

Calcutta High Court

HON'BLE JUDGE(S): SHEKHAR B. SARAF , J

M/S UGRO CAPITAL LIMITED (FORMERLY KNOWN AS CHOKHANI SECURITIES LTD.) V.

RAJ DRUGAGENCY

A.P. No. 200 of 2022, decided on 26/04/2023

Arbitration and Conciliation Act (26 of 1996) , S.11(6)— Appointment of arbitrator - Arbitrable dispute - Dispute relating to default in re-payment of loan obtained by respondent on basis of agreement which authorised him to run business of proprietorship concern and make use of its bank account - Allegations that amount was siphoned off by respondent raises dispute inter-se parties - Mere possibility or existence of criminal proceedings would not make dispute non-arbitrable - Sole Arbitrator appointed by Court.

(Para 14, 15)

Case Referred :

Chronological Paras

AIROnline 2020 SC 929	Para No.(9, 12, 13)
AIR 2020 SC (Supp) 470 : AIROnline 2020 SC 691	Para No.(8, 11, 13)
AIROnline 2019 SC 1046	Para No.(8, 10, 13)
AIR 2011 SC 2507 : 2011 AIR SCW 3089	Para No.(11)
2010 AIR SCW 498	Para No.(11)
AIR 2010 SC (Supp) 307 : 2010 AIR SCW 331	Para No.(12)
AIROnline 2012 DEL 70	Para No.(12)

Name of Advocates

Rohit Banerjee, Shrayashee Das for Petitioner; Tanish Geriwala, Ishaan Saha, Sananda Gangulifor Respondent.

1. **ORDER :-**The petitioner, M/s Ugro Capital Limited., is a company having its registered office at Equinoc Business Park, Tower- II, 4th Floor, Off BKC, LBS Road, Kurla, Mumbai- 400070, Maharashtra, India having its branch office at 20B, British India Street, 6th Floor, Kolkata- 700069. It is engaged in the business of providing customized loan services to its customers. It holds a license issued by the Reserve Bank of India to carry on business as a Non-Banking Financial Company.

2. The respondent no. 1, Raj Drug Agency, is a proprietorship concern having its place of business at M 42, Paharpur Road, Garden Reach, Kolkata- 700024. It is engaged in the business of pharmaceuticals and medical drugs. The respondent no. 2, Mr. Prakash Chandra Gupta, is the proprietor of respondent no. 1. The respondent no. 3, Kiran Gupta is the next of kin of respondent no. 2 and the respondent no. 4, Mr. Saikat Pal is an associate of the rest of the respondents.

Relevant facts

3. On February 28, 2000, vide an agreement, respondent no. 4 was trusted to manage and run the business by respondent no. 2. Respondent no. 4 was also allowed to use the bank account and all other license and permissions for running the pharmaceuticals business.

4. The respondents had obtained a credit facility repayable with interest from the petitioner under an agreement dated 28th November 2020 [hereinafter referred to as 'the Agreement']. The petitioner had disbursed the loan amount of Rs. 25,45,000 on 28th November 2020 through electronic transfer fund to the bank account of the respondent no. 1, maintained with Axis Bank.

5. A credit facility of Rs. 25,45,000 was advanced to the borrowers according to the Agreement, which was repayable within 36 months with floating rate of interest at the rate of 19.5% per annum. The agreed quantum of instalment payable per month was Rs. 93,934 with effect from January 10, 2021 till December 10, 2023.

6. The respondents had started paying interest by way of ECS. On September 10th, 2021, ECS was dishonoured as the bank account of the respondent was frozen/blocked. The petitioners caused issuance of notice dated October 07, 2021 under Section 25 of the Payment and Settlement System Act, 2007, demanding payment of the said dishonoured electric fund transfer within the statutory period. The respondents defaulted in re-payment of the instalments and hence the loan was recalled.

