Weiss Technik India Private Limited vs Ms. Bollupalli Madhavilatha on 7 June, 2021

Equivalent citations: AIR 2021 TELANGANA 142, AIRONLINE 2021 TEL 50

Author: P.Naveen Rao

Bench: P.Naveen Rao

*THE HONOURABLE SRI JUSTICE P.NAVEEN RAO

+ARBITRATION APPLICATION NO.3 OF 2021

% 07.06.2021

Weiss Technik India Private Limited, having its Registered Office at 2nd floor, Sudheer Tapani Towers, 3-6-271, Himayath Nagar, Hyderabad, Rep.by its Vice President - Projects and Services, Mr. Bhaskar Thobbi.

.....Applicant

Vs.

$ Ms. Bollupalli Madhavilatha, residing at Flat No.402, Itkyal Ashok Residency, Itkyala Satyanarayana Rao Marg, St.No.7, 3-6-499/a, Himayath Nagar, Hyderabad.

.....Respondent

!Counsel for the applicant : Sri Tarun G Reddy

Counsel for the Respondent : M.Krishna Chaitanya

<Gist :

>Head Note:

? Cases referred:

(2017) 9 SCC 729
(2010) 5 SCC 306
(2018) 17 SCC 95
(2016) 10 SCC 386
(2019) 8 SCC 710
2020 SCC Online SC 656

IN THE HIGH COURT FOR THE STATE OF TELANGANA

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ARBITRATION APPLICATION NO.3 OF 2021

Between:

Weiss Technik India Private Limited, having its Registered Office at 2nd floor, Sudheer Tapani Towers, 3-6-271, Himayath Nagar, Hyderabad, Rep.by its Vice President - Projects and Services, Mr. Bhaskar Thobbi.

.....Applicant

And

Ms. Bollupalli Madhavilatha, residing at Flat No.402, Itkyal Ashok Residency, Itkyala Satyanarayana Rao Marg, St.No.7, 3-6-499/a, Himayath Nagar, Hyderabad.

.....Respondent

JUDGMENT PRONOUNCED ON : 07.06.2021

THE HON'BLE SRI JUSTICE P.NAVEEN RAO

1. Whether Reporters of Local Newspapers may be allowed to see the Judgments ? : Yes

2. Whether the copies of judgment may be marked to Law Reporters/Journals : Yes

3. Whether Their Ladyship/Lordship wish to See fair Copy of the Judgment ? : No

HONOURABLE SRI JUSTICE P.NAVEEN RAO

ARBITRTION APPLICATION NO.3 OF 2021

ORDER:

Averments of the application disclose that applicant is a Company, registered under the Companies Act, 1956 having its registered office at Hyderabad, involved in manufacture of environmental simulation systems and is a subsidiary of a company by name Weiss Umwelttechnik GmbH registered in the Germany. The respondent was appointed as Head- Administration and Finance in the year 2011 and presently working as Vice President - Administration and Finance. On 31.08.2011 the applicant and the respondent entered into Employment Agreement. The applicant alleges that the respondent breached the confidence reposed in her, indulged in fraudulent activities, and misappropriated and siphoned off the funds of the applicant, causing huge loss to the applicant. Vide proceedings dated 20.03.2020, respondent was suspended from service. On 17.06.2020, show-cause notice was issued calling upon the respondent to explain the alleged illegalities committed by her. In the meantime, the applicant appointed M/s Nathu and Pathak, Chartered Accountants, to conduct a forensic audit. The forensic audit report was submitted on 15.10.2020. The report pointed out misappropriation of Rs.11,44,26,184/-.

2. After analyzing the findings of audit report, on 17.10.2020 notice was issued to the respondent proposing to refer the inter se dispute to an arbitrator by invoking clauses 13.3 and 13.4 of the Employment Agreement. In the notice, applicant suggested the name of Mr. Kranthi Kumar Reddy as sole arbitrator. In the reply PNR,J dated 23.11.2020, while accepting that there is a provision for resolution of inter se disputes by arbitration, the respondent rejected the proposal to appoint Mr. Kranthi Kumar Reddy, practicing Advocate, as sole arbitrator and instead suggested the name of Justice A.Gopal Reddy, Retired Judge of this Court as sole arbitrator. The name suggested by the respondent as arbitrator was not agreeable to the applicant. Therefore, in the reply dated 08.12.2020 the applicant suggested the name of Justice L.Narasimha Reddy, former Judge of this Court and retired Chief Justice of Patna High Court, as sole arbitrator. This was not agreeable to the respondent. Since there is no consensus on the appointment of the arbitrator, this application is filed.

