

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH (COURT-I)
KOLKATA**

Comp.Appl No. 36/KB/2021

IN

C.P. No. 1093/KB/2020

An application under Section 8 of the Arbitration and Conciliation Act, 1996

In the matter of :-

Kumar Sachin & Anr.

..... Applicants

And

In the matter of

Manoj Kumar Sahu & Anr.

..... Petitioners

Versus

Pali Hills Breweries Private Limited & Ors.

..... Respondents

Date of pronouncement:- 08 May 2023

Appearances (via Hybrid mode)

For the Applicants : Mr. Siddhartha Mitra, Senior Advocate
: Mr. D.N. Sharma, Advocate
: Mr. Domingo Gomes, Advocate
: Mrs. Roopa Sheth Mitra, Advocate

For Manoj Kumar Sahu : Mr. Ratnanko Banerjee, Senior Advocate
: Mr. Kanishk Kejriwal, Advocate
: Mr. Yash B
: Mr. Utkursh Singh, Advocate

Coram:

Rohit Kapoor: Member (Judicial)

Balraj Joshi: Member (Technical)

ORDER

Per Rohit Kapoor, Member (Judicial)

1. The instant application has been filed by the Respondent no 2 and 3 in CP 1093/KB/2020 under section 8 of the Arbitration and the Conciliation Act 1996 to enforce an arbitration agreement as contained in the Memorandum of Understanding dated 3rd October 2019 (MoU) to which the petitioner no.1 in CP 1093/KB/2020 i.e., the Respondent herein is a party and signatory.

Submissions by the Learned Senior Counsel appearing for the Applicant :-

2. The Ld counsel for the applicants submit that there was an arbitration agreement entered between the applicants and the Respondent herein. The Arbitration Clause as contained in the said MOU is as follows:-

"In the event of any dispute or difference between the parties herein, arising out of or in connection with the said Memorandum of Understanding and/or its scope and/or interpretation thereof and/or relating to matters covered thereunder, the same shall be referred to Arbitration of two Arbitrators to be appointed by the parties herein, who shall then appoint the third arbitrator who shall be the Presiding Arbitrator. The decision of the Arbitrators shall be final and binding on the parties. The law governing the Arbitration shall be as under the Arbitration & Conciliation Act 1996 and/or any statutory modifications thereof. The language in which the arbitration proceedings will be conducted shall be English and the substantive law will be the Indian Law. The venue of such arbitration shall be at Ranchi and the Courts at Jharkhand shall have exclusive jurisdiction in respect of this Agreement."

3. It is submitted that the main Company Petition being CP 1093/KB/2020 filed under Section 241, 242 of the Companies Act, 2013 relates to disputes and differences which are and form the subject matter of arbitration agreement, as contained in the Memorandum of Understanding dated 3rd October, 2019.¹

¹ Annexure-A of the Application

4. It is further submitted that the Applicants have not filed any response to the main company petition till date. The applicants have filed this instant application without prejudice to their rights and contentions in respect of the allegations levelled against them by the petitioner no.1 in the said company petition and reserve their right to deal with the same as and when such occasion arises. They also state that nothing in the said company petition, are admitted or deemed to have been admitted by them.
5. The Ld. Counsel for the applicants submitted that the disputes raised and the claims made in the Company Petition being CP 1093/KB/2020 centre around the transfer of shares by the petitioner no.1 to the respondent no.3, and the resignation of the petitioner no.1 as director of the respondent no.1 company. The said company petition inter alia under Section 241, 242 of the Companies Act, 2013 was moved on behalf of the petitioners on 24th December, 2020 before the Hon'ble Tribunal and an order² was passed granting interim reliefs as prayed for by the petitioners. Upon a bare perusal of the said order, it would show that the disputes raised and the claims made by the petitioners in the company petition and the reliefs prayed for therein are directly covered and are the subject matter of an arbitration agreement as contained in the Memorandum of Understanding dated 3rd October, 2019 entered between the parties thereto.
6. It is submitted on behalf of the applicants that a valid arbitration agreement exists that concerns the subject matter of the disputes raised in the said Company Petition and as such the disputes between the parties to the Arbitration Agreement should be referred to arbitration in terms of the Arbitration agreement. The said Arbitration Agreement and/or the existence thereof was completely suppressed from the Tribunal, for reasons best known to the Petitioners.
7. The resignation of the petitioner no.1 as director of the respondent no.1