7. The petitioner had filed an application under section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] for interim orders being A.P. No. 39 of 2022. The Hon'ble Court directed an injunction vide order dated 2nd March 2022 on the property of the respondents and the bank account to the extent of Rs. 24,40,945.51. The respondents have filed an appeal against the order being A.P.O. No. 62 of 2022, which is pending. Thereafter, the petitioner preferred the instant application, being A.P. 200 of 2022, under Section 11 of the Act for appointment of the arbitrator.

Rival Submissions

8. Mr. Rohit Banerjee, appearing on behalf of the petitioner made the following submissions :-

a) Despite receiving the notice, the respondent has deliberately and wilfully chosen not to make payments and departed from the principal obligation to pay monthly instalment.

b) The respondent no. 2 and 3 have relied upon an F.I.R. dated September 18, 2021 against respondent no. 4 who is being accused of forgery. Such documents are irrelevant, internal and do not discharge the obligation of the respondents. The petitioner no. 1 has received the payment from the petitioner vide the Agreement wherein respondents no. 2 to 4 are mentioned as borrowers along- with their signatures. The Agreement clearly has an arbitration clause and therefore the matter should be referred to arbitration.

c) The respondents cannot treat the contract piecemeal for their convenience and rescind

from the obligation to repay all the credit facilities availed by it.

d) The allegations of fraud are not such that the power of this Court to appoint an arbitrator would wither away. Reliance was placed on *Rashid Raza v. Sadaf Akhtar* (2019) 8 SCC 710 :

(**AIROnline 2019 SC 1046**) and *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited* (2021) 4 SCC 713 : (**AIR 2020 SC (Supp) 470**).

9. Mr. Tanish Geriwala, advocate appearing on behalf of the respondent has made the following submissions :-

a) The sanction letter issued by the petitioner has not been signed by the respondent no. 2 and 3 [hereinafter referred to as 'the answering respondents'] and signatures appearing on the documents are blatant forgeries. The answering respondents had no knowledge of the Agreement and they have not in any way consented to be bound by the terms of it.

b) Respondent no. 4 has confessed that he had taken undue advantage of respondent no. 2's condition and had taken diverse loans in the name of respondent no. 1 without the knowledge or consent of the answering respondents.

c) Inspector of Metiabruz Police Station has brought to the notice of Ld. ACJM Alipore that Ugro Capital has failed to furnish the original loan agreement for signature verification.

d) The answering respondents have not received any money from the petitioner and that the money has been appropriated by respondent no. 4. The answering respondents are not bound by the Agreement and accordingly cannot be held liable for the fraudulent and unlawful acts of the respondent no. 4.

e) The very existence of the arbitration agreement is vitiated by fraud as the action of respondent no. 4 entering into the agreement having the arbitration clause is an act of fraud coupled with forgery, rendering the Agreement void. Hence, the application is not maintainable and no reference to arbitration can proceed on the basis of an arbitration agreement vitiated by fraud.

f) A suit has been instituted being CS No 1544 of 2021 before the Ld. City Civil Court seeking a declaration that the Agreement is invalid.

g) This Hon'ble Court cannot exercise its powers under section 11 of the Act to appoint an arbitrator or pass any ad-interim order(s) as sought for in the said application as any arbitration cannot proceed out of an agreement ex-facie invalidated by fraud and in circumstances wherein the subject matter is non-arbitrable. Reliance was placed on *Vidya Drolia and Others v. Durga Trading Corporation* (2021) 2 SCC 1 : (**AIROnline 2020 SC 929**) for the said proposition.

Analysis

10. The Supreme Court in *Rashid Raza* (**AIROnline 2019 SC 1046**) (supra) had laid down a two-fold test to decide upon allegations of fraud vis-à-vis appointment of

arbitrators. The relevant paragraphs are extracted below :-

'4. The principles of law laid down in this appeal make a distinction between serious allegations of forgery/fabrication in support of the plea of fraud as opposed to "simple allegations". Two working tests laid down in para 25 are: (1) does this plea 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 the public domain.

The Apex Court pronounced that in case the answer to any of the above two tests was in the positive, reference to arbitration must be denied.