3. In the counter-affidavit, respondent points out that when serious allegations of fraud are levelled, arbitration proceedings are not maintainable. The allegations of fraud are complicated and it is essential that such complex issues ought to be decided only by a civil Court on appreciation of the evidence and, therefore, the allegation of fraud committed by the respondent cannot be an arbitral issue. Further, respondent denied the existence of arbitration agreement.

4. Heard Mr. Tarun G Reddy, learned counsel for the applicant and Mr. M.Krishna Chaitanya, learned counsel for the respondent.

5. Taking through the employment agreement clauses, more particularly, clauses-5, 13.3 and 13.4,

learned counsel for the applicant submitted that the respondent failed to discharge the duties and responsibilities with utmost devotion and dedication and breached trust reposed in her. There are serious disputes on PNR,J siphoning and misappropriating the funds of the applicant and in terms of clauses 13.3 and 13.4 of the employment agreement, if there are disputes between the employer and the employee, the disputes have to be referred to arbitrator. He therefore submitted that arbitration clause was validly invoked by the applicant. He further submitted that the respondent has also agreed to refer the disputes to the arbitrator. The only area where there is no agreement between the parties is on who should be the arbitrator. He submitted that Court may appoint an arbitrator.

6. Learned counsel for respondent while reiterating the specific assertions in the counter-affidavit further submitted that in the allegation of misappropriation of funds though several other employees are also involved, but no action is initiated against them and only respondent is targeted. It amounts to arbitrary and discriminatory exercise of power by the applicant/employer. There cannot be resolution of dispute in isolation against one person when allegations cover several other employees. He further submitted that when more than one person is involved in the alleged misappropriation and playing fraud, arbitration proceedings are not maintainable against only one employee and the only remedy is civil law remedy. In support of his contention, he placed reliance on the following decision:

> i) Judgment of the Hon'ble Supreme Court in Ayyasamy vs. Paramasivam and others in Civil Appeal Nos.8245-8246 of 2016.

7. In reply, learned counsel for applicant submitted that as held by the Hon'ble Supreme Court consistently that in matters arising under Section 11(6) of the Arbitration and Conciliation Act, PNR,J 1996 (for short, the Act, 1996), the role of High Court is very limited. The High Court cannot go into intricate issues on inter se disputes. Once arbitration clause is incorporated in the agreement and if there is dispute between the parties to the agreement, the dispute has to be resolved through arbitral proceedings only.

8. In application filed under Section 11 of the Act, 1996, this Court is only required to verify existence of arbitration clause, the endeavour made by the parties for resolution of the dispute amicably and the Court is only required to consider appointment of arbitrator when there is no consensus between the parties to the contract on who should be the arbitrator. He further contended that all the objections raised herein can as well be raised before the arbitrator.

9. In support of his contentions, learned counsel placed reliance on the following decisions:

> i) Duro Felguera, S.A. Vs. Gangavaram Port Limited1;
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> ii) Indowind Energy Limited Vs. Wescare (India) Limited and another2;
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> iii) IBI Consultancy India Private Limited Vs. DSC Limited3;

iv) A.Ayyasamy Vs. A.Paramasivam and others4;

v) Rashid Raza vs. Sadaf Akhtar5; and

vi) Avitel Post Studioz Limited and others Vs. HSBC PI Holdings (Mauritius) Limited6.

(2017) 9 SCC 729 (2010) 5 SCC 306 (2018) 17 SCC 95 (2016) 10 SCC 386 (2019) 8 SCC 710 2020 SCC Online SC 656 PNR,J

10. According to applicant, by misusing her position as Head of Administration and Finance, respondent misappropriated huge amount of the applicant and it intends to recover the amount of loss caused to the applicant. Respondent violated trust reposed in her and the terms of contract of employer. Whereas, respondent denies the allegations of misappropriation and violation of terms of contract of employment. Thus, there is a dispute between the applicant and the respondent on alleged loss caused to the applicant.

