ORDER OCD-11

IN THE HIGH COURT AT CALCUTTA
COMMERCIAL DIVISION
ORIGINAL SIDE

AP-COM/311/2025
M/S. ELECTRONICA FINANCE LTD.
VS
M/S. SAMANTA ENTERPRISE AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 19th June 2025.

Appearance:-
Mr. Sakya Sen, Sr. Adv.
Mr. Sayan Ganguly, Adv.
Ms. Sormi Dutta, Adv.
...for petitioner.

Mr. Pujon Chatterjee, Adv.
...for respondents.

1. This is application for appointment of an arbitrator. A term loan cum hypothecation agreement dated December 31, 2021, was executed. The petitioner claims to have provided a loan for an amount of Rs.38,44,588/-, for the purpose of securing the loan, the respondents had hypothecated one equipment. The description of the secured asset is available in the Term Loan Cum Hypothecation Schedule-I. The petitioner claims to have a first charge on the said secured asset in terms of the Schedule of Hypothecation. The loan was to be repaid in 60 monthly instalments. The petitioner contends that the payment was made up to 19th instalment. Thereafter, the respondents failed and neglected to make the payment. Allegedly, the last payment was made on August 5, 2023. On November 1, 2023, the petitioner issued a

demand notice and it is submitted that the claim as of now, amounts to Rs. 24 lakhs.

2. An application was filed under Section 9 of the Arbitration and Conciliation Act, 1996 before the Learned Chief Judge, City Civil Court at Calcutta. By an order dated November 7, 2023,a receiver was appointed for the purpose of taking possession of the secured asset. However, thereafter, theLearned Court directed return of the secured asset.

3. A noticed invoking arbitration was issued on February 19, 2025. The respondents replied to the said notice. The petitioner had requested the respondents to choose one person from the panel of three, which was supplied by the petitioner. The respondents did not agree.

4. Mr. Sen submits that this is a clear case for reference of the dispute to arbitration, in view of the arbitration clause and upon proper invocation thereof.

5. Mr. Chatterjee, learned advocate for the respondent submits that the claim is not maintainable. The calculations of the petitioner are erroneous. The arbitration agreement was not signed by the respondents. The petitioner had misled the respondents into signing blank papers.

6. This Court is of the, prima facie, view that there are documents to show that the first 19 instalments werepaid by the respondents. Thus, the issue whether the payment made, as alleged by the petitioner, and

documented in this application, arose out of the subject agreement or the claims were based on certain signatures obtained from the respondents by misleading them, is a matter of trial. This issue will have to be decided on the basis of evidence to be led before the learned arbitrator.

7. In the reply dated March 21, 2025, to the notice invoking arbitration, the factum of payment by the respondents is available. It also appears that the secured asset was taken possession of by the receiver, which was directed to be returned to the respondents by the competent court. The contention was with regard to the rate of interest which was charged. In the said reply, the issue raised was that blank cheques had been obtained. There is no statement to the effect that blank papers were signed. In my, prima facie, view it is unlikely that without execution of an agreement, loan would be disbursed and payment would be made. However, the contention of the respondents that no such agreement had been entered into between the parties and blank papers and cheques were signed and issued to the petitioner, upon being misled, will have to be decided on evidence. The issue of misrepresentation and fraud can be decided by the learned Arbitrator.

8. With regard to the jurisdiction of the referral court to decide on the issue of fraud, in the matter of ***A. Ayyasamy v. A. Paramasivam,*** reported in ***(2016) 10 SCC 386***, the Hon'ble Apex Court held as follows:-

45.2. Allegations of fraud are not alien to ordinary civil courts. Generations of judges have dealt with such allegations in the context of civil and commercial disputes. If an allegation of fraud can be adjudicated upon in the course of a trial before an ordinary civil court, there is no reason or justification to exclude such disputes from the ambit and purview of a claim in arbitration. The parties who enter into commercial dealings and agree to a resolution of disputes by an arbitral forum exercise an option and express a choice of a preferred mode for the resolution of their disputes. The parties in choosing arbitration place priority upon the speed, flexibility and expertise inherent in arbitral adjudication. Once parties have agreed to refer disputes to arbitration, the court must plainly discourage and discountenance litigative strategies designed to avoid recourse to arbitration. Any other approach would seriously place in uncertainty the institutional efficacy of arbitration. Such a consequence must be eschewed.

