

**In the High Court at Calcutta
Original Civil Jurisdiction
Commercial Division**

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 12 of 2023

**TARUN PALIWAL
VS
MLINDA SUSTAINABLE ENVIRONMENT PRIVATE LIMITED**

For the petitioner	:	Mr. Sarvapriya Mukherjee, Adv. Mr. Syed Adil Murshed, Adv. Mr. Abhidipto Tarafder, Adv.
For the respondent	:	Mr. Ayan Banerjee, Adv. Mr. Arijit Bhowmick, Adv. Ms. Debashree Dhamali, Adv. Ms. Pooja Agarwal, Adv.
Hearing concluded on	:	25.04.2023
Judgment on	:	08.05.2023

The Court:-

1. The petitioner places reliance on an Employment Contract dated January 20, 2021, allegedly entered into by the petitioner with the respondent-Company, where the petitioner was an employee. Clause 20 of the same, in particular sub-clauses 20.1 and 20.5, provide for arbitration in case of any dispute or controversy arising between the parties in relation to or in connection with or arising out of the contract.

2. The respondent-Company opposes the prayer for reference to arbitration primarily on the ground that the Employment Contract is a manufactured document and was never entered into by the parties.
3. Learned counsel for the respondent contends that the petitioner was appointed in the month of December, 2020 *vide* Offer Letter dated December 20, 2020, sent via e-Mail. The e-Mail indicates that the petitioner was offered the position of General Manager with the respondent-Company. However, *vide* e-Mail dated March 26, 2021, annexed to the affidavit-in-opposition filed by the respondent, it is seen that the petitioner asked for a revision of his designation in the appointment letter from “General Manager” to “Chief Executive Officer”. Thus, it is seen that there was no existence of any Employment Contract, nor was the same referred to in the said e-Mail.
4. It is argued that the purported Employment Contract is a forged document, which vitiates the alleged arbitration clause itself. The act of forgery, it is alleged, was committed by the petitioner in the garb of creating ‘standard employment contracts’ for existing and new employees, whereas while working towards creation of templates for the rest of the employees, the petitioner created a different document for himself by perpetrating fraud. The petitioner was all along employed by the respondent-Company at the post of General Manager and he was entrusted to oversee and manage the day to day working of the Company. Owing to his position he had significance influence and command over employees under him, taking advantage of which the petitioner manufactured the contract, it is alleged.

5. A notice of termination dated August 11, 2022 was served upon the petitioner by the Company in accordance with the terms and conditions of the offer letter dated December 29, 2020, which was the guiding document/agreement in respect of the terms of employment.
6. It is submitted that the petitioner transferred huge amounts of money fraudulently, for which the petitioner is liable to face criminal prosecution. It is further alleged that Mr. Aniruddha Bakshi, who was another employee of the Company, facilitated the creation/forging of the document.
7. Hence, the plinth of the argument of the respondent is that the document containing the purported arbitration clause was forged.
8. Learned counsel for the petitioner controverts such submissions and argues that no particulars of fraud have been pleaded in the affidavit-in-opposition by the respondents. It is submitted that the allegation of fraud has to be decided by the Arbitrator, when appointed. It is further argued that initially the respondent-Company had relied on the Employment Contract in its reply to the claim of the petitioner but later seeks to deny the same.
9. Learned counsel further argues that the existence of the Employment Contract is not *ex facie* improbable, since the same could very well be handed over even after the appointment letter.
10. Learned counsel cites an unreported judgment of this Court in *Rajia Begum Vs. Barnali Mukherjee and others* dated September 24, 2021 in support of the proposition that the question of fraud can be decided by the Arbitral Tribunal. Under Section 16 of the Arbitration and

Conciliation Act, 1996 (hereinafter referred to as, “the 1996 Act”), the Tribunal can decide on the existence or validity of the arbitration agreement itself and has ample powers under Sections 26 and 27 to appoint experts and to take assistance of the Court in taking evidence, if necessary, to decide the question of fraud and forgery.