11. Before considering the issue whether applicant is entitled to succeed in the application, it is necessary to clear the objections raised by learned counsel for the respondent on non-availability of arbitration clause; on arbitrability of an allegation of fraud; and on maintainability of simultaneous proceedings, criminal as well as arbitration.

WHETHER THERE EXISTS ARBITRATION CLAUSE IN THE EMPLOYMENT AGREEMENT:

12. The contract in issue is an employment contract entered into on 31.08.2011. Clause-5 of the agreement enlists the duties to be performed by the employee. It is exhaustive and covers various aspects of the employment. Under the heading 'miscellaneous', there are six clauses. Clause Nos.13.37 and 13.48 deal with "Clause 13.3 - In the event of any dispute or difference arising at any time between the parties hereto as to the construction, meaning or effect of this Agreement or any clause or thing contained herein or the rights, duties, liabilities and obligations of the parties hereto in relation to Clause 13.4 - the same shall be referred to a single arbitrator, in case the parties can agree upon one (1), within a period of thirty days upon being called by a party to do so and failing such agreement to three (3) arbitrators one (1) each to be appointed by the company and the employee and the third to be appointed by the two arbitrators so appointed. All such arbitration proceedings shall be held in Hyderabad in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time."

PNR,J arbitration. These two clauses are relevant for consideration of this case.

13. Clause-13.3 read with clause 13.4 is very exhaustive. Clause 13.3 encompass all aspects of employment. During the course of employment, if there is "any dispute" or "difference" arising between the parties, in terms of clause-13.4, the dispute/ difference has to be referred to a single arbitrator, if there is an agreement on a person to be an arbitrator. If there is no understanding on a person, there should be three arbitrators, one each to be appointed by the parties and third to be

appointed by the two arbitrators nominated by the parties.

14. As can be seen from the reply to the arbitration notice given by the respondent on 23.11.2020, respondent acknowledges the existence of arbitration clause, expresses willingness to resolve the dispute through arbitration. She only rejects the proposal to appoint Mr. Kranthi Kumar Reddy as sole arbitrator and suggested the name of a retired Judge of this Court. While so, in the counter-affidavit filed in this application, respondent takes a U- turn and denies existence of arbitration clause. Having regard to this stand of respondent, it is useful to extract last paragraph of reply dated 23.11.2020. It reads as under:

> "In view of all the facts and circumstances stated supra my client is willing to resolve the issues through arbitration and my client hereby suggest a Retd. Judge as sole arbitrator and call upon you to give your consent in appointing Sri A.Gopal Reddy (Retd.High Court Judge), O/o.Plot No.511, Road No.86, Phase-III, Film Nagar Site II, Jubilee Hills, Hyderabad, as sole Arbitrator. My client further demands you to withdraw the FIR No.141 of 2020 dated PNR,J 01.10.2020 as the same is violation of Employment Contract and agrees to initiate Arbitral proceedings."

15. Thus, it is beyond pale of doubt that there exists arbitration clause in the employment agreement, is very exhaustive, encompasses all disputes including the disputes raised herein and respondent agreed to refer the dispute to arbitrator. Having agreed to refer the dispute to an arbitrator it is uncalled for the respondent to retract and take diametrically opposite stand. Such course is not permissible.

ONCE AN ARBITRTION CLAUSE IS INCORPORATED IN THE AGREEMENT WHETHER HIGH COURT CAN GO INTO ANY OTHER ASPECT WHILE CONSIDERING AN APPLICATION UNDER SECTION 11(6) OF THE ACT:

16. It is now well settled that, after the amendment to the Act, 1996, the High Court is only required to confine its consideration as to whether an arbitration agreement exists. Nothing more, nothing less. If there is an arbitration clause, if there is a dispute inter parties and there is difference of opinion between the parties on who should be arbitrator, High Court should step in and appoint an arbitrator. While deciding the question of appointment of arbitrator, the Court has not to touch the merits of the case. [IBI Consultancy India Pvt. Ltd. Vs. DSC Limited: (2018) 17 SCC 95; Mayavati Trading Pvt. Ltd. Vs. Pradyuat Deb Burman: (2019) 8 SCC 714]. The legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator [Duro Felguera, SA Vs. Gangaram Port Ltd: (2017) 9 SCC 729].

