OCD-14

AP-COM/590/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISON

H P ISPAT PVT LTD
VS
MD MUSTAQUIM

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 10th March, 2025.

Appearance:
Mr. Aniruddha Mitra, Sr. Adv.
Mr. Debraj Sahu, Adv.
Mr. Bhaskar Dwivedi, Adv.
Mr. Souvik Kundu, Adv.
. . .for the petitioner.

Mr. Sanjay Saha, Adv.
Mr. Lal Ratan Mondal, Adv.,
Mr. Probal Sarkar, Adv.
. . .for the respondent.

The Court:

1. This is an application for appointment of a learned Arbitrator, on the basis of a clause contained in the Memorandum of Understanding (MoU) dated January 18, 2024. The arbitration clause reads as follows:-

   "It is mutually agreed and accepted by the parties to this agreement that any and all disputes and/or differences or controversy or claim arising out of or in relation to and/or in connection with and/or touching and/or concerning and/or arising out of this agreement or any disputes and/or differences in respect of or in relation to or in connection with any and all transaction between the parties, whether past, present or future, for sale/purchase/distribution/supply of goods of whatsoever nature or description, including but not limited to determination of any liability or rights or duties of the parties hereto, breach, termination or invalidity of any transaction/agreement, the existence or validity or interpretation or performance of any right or obligation of the parties arising out of this agreement or in relation to any past, present or future transactions between the parties, as the case maybe, shall be referred to and finally be adjudicated by a Sole Arbitrator under the provisions of the Arbitration & Conciliation Act, 1996. The Arbitrator shall be appointed under the provisions of the Arbitration & Conciliation Act, 1996. It is further agreed by and between the parties that the Arbitrator shall hold the arbitration proceeding under Fast-Track procedure as per Section 29B of the Arbitration & Conciliation Act, 1996. The seat/venue/place of arbitration will be with in jurisdiction of High Court, Calcutta. The Hon'ble High Court at Calcutta shall have alone exclusive jurisdiction only. Time shall be essence of the contract."

2. The clause provides that any difference, dispute or controversy with regard to the said agreement whether past, present or future, for sale, purchase, distribution or supply of goods, including the validity and interpretation of the performance of any rights and obligations arising therefrom, shall be referred to the adjudication by a sole Arbitrator under the provisions of the Arbitration and Conciliation Act, 1996, The

clause also provides for a fast track adjudication as per Section 29B of the said Act.

3. The petitioner contends that on account of non-payment of the dues, a dispute arose. By a letter dated February 14, 2024, the Arbitration clause was invoked through the learned advocate for the petitioner. A name of another learned advocate, who would act as the sole arbitrator, was proposed. The notice was received by the respondent on February 19, 2024. By a letter dated February 23, 2024, the learned advocate for the respondent replied.

4. Upon expiry of thirty days from service of the said notice invoking arbitration, this application has been filed before the referral Court, for reference of the dispute to a sole Arbitrator, in terms of the said clause. It is the contention of the petitioner that, in the usual course of business, some time in 2022, the respondent introduced himself as the sole proprietor of the proprietorship concern namely India Cement Suppliers. The respondent expressed intention to take dealership of the TMT Bars and other Metallic products manufactured by the petitioner. The outstanding dues, allegedly payable to the petitioner, is more than Rs.31 crores. It is specifically stated that out of the total receivable, part payment of Rs.2,26,13,860/- was made by the respondent to the petitioner. It is the case of the petitioner that a cheque issued by the respondent was dishonoured and proceedings in respect thereof, are pending.

5. Mr. Saha, learned advocate for the respondent, submits that the MoU was never executed. He relies on the Google Map annexed to the application in support of the contention that, the respondent was all along present at Murshidabad on the day the petitioner claimed that the document had been executed at the office of the petitioner situated at 1, R.N. Mukherjee Road, Kolkata 700001. The next contention of the respondent is that, a first information report was registered on the complaint made by the respondent with regard to the alleged forgery and fabrication of the document. Mr. Saha submits that two blank letter heads of the respondent had been obtained by the petitioner who used those letterheads to print the MoU along with the Arbitration Clause and forged the respondent's signature. According to learned Advocate, when the very existence of the document was in question, the referral court should not refer the dispute to arbitration.

6. Heard the learned advocates for the respective parties. The only issue to be decided in this matter is whether the referral court should exercise power under Section 11(6) of the Arbitration and Conciliation Act, 1996 and refer the dispute to arbitration.

7. The existence of the MoU is available from the records. There is an arbitration clause. A revisional court had stayed the proceedings arising out of the First Information Report which was registered on the basis of the complaint by the respondent, being G.R. Case No. 570/2024, which was pending before the learned Additional Chief Judicial Magistrate, Murshidabad, inter alia, opining that an arguable

case had been made out for quashing the proceedings. Thus, the investigation which was initiated by the police authorities, on the complaint lodged by the respondent to the effect that the MoU was a creature of fraud and forgery, has been stayed by a court of competent jurisdiction with, prima facie, observations.

8. Under such circumstances, this Court is not in a position to hold that the allegation of fraud goes to the very root of the matter and the prayer for appointment of the Arbitrator should be rejected on such allegation. The law is well settled. The allegation of fraud has to be serious and all pervasive. The referral Court must arrive at a conclusion that, under no circumstances, the party who alleges fraud, could have signed a document of such nature at any point of time. From the affidavit in opposition which has been filed by the respondent, it appears that the respondent and the petitioner were in a continuous business relationship. In paragraph 5, it has been averred that one Mr. Subhajit Sarkar, who introduced himself as the sales manager of the petitioner, proposed to enter into business with the respondent. The respondent started to deal in the goods and products supplied by the petitioner, from the later part of 2022. Within a short span of time, an amount of Rs.23,26,288/- was paid by the respondent to the petitioner, as per the averments in the opposition. It has also been averred that, on the request of Mr. Subhajit Sarkar, two blank letter heads had been handed over to the said representative of the petitioner. Upon the death of Subhajit Sarkar sometime in November 2023, disputes cropped up. The

respondent relies on several payments which were made with regard to the TMT Bars supplied by the petitioner.

9. 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.

10. ***

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.'

11. ***

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 [6thEdn., 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."

12. 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."

13. Under such circumstances, I, prima facie, find from the records that, the parties had a long standing business relationship. Several transactions took place between the parties. Two letter heads were made available to the petitioner, during the course of business. The issue as to whether those letter heads were actually used for an illegal

purpose, i.e., to create an arbitration agreement, is an arbitrable dispute.

14. An Arbitrator is competent to decide such matters and the learned Arbitrator can also appoint a handwriting expert in deciding the issue, by scanning the evidence. This referral court does not find that the allegation of fraud is ex-facie available from the records. With regard to the location of the respondent and the Google map which has been annexed, I am of the view that this is also a matter of evidence, which can be ascertained upon getting the relevant information from the service provider of the respondent.

15. Under such circumstances, this Court is of the view that all objections available to the respondent, including the validity and existence of the said MoU and the allegation of fraud and forgery, shall be raised before the learned arbitrator and the learned arbitrator shall dispose of all issues, upon weighing the evidence.

16. Under such circumstances, this Court allows the application, by keeping all points open for adjudication.

17. The Court appoints Mr. Farhan Ghaffar, learned Advocate, Bar Association Room No.7, [Mobile No.9830179148], as the learned Arbitrator, to arbitrate upon the dispute between the parties. This order is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

18. The learned Arbitrator shall fix his own remuneration as per the provisions of the Arbitration and Conciliation Act.

19. AP-COM/590/2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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