11. Learned Counsel appearing for the petitioner next cites another co-ordinate Bench judgment of this Court reported at 2022 SCC OnLine Cal 3974 [*Jayant Chaurasia Versus Anup Kumar Chaurasia*] in support of the same proposition that the question of forgery is required to be decided by the Arbitrator. In the said case, it was held that the contention of the respondent regarding the partnership agreement being manufactured, forged and fake was merely a dilatory tactic.
12. Learned counsel then cites another co-ordinate Bench judgment reported at 2022 SCC OnLine Cal 2386 [*Yashovardhan Sinha HUF Vs. Satyatej Vyapaar (P) Ltd.*] to reiterate the same proposition.
13. The next judgment cited by the petitioner is *N.N. Global Mercantile Private Limited Vs. Indo Unique Flame Limited and others*, reported at (2021) 4 SCC 379, a three-Judge Bench decision of the Supreme Court. In paragraph no. 39.10 of the same, the Supreme Court had observed that the involvement of civil disputes on questions of fraud, misrepresentation, etc., would not lead to the conclusion that a dispute which is otherwise arbitrable ceases to be so.
14. Learned counsel for the petitioner next cites *Vidya Drolia and others Vs. Durga Trading Corporation*, another three-Judge Bench decision of the Supreme Court reported at (2021) 2 SCC 1. In paragraph

no.154.4 of the said judgment, the Supreme Court observed that rarely as a demurrer the court may interfere at the Section 8 or 11 stage, when it is manifestly and *ex facie* certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable.

15. The judgment of *NTPC Ltd. Vs. SPML Infra Ltd.*, reported at 2023 SCC OnLine 389 is also cited where the Supreme Court held that the limited scope of judicial scrutiny at the pre-referral stage is navigated through the tests of '*prima facie* review'. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably non-arbitrable and to cut-off the deadwood.
16. The primary question, thus, which arises for consideration is whether the alleged Employment Contract dated January 20, 2021 is *ex facie* tainted by fraud/forgery and/or non-existent.
17. It is also submitted by learned counsel for the petitioner that no specific particulars of fraud have been pleaded in the affidavit-in-opposition, which is a *sine qua non* for deciding issues of fraud.
18. The allegation of fraud levelled by the respondent is definitely arguable on facts, for which the same is required to be decided on evidence, which transcends the jurisdiction of this Court under Section 11 of the 1996 Act and enters into the domain of a factual enquiry by the Arbitrator.

19. *Prima facie*, the Employment Contract includes an arbitration clause, within the purview of which the present dispute falls.
20. There are certain indicators in the pleadings before this Court to show that there is sufficient doubt as to whether the Employment Contract is a non-existent one. In the affidavit-in-opposition of the respondent, the appointment letter dated December 29, 2020 is annexed, which merely recorded an offer for the position of General Manager to have been given to the petitioner. In the e-Mail dated December 29, 2020 itself, it was clearly mentioned that a duly signed contract shall be given to the petitioner on the date of reporting, that is, January 20, 2021. The date depicted on the Employment Contract produced by the petitioner corroborates the same, since it was also executed on January 20, 2021, in consonance with the offer letter.
21. Even in the reply dated September 3, 2022 of the respondent to the claim of the petitioner, it was stated that the so-called provisions/clauses allegedly relied on by the petitioner are of no avail as his Employment Contract dated January 20, 2021 “did not deal with any of these clauses” and the same was put to the strict proof. In the same reply, the respondent alleged that the multiple breach of the Employment Contract by the petitioner had caused the respondent-Company great loss and damage to reputation. Hence, there is *prima facie* material to indicate that the respondent itself admitted the existence of an Employment Contract. Since no other alternative employment contract has been produced by the

respondent, it can very well be presumed that the only Employment Contract related to the matter is the one relied on by the petitioner.