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17. In Sajiv Prakash Vs. Seema Kukreja9, the Hon'ble Supreme Court reviewed the law on the subject. In paragraph-41, the Hon'ble Supreme Court recorded as under:

> "41. Judged by the aforesaid tests, it is obvious that whether the MoU has been novated by the SHA dated 12.04.1996 requires a detailed consideration of the clauses of the two Agreements, together with the surrounding circumstances in which these Agreements were entered into, and a full consideration of the law on the subject. None of this can be done given the limited jurisdiction of a court under Section 11 of the 1996 Act. As has been held in paragraph 148 of Vidya Drolia (supra), detailed arguments on whether an agreement which contains an arbitration clause has or has not been novated cannot possibly be decided in exercise of a limited prima facie review as to whether an arbitration agreement exists between the parties. Also, this case does not fall within the category of cases which ousts arbitration altogether, such as matters which are in rem proceedings or cases which, without doubt, concern minors, lunatics or other persons incompetent to contract. There is nothing vexatious or frivolous in the plea taken by the Appellant. On the contrary, a Section 11 court would refer the matter when contentions relating to non-arbitrability are plainly arguable, or when facts are contested. The court cannot, at this stage, enter into a mini trial or elaborate review of the facts and law which would usurp the jurisdiction of the arbitral tribunal." (emphasis supplied) WHETHER SIMULTANEOUS PROCEEDINGS ARE MAINTAINABLE:

18. On taking up/continuation of arbitral proceedings simultaneously when crime is reported on the same incident, the principle of law is well settled by catena of decisions of the Hon'ble Supreme Court. Suffice to note recent judgment in Swiss Timing Ltd Vs. Commonwealth Games 2010 Organizing Committee10. On this aspect, the Hon'ble Supreme Court held as under:

> 2021 SCC Online SC 282 (2014) 6 SCC 677 PNR,J "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." (emphasis supplied) WHEN FRAUD IS ALLEGED WHETHER ARBITRAL PROCEEDINGS ARE MAINTAINABLE:

19. The aspect of commencement of arbitral proceedings when fraud is alleged, was considered exhaustively by the Hon'ble Supreme Court in two recent decisions, Avitel Post Studioz Limited vs. HSBC P1 Holdings (Mauritius): 2020 SCC Online SC 656; and Global Mercantile Pvt.Ltd vs. Indo Unique Flame Ltd :

2021 SCC Online SC 13.

20. In Avitel (supra), the Hon'ble Supreme Court held, "33. In a recent judgment reported as Rashid Raza (supra), this Court referred to Sikri, J.'s judgment in Ayyasamy (supra) and then held:

> "4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in PNR,J para 25 are : (1) does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or (2) whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain."

34. After these judgments, it is clear that "serious allegations of fraud" arise only if either of the two tests laid down are satisfied, and not otherwise. 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 malafide 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."

(emphasis supplied)

21. In Global Mercantile (supra), the Hon'ble Supreme Court held, "52. The legislative policy of minimal interference is enshrined in Section 5, which by a non-obstante clause prohibits judicial intervention except as specified in Part I of the Arbitration Act. A conjoint reading of Sections 5 and 16 would indicate that all civil commercial matters, including the issue as to whether the substantive contract was voidable can be resolved through arbitration.

110. The civil aspect of fraud is considered to be arbitrable in contemporary arbitration jurisprudence, with the only exception being where the allegation is that the arbitration agreement itself is vitiated by fraud or fraudulent inducement, or the fraud goes to the validity of the underlying contract, and impeaches the arbitration clause itself. Another category of cases is where the substantive contract is "expressly declared to be void" under Section 10 of the Indian Contract Act, 1872 where the agreement is entered into by a minor (without following the procedure prescribed under the Guardian and Wards Act, 1890) or a lunatic, which would be with a party incompetent to enter into a contract.

PNR,J

111. The civil aspect of fraud can be adjudicated by an arbitral tribunal. The civil aspect of fraud is defined by Section 17 of the Indian Contract Act, 1872 as follows:

> "17. Fraud defined. - Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his [agent], or to induce him to enter into the contract:
>
> (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it;
>
> (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent."

