OCD 9

ORDER SHEET
AP-COM/526/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S SHOP RIGHTEPAY CORPORATION LIMITED
VS
SMT MADHUMITA SARKAR AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 4th March, 2025.

Appearance:
Mr. Piyush Biswas, Adv.
Mr. Kamal Mishra, Adv.
Mr. Pratap Sanfui, Adv.
...for the petitioner

Ms. Sulagna Mukherjee, Adv.
Mr. Victor Chatterjee, Adv.
Ms. Sweta Saha, Adv.
...for the respondents

The Court:

1. This is an application for appointment of an Arbitrator on the strength of Clause 25 of the Leave and License Agreement. The Leave and License Agreement was allegedly entered into between the petitioner and the respondents. The respondents were described as licensors and the petitioner as the licensee. It is submitted that, under the said agreement, the licensors had let out a property described in the schedule thereof, to the petitioner for a period of five years on and from August 1, 2021 to July 30, 2026. The terms and conditions provided

the mode and manner of user, payment of rent and rights and obligations of the parties. Documents have been annexed to show that fire license and a permanent certificate of enlistment were granted to the petitioner by the statutory authorities, in respect of the business being run from the premises. Allegedly, the disputes and differences arose, on and from April 10, 2023. The respondents allegedly locked up the premises, thereby, restraining the directors, staff and representatives of the petitioner from entering into the premises.

2. Various disputes were raised by a letter dated January 22, 2024. The respondents' learned advocate denied the existence of the agreement by a reply dated February 01, 2024. It was alleged that the petitioner had manufactured the documents and the same did not have any existence in the eye of law. Thereafter, the petitioner invoked arbitration, by a letter dated February 29, 2024.
3. Learned advocate for the petitioner submits that the allegation of forgery and fabrication of the documents are arbitrable issues, which have to be decided upon weighing evidence and the referral court should not venture into an investigation on such issue. Arbitrability should be adjudicated by the learned Arbitrator.
4. Ms. Mukherjee, learned advocate for the respondents vehemently opposes the application and submits that the Hon'ble Apex Court had laid down the law relating to the authority of the referral court to reject an application for appointment of an arbitrator. In case of serious allegations of fraud, which goes to the very root of the question of

existence of the agreement, the referral court should refrain from referring the dispute to arbitration. She relies on the decision of the Delhi High Court in the matter of *Amrish Gupta vs. Gurchait Singh Chima (Deceased) Through His LR and Widow Mrs. Daljeet Kaur Chima* passed on 18th April, 2022 in *O.M.P. (COMM) 68/2021,* in support of her contention. She submits that allegation of fraud is an exception to arbitrability of a dispute. Such allegation impinges on the existence of the arbitration agreement. The allegation that the arbitration agreement does not exist, because the document was forged and fabricated, strikes at the very existence of the arbitration agreement. Therefore, such disputes are not arbitrable.

5. Ms. Mukherjee has taken the court through three other Leave and License Agreements of similar nature, which were executed in respect of portions of the entire building. The scheduled property is also situated in the said building. It is submitted that those three Leave and License Agreements were admitted documents and the director of the petitioner company had signed those agreements on behalf of three other companies. However, no such agreement with the petitioner company, of which Mr. Brojo Gopal Chatterjee was also a director, had ever been entered into. Ms. Mukherjee further refers to two documents to demonstrate that, Brojo Gopal had requested for renewal of the Leave and Licence in favour of the petitioner and for cancellation of the one with TRIO.

6. This Court has perused the Leave and License Agreement dated August 1, 2021, which is the subject matter of this application. The existence of the arbitration clause is available. The admissibility of the said agreement as evidence, is no longer to be decided at the referral stage. The learned Arbitrator shall deal with such issue at the appropriate stage, if raised.
7. Whether, the allegation of fraud made by the respondent is so serious that, it ex facie discloses commission of a criminal offence, which should deter the referral court from referring the dispute, is to be considered on the facts of the case and the papers before this Court. It is not in dispute that, there was a jural relationship between the respondents and other companies, and the director of the petitioner company was also the director of those companies who were lessees in the admitted leave and license agreements. He was a signatory.
8. The fact that Brojo Gopal had approached the licensors for cancellation of the licence in favour TRIO and prayed for renewal of the Leave and License in favour of the petitioner, is also on record. The response of the respondents to the request for renewal of the Leave and License Agreement in favour of the petitioner, thereby cancelling the Leave and License Agreement issued in favour of the TRIO, is not before the Court. There are civil suits pending, but this Court finds that those suits do not arise out of the subject agreement. Under such circumstances, what transpired between the parties during their relationship as licensors and licensee or lessor or lessee as the case may be, while

discharging their rights and obligations arising out of the three prior Leave and License agreements, are matters of evidence. While the petitioner argues that TRIO was renamed as M/s. Shop Rightepay, Ms. Mukherjee vehemently opposes such contention and submits that the petitioner company did not have any existence and was not a licensee at any point of time. There is a fire license and a permanent enlistment certificate in favour of the petitioner.

9. Under such circumstances, this Court is of the view that the issue of forgery and fabrication of document is a triable issue. The issue of non-arbitrability as raised by Ms. Mukherjee can be raised before the learned Arbitrator. The Arbitrator is empowered under the law to decide on his/her jurisdiction and arbitrability of the disputes. The Arbitrator can also seek expert opinion by appointing a handwriting expert.

10. With regard to the jurisdiction of the referral court to decide on the issue of fraud, the Hon'ble Apex Court in ***A. Ayyasamy v. A. Paramasivam,*** reported in ***(2016) 10 SCC 386***, 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. <u>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</u>. 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."

11. 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."

12. The above two tests are not satisfied in this case. Under such circumstances, this Court is of the view that this is not a case where the commission of fraud and fabrication of the document, stares in the face of this Court, leaving the Court with no other option, but to reject this application. The respondents can also approach the learned Arbitrator under Section 16 of the said Act, challenging arbitrability of the issue.

13. The observations made herein are, prima facie, and the learned Arbitrator shall proceed in accordance with law.

14. Accordingly, the Court appoints Mr. Sarosij Dasgupta, learned Advocate, as the Arbitrator, to arbitrate upon the dispute 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.

15. AP-COM/526/2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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