- 22.** It has been argued by the respondent that the petitioner was given employment as a General Manager and not as a Chief Executive Officer (CEO).
- 23.** It is apparent from the correspondence between the petitioner and the respondent-Company, particularly in the communication dated March 26, 2021 by the petitioner, that the latter contained the petitioner's opinion that no Board Resolution was required to make him a Manager first and then another Board Resolution to change the title to CEO. The petitioner wrote that the respondent-Company was just to change the designation of the petitioner in his appointment letter from General Manager to Chief Executive Officer and reiterated that he had not received the hard copy of the earlier appointment letter.
- 24.** That apart, there are several other communications annexed to the pleadings, including the communication dated August 8, 2021, on behalf of the respondent-Company to one Richard Azarnia, containing the discussions between the two, both functionaries of the respondent-Company, about the designation of the petitioner as CEO. Such communications go on to reveal that the question of designation was still fluid even after the petitioner was appointed.
- 25.** Moreover, in the Employment Contract produced by the petitioner, no particular designation was mentioned as such and the petitioner was described just as an "employee" of the Company.

- 26.** The petitioner also placed reliance on the Employment Contract and referred to the same specifically in his communication dated August 25, 2022, in reply to which the respondent wrote on September 3, 2022 alleging that there was a multiple breach of the Employment Contract by the petitioner and that the Employment Contract dated January 20, 2021 did not deal with any of the clauses-in-question. Hence, there are several documents to show that the Employment Contract-in-question was referred to and even relied on by the respondent-Company at various stages. Allegations have been sought to be levelled in the affidavit-in-opposition against one Aniruddha Bakshi. However, the offer letter given to the petitioner, as annexed to the affidavit-in-opposition of the respondent, itself was issued by way of an e-Mail from the said Aniruddha Bakshi.
- 27.** Thus, even as per the contentions of the respondent, it is Aniruddha Bakshi who was not only mechanical in the petitioner getting the Employment Contract but also admittedly issued the offer letter to the petitioner.
- 28.** Hence, upon a complete scrutiny of the materials-on-record, nothing is shown by the respondent to the effect that the Employment Contract is *ex facie* non-existent or tainted by fraud.
- 29.** As held in *Vidya Drolia (supra)*, even if the question of non-arbitrability or validity of the agreement is arguable and the consideration would be insufficient and inconclusive in a summary proceeding such as the present one, the parties are to be referred to arbitration. The respondent has miserably failed to satisfy the scope

of enquiry under Section 11 of the 1996 Act which, according to the Supreme Court in *Vidya Drolia (supra)*, is a restricted and limited review.

- 30.** It has been consistently held by the Court, as borne out by the several judgments of this Court as well as *N.N. Global (supra)* that arguable questions of fraud, requiring appreciation of evidence, have to be referred for adjudication before the Arbitral Tribunal itself. In *N.N. Global (supra)*, the Supreme Court categorically observed that when a civil dispute involves questions of fraud, misrepresentation, etc., such involvement *per se* would not lead to the conclusion that an otherwise arbitrable dispute ceases to be so.
- 31.** Even the question of fraud, sought to be alleged by the respondent, is an arguable issue which is required to be decided by the Arbitrator. As rightly pointed out by the petitioner, the Arbitral Tribunal has ample power to take evidence through the court and to appoint experts, apart from taking detailed evidence, for deciding all questions, including that of fraud.
- 32.** Hence, the objection taken by the petitioner is not tenable in the eye of law, particularly within the limited scope as envisaged in Section 11(6) of the 1996 Act. Moreover, the issues involved are otherwise arbitrable and fall within the purview of the arbitration clause contained in the Employment Contract cited by the petitioner.
- 33.** In such view of the matter, there cannot be any impediment in referring the matter to arbitration. Accordingly, AP No.12 of 2023 is allowed, thereby appointing Mr. Sabyasachi Choudhury (Mobile

No.9831034562), a learned advocate practising in this Court and a member of the Bar Library Club, as the sole Arbitrator to resolve the dispute between the parties, subject to obtaining his declaration/consent under Section 12 of the Arbitration and Conciliation Act, 1996.

(Sabyasachi Bhattacharyya, J.)