116. The ground on which fraud was held to be non arbitrable earlier was that it would entail voluminous and extensive evidence, and would be too complicated to be decided in arbitration. In contemporary arbitration practice, arbitral tribunals are required to traverse through volumes of material in various kinds of disputes such as oil, natural gas, construction industry, etc. The ground that allegations of fraud are not arbitrable is a wholly archaic view, which has become obsolete, and deserves to be discarded. However, the criminal aspect of fraud, forgery, or fabrication, which would be visited with penal consequences and criminal sanctions can be adjudicated only by a court of law, since it may result in a conviction, which is in the realm of public law."

(emphasis supplied)

22. In the case on hand applicant alleges that respondent abused the authority vested in her as Head of Administration and Finance, siphoned of monies of the applicant, engaged in another business without intimation and consent of employer, manipulated and forged bogus expenses vouchers, violated duties and responsibilities, and cumulatively the applicant was subjected to huge financial loss. By referring to clause 5(k) of employment contract, applicant asserts that it can recover the loss caused to it.

PNR,J

23. In substance what is alleged by applicant is breach of trust reposed in the respondent by the employer. From the narration of instances in the notice dated 17.10.2020 setting in motion process to appoint arbitrator, it is seen that applicant alleges various misdeeds committed by respondent resulting in huge loss to the applicant. They all related to terms of employment. Thus, it is not a case of serious fraud. It is appropriate to note that the validity of underlying contract is not under challenge. Cumulatively, what is alleged, even amounting to fraud, is a civil aspect of fraud and can be arbitrable, as held by the Hon'ble Supreme Court in the above decisions.

24. Having regard to the provisions of the Act, 1996 and law laid down by the Hon'ble Supreme Court, the contentions urged by the learned counsel for the respondent have no merit and they are accordingly rejected.

25. This leaves the issue of consideration of the prayer in the application. The parties have not arrived at a consensus on who should be the arbitrator.

26. Through Arbitration clause contemplated appointment of sole arbitrator, if agreeable to both parties, it also envisages to have three arbitrators. One each to be appointed by the applicant and respondent and third to be appointed by two arbitrators. The parties to the contract have not nominated arbitrators of their choice under this clause. However, in paragraph-17 of the application, applicant wants appointment of sole arbitrator. During the course of the arguments, learned counsel for applicant also reiterated same thing. While emphasizing on the contentions PNR,J urged, learned counsel for the respondent submitted that in the event Court is not agreeing on the objections raised by the respondent, the Court may appoint sole arbitrator. However, names suggested by applicant were not agreeable to respondent and name suggested by respondent is not agreeable to applicant. Thus, as things stand now, there is no consensus on who should be the arbitrator.

27. Section 10 of the Act, 1996 reads as under:

> "Section 10. Number of arbitrators.--(1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
>
> (2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator."

28. Since parties are not able to arrive to an understanding to identify a person to act as arbitrator, in view of the provision in sub-section (2) of section 10 of the Act, sole arbitrator can be appointed by the Court to resolve the inter se disputes arising out of the employment agreement dated 31.08.2011.

29. Accordingly, the Arbitration Application is allowed appointing Hon'ble Justice Sri G.Bhavani Prasad, Retired Judge of the combined High Court of Andhra Pradesh as sole arbitrator for resolution of dispute between the applicant and the respondent arising out of employment agreement dated 31.08.2011 (Annexure- A1) in accordance with the provisions and mandate of the Act, 1996. Learned Arbitrator is entitled to fee as per the rules prescribed in the 4th schedule of the Act, 1996, which shall be borne by both parties equally.

30. It is made clear that there is no expression of opinion on merits. What is discussed herein above is only to consider the PNR,J issue whether arbitrator can be appointed to resolve inter se dispute. It is open to the respondent to raise all the objections as urged in this application, before the arbitrator.

Pending miscellaneous petitions if any shall stand closed.

_____ JUSTICE P.NAVEEN RAO Date: 07.06.2021 Kkm Note: LR Copy to be marked: Yes PNR,J HONOURABLE SRI JUSTICE P.NAVEEN RAO ARBITRTION APPLICATION NO.3 OF 2021 Date: 07.06.2021 kkm