



Saraswati Poddar
Senior Associate

BOMBAY HIGH COURT ON ARBITRABILITY OF FRAUD

The Bombay High Court (“**HC**”), in *Nilesh Shejwal* case¹ in January 2024, held that due to a shift in the field of contemporary arbitration, where disputes involving fraud were deemed unsuitable for arbitration, arbitral tribunals are now known to review vast volumes of evidence in a wide range of dispute situations.

Hence it concluded that the antiquated notion that fraud cannot be arbitrated due to its complexity is obsolete and does not apply to modern arbitration processes.

Brief Facts.

A Share Purchase Agreement was entered into to buy out the Krushiking Agrotech Industries Private Limited (“**Krushiking**”) owned by Nilesh Shejwal (“**Shejwal**”) and by his brother Abhijit Pawar of Sakal Group, renaming the company to Agrowon Agrotech Industries Private Limited (“**Agrowon**”).

A Deed of Assignment was also entered in favour of Krushiking assigning all the ownerships rights, trademark, copyrights as well as other intellectual property rights owned by Shejwal.

By letter of appointment and employee agreement (“**Agreement**”), Shejwal was named as Chief Executive Officer (“**CEO**”).

Shejwal faced sudden office restraint and rescinded after an audit. Agrowon issued termination letter, alleging misappropriation, brand misuse and breach of trust/ contract, leading to Agrowon filing a criminal complaint.

Shejwal demanded termination revocation and full remuneration, and petitioned for appointment of arbitrator.

Agrowon denied claims, contested arbitration invocation citing breach of agreement terms. Agrowon argued contending that the dispute involving allegations of fraud and collusion resulting in financial losses for the company, was not arbitrable.

Criminal complaint was also filed against Shejwal invoking 409,² 420³ and 477A⁴ of the Indian Penal Code, 1860 (“**IPC**”).

¹*Nilesh Shejwal vs. Agrowon Agrotech Industries Private Limited*, Commercial Arbitration Petition No. 14 of 2022, 2024:BHC-AS:1296.

² Section 409: Criminal breach of trust by public, servant, or by banker, merchant or agent.

³ Section 420: Cheating and dishonestly inducing delivery of property.

⁴ Section 477A: Falsification of accounts.

Parties' Contentions before HC.

Shejwal's Contentions

He had issued notice demanding revocation of termination letter; and payment of the agreed-upon remuneration for his service tenure on the ground that his termination was in violation of principles of the natural justice.

He invoked arbitration clause on the ground that the termination was illegal and in breach of the terms of the Agreement.

Agrowon's Contentions

It denied the allegations of illegality and rejected the claim of salary and variable pay.

It asserted it has right to claim damages and contested the invocation of arbitration by Shejwal.

It contended that the dispute, involving allegations of fraud and collusion resulting in financial losses for the company, was not arbitrable.

HC's Judgment and Reasoning.

The HC:

- Relied on *A. Ayyasamy* case,⁵ where the Supreme Court laid down a twin test to be followed i.e., "1./ Does the plea of fraud 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 public domain."⁶

"The broad categories of disputes which are considered to be non-arbitrable are specifically highlighted in the decision of the Apex Court in case of Vidya Drolia vs. Durga Trading Corporation,⁷ and the penal offences which are visited with criminal sanction; offences pertaining to bribery/ corruption; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody and guardianship matter, which pertain to the status of the person; testamentary matters which pertain to disputes relating to validity of a Will, grant of probate etc. are some instances, which are to be adjudicated by Civil Courts. Thus disputes of non-arbitrability and arising out of criminal offence, are admittedly, not arbitrable."⁸

- Distinguished between rights *in rem*, adjudicated by courts, and actions *in personem*, arbitrable.
- Debunked past beliefs that fraud disputes, despite complexity, were unfit for arbitration. Modern arbitration's evolution in handling extensive evidence renders the old notion archaic; fraud is now arbitrable in contemporary practice.
- Further determined that the dispute was essentially about the Shejwal's termination and employment contract, which was a matter of arbitrable claims.
- Allowed the petition and directed the parties to raise all the contentions before the arbitrator.

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⁵ *A. Ayyasamy v. Paramasivam*, (2016)10 SCC 386.

⁶ Para 8 of the Judgement.

⁷ *Vidya Drolia vs. Durga Trading Corporation*, (2021)2 SCC1.

⁸ Para 9 of the Judgement.