the arbitration agreement exists between the parties.

iv) Only after the learned arbitrator finds that the arbitration agreement exists, the learned arbitrator shall adjudicate the claim if any and/or all disputes which arise out of the MOU dated 16.07.2012.

v) In the event the aforesaid preliminary issue is answered is in the negative, the mandate of the learned arbitrator would stand terminated.

vi) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the „DIAC). The remuneration of the learned Arbitrator shall be in terms of DIAC Schedule or as the parties may agree.

vii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

viii) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims

on merits of the dispute of This is a digitally signed order.

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ix) The parties shall approach the learned arbitrator within two weeks from today.

22. The petition is disposed of in the above terms.

DINESH KUMAR SHARMA, J FEBRUARY 12, 2024 Pallavi//Ak This is a digitally signed order.

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