11. The tests outlined above were further explained by the Supreme Court in Avitel Post Studios Limited (**AIR 2020 SC (Supp) 470**) (supra). The germane portion of the judgement is reproduced herein below :-

'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.'

Emphasis Added

The Court also elaborated on the consequences of there being a possibility or existence of criminal proceedings, on arbitrability of the dispute. The relevant paragraph is extracted below :-

'43. In the light of the aforesaid judgments, para 27(vi) of Afcons [Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24 : (2010) 3 SCC (Civ) 235] : (**2010 AIR SCW 4983**) and para 36(i) of Booz Allen [Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] : (**AIR 2011 SC 2507**), must now be

read subject to the rider that the same set of facts may lead to civil and criminal proceedings and if it is clear that a civil dispute involves questions of fraud, misrepresentation, etc. which can be the subject-matter of such proceeding under Section 17 of the Contract Act, and/or the tort of deceit, the mere fact that criminal proceedings can or have been instituted in respect of the same subject matter would not lead to the conclusion that a dispute which is otherwise arbitrable, ceases to be so.'

12. Mr. Tanish Geriwala, advocate appearing on behalf of the answering respondents relied

upon VidyaDrolia (**AIROnline 2020 SC 929**)(supra) to contend that the issue at hand is non-arbitrable owing to there being serious allegations of fraud relating to the validity of the Agreement itself,

which also carries the arbitration clause. Therefore, reference to certain paragraphs of Vidya Drolia

(supra) is apposite, which are extracted below :-

'76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

(1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

(2) When cause of action and subject-matter of the dispute affects third-party rights; have ergaomnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

(3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

(4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrableas per mandatory statute(s).

(5) These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

* * *

78. In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] : **(2010 AIR SCW 331)** inter alia observing that allegations of fraud can (sic cannot) be made a subject-matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full Bench decision of the Delhi High Court in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] : (AIROnline 2012 DEL 70) which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable.'

Emphasis Added

13. The Supreme Court, in Vidya Drolia (**AIROnline 2020 SC 929**)(supra), concurred with the view taken in Rashid Raza (**AIROnline 2019 SC 1046**)(supra) and Avitel Post

Studioz Limited (**AIR 2020 SC (Supp) 470**)(supra). Furthermore, the Court in Vidya Drolia (supra) also

interpreted, as it appears from a reading of the portion extracted above, the law with respect to

arbitrability and holds that the existence of certain kinds of fraud would make the subject matter non-arbitrable. However, such non-arbitrability has to be considered alongside the other two decisions in Rashid Raza (supra) and Avitel Post Studioz Limited (supra). A holistic reading of all these judgements would illuminate the law in the realm of non-arbitrability jurisprudence, which is rather clouded with uncertainty. It is only in clear circumstances where the Court unerringly finds that the agreement or the arbitration clause does not exist, as in, the party against whom breach is alleged has not entered into the agreement, will the Court hold the matter to be non-arbitrable and refuse to refer the matter to arbitration.

Conclusion

14. It appears that the money was credited to the account of the respondent no.1. It is also evident that respondent no. 4 was granted the power to run the business of respondent no. 1 and make use of its bank accounts, by respondent no. 2 vide agreement dated February 28, 2000. Furthermore, such agreement was renewed on July 15, 2015 for a period of ten years.

15. In my opinion, after considering the facts above, a clear inference cannot be drawn that the Agreement was not entered into by the answering respondents. Correspondingly, the allegations that the amount was siphoned off by the respondent raise disputes inter-se parties and the mere possibility or existence of criminal proceedings in respect of the same would not make the dispute non-arbitrable. Therefore, the matter should be referred to arbitration.

16. Accordingly, I appoint Ms. Radhika Singh, Advocate (Mobile No. 9831090675) as the sole arbitrator to resolve the dispute between the parties. The appointment is subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court within four weeks from today.

17. A.P. 200 of 2022 is therefore allowed and disposed of.

18. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

Order Accordingly