

PENDENCY OF CRIMINAL PROCEEDINGS - NO BAR TO ARBITRATION

The Supreme Court in its recent judgment in ***Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee.***, (2014) 6 SCC 677, has held 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.

The Supreme Court made these observations in a petition filed by Swiss Timing Limited under Section 11(4) of the Arbitration and Conciliation Act, 1996 seeking to appoint an arbitrator for resolution of disputes arising from an agreement dated 11.03.2010 that was entered into for providing timing, score and result system services to the Commonwealth Games 2010 Organising Committee. The petition was resisted by the Respondent *inter-alia* on the ground that the contract itself stands vitiated and *void ab initio* in view of the clauses in the agreement that provide for indemnity and termination in the event Swiss Timing Limited indulged in corrupt, fraudulent or coercive practices with regard to the agreement. It was contended that since criminal cases had been filed alleging corruption against Mr. Suresh Kalmadi, the then Chairman of the Respondent and some of the officials of the Respondent, the contract itself was void and unenforceable. It was also contended that since the criminal cases were pending adjudication in the Trial Court and investigated by the Central Bureau of Investigation, if the arbitration proceedings are permitted to continue, it will lead to a real danger of conflicting conclusions by the two fora, leading to unnecessary confusion. Among others, strong reliance was placed on the judgment of the Supreme Court in ***N. Radhakrishnan v. Maestro Engineers.***, (2010) 1 SCC 72, where the Supreme Court relegated the dispute to a civil court despite the existence of an arbitration agreement since the dispute required detailed investigation into allegations of fraud and malpractices committed in the account books and manipulation of finances of partnership firm, which the court held cannot be properly dealt with by the arbitrator.

However, the Supreme Court observed that the judgment in *N. Radhakrishnan* case is per incuriam for its failure to take into account: - (a). Other judgments of the Supreme Court which have held that if there is an agreement for arbitration, the court must necessarily refer the dispute to arbitration (b). Section 16 of the Arbitration and Conciliation Act, 1996 which entitles the arbitration to rule on his own jurisdiction. The Supreme Court based its reasoning for leaning towards referring the matter to arbitration after weighing the practicalities that if an award is rendered by the Arbitral Tribunal, and the criminal proceedings result in a conviction rendering the underlying contract void, necessary plea can be taken on the basis of the conviction to resist the enforcement/execution of the award. However, if the dispute is not referred to arbitration and the criminal proceedings result in an acquittal leaving no ground to claim that the contract itself is void or voidable, it would lead to an undesirable result of delaying the arbitration. The Supreme Court taking note of the fact that defences of the contract being void are routinely taken just a ploy to avoid/delay reference to arbitration, observed that such grounds ought to be summarily rejected unless there is clear indication

that the defence has a reasonable chance of success. The Supreme Court also held that the arbitrator can decide even allegations of fraud in obtaining the contract and stalling of arbitration proceedings till disposal of criminal proceedings was not warranted in the facts of the case.

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*This judgment is a welcome development. There was no justifiable basis in law for the Supreme Court to have held earlier in N. Radhakrishnan case that questions of fraud could not have been enquired into by an arbitrator. The Supreme Court had erroneously relied on decisions rendered under the 1940 Arbitration Act which gave discretion to the court not to stay suits. So also the judgment of the Supreme Court in Booz Allen's Case (**Booz Allen & Hamilton Inc v. SBI Home Finance Ltd.**, (2011) 5 SCC 532) did not really draw support from any authority or from precedents for declaring that a well recognized exception to arbitration is a dispute relating to rights and liabilities which give rise to arise out of criminal offences. There are several instances where a civil wrong could also constitute a criminal offence and that could hardly be a basis to avoid arbitration. For instance, it cannot be said that an arbitrator would be disabled from entertaining a claim on a dishonoured cheque merely because drawee has contended that cheque has been forged or manipulated, or that the transaction is vitiated by fraud. The 1996 Arbitration Act empowers the arbitrator to hold oral hearings, receive evidence, appoint experts etc in order to determine the commission of fraud or any other civil wrong that may constitute criminal offence. In fact, arbitrator may be more efficient and quicker in dealing with such cases than the civil court which is already over-burdened.*

It is not uncommon to see parties abuse the criminal machinery by filing criminal cases alleging offences in respect of disputes that are purely civil in nature. In the guise of the pending criminal proceedings, or by coming up with allegations of fraud parties have tried to avoid/delay going to arbitration by seeking to contend that there are criminal proceedings pending or allegations of criminal offences raised with regard to the same dispute and that since such allegations would require detailed investigation, the arbitrator would not be competent to decide the same. The judgment also seeks to mitigate defences taken by parties that contract is void just to avoid/delay arbitration and frustrate the rights and claims of the other party. However, in the light of this judgment, the courts are more likely to refer the dispute to arbitration despite the pendency of criminal proceedings or raising of such contentions of fraud. However, when viewed from the stand point of judicial discipline, eyebrows could be raised at the manner in which a nominee of the Chief Justice acting under S. 11 of the 1996 Act in the matter of appointing an arbitrator, has declared a Supreme Court judgment of a two judge bench in Radhakrishnan' case as bad law and has overlooked the observations of another two judge bench in the Booz Allen case. Proponents of arbitration will not be complaining.



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