46. The position as it obtains in other jurisdictions which value arbitration as an effective form of alternate dispute resolution is no different. In the UK, Section 24(2) of the Arbitration Act, 1950 provided that the court could revoke the authority of a tribunal to deal with claims involving issues of fraud and determine those claims itself. The English Act of 1979 provided for a stay of proceedings involving allegations of fraud. However, under the English Arbitration Act, 1996, there is no such restriction and the Arbitral Tribunal has jurisdiction to consider and rule on issues of fraud. In Fiona Trust and Holding Corpn. v. Privalov [Fiona Trust and Holding Corpn. v. Privalov, (2007) 1 All ER (Comm) 891 : 2007 Bus LR 686 (CA)] , the Court of Appeal emphasised the need to make a fresh start in imparting business efficacy to arbitral agreements. The Court of Appeal held that : (Bus LR pp. 695 H-696 B & F, paras 17 & 19)

"17. … For our part we consider that the time has now come for a line of some sort to be drawn and a fresh start made at any rate for cases arising in an international commercial context. Ordinary businessmen would be surprised at the nice distinctions drawn in the cases and the time taken up by argument in debating whether a particular case falls within one set of words or another very similar set of words. If businessmen go to the trouble of agreeing that their disputes be heard in the courts of a particular country or by a tribunal of their choice they do not expect (at any rate when they are making the contract in the first place) that time and expense will be taken in lengthy argument about the nature of particular causes of action and whether any particular cause of action comes within the meaning of the particular phrase they have chosen in their arbitration clause. If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively simple to say so.

9. ***

19. One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction."

Arbitration must provide a one-stop forum for resolution of disputes. The Court of Appeal held that if arbitrators can decide whether a contract is void for initial illegality, there is no reason why they should not decide whether a contract is procured by bribery, just as much as they can decide whether a contract has been vitiated by misrepresentation or non-disclosure.

50. Lord Hoffmann held that if this is the purpose underlying an agreement to arbitrate, it would be inconceivable that parties would have intended that some, amongst their disputes should first be resolved by a court before they proceed to arbitration : (Premium Nafta Products case [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , Bus LR pp. 1723 D-E, para 7)

"7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention."

51. While affirming the judgment of the Court of Appeal, the House of Lords held : (Premium Nafta Products case [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , Bus LR p. 1725 A-B & D-E, paras 13 & 15)

"13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore, L.J. remarked, at para 17:

'if any businessmen did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.'

10. ***

15. If one adopts this approach, the language of Clause 41 of Shelltime 4 contains nothing to exclude disputes about the validity of the contract, whether on the grounds that it was procured by fraud, bribery, misrepresentation or anything else. In my opinion it therefore applies to the present dispute."

This principle should guide the approach when a defence of fraud is raised before a judicial authority to oppose a reference to arbitration. The arbitration agreement between the parties stands distinct from the contract in which it is contained, as a matter of law and consequence. Even the invalidity of the main agreement does not ipso jure result in the invalidity of the arbitration agreement. The parties having agreed to refer disputes to arbitration, the plain meaning and effect of Section 8 must ensue.

55. Similarly, Redfern and Hunter on International Arbitration [6th Edn., para 2.154] contains the following statement of legal position in relation to arbitrability of matters involving fraud:

"(vi) Fraud

Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the Arbitral Tribunal to decline jurisdiction. Indeed, in the heat of battle, such allegations are frequently made, although much less frequently proven."

9. In the matter of ***Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.,*** reported in ***(2021) 4 SCC 713***, the Hon'ble Apex Court held as follows:-

"**35.** 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 mala fide 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."

10. The Arbitration and Conciliation Act imposes an affirmative obligation that, every judiciary must follow to uphold and make operative the agreement. Unless it is, prima facie, available from the record, that the agreement is null and void and/or inoperative or incapable of being performed on account of fraud, the referral Court should not indulge into a roving investigation, which is within the domain of the learned arbitrator.

11. Under such circumstances, this Court allows the application and refers the dispute to a learned arbitrator. This Court appoints Mr. Abhidipto Tarafdar learned Advocate, Bar Library Club, as a sole arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996. The learned arbitrator shall fix his remuneration as per the Schedule of the Act. All questions raised by the respondents including arbitrability of the dispute, admissibility of the claim and limitation etc. are to be raised by the respondents before the learned arbitrator.

12. The application is disposed of.

(SHAMPA SARKAR, J.)

S. Kumar / R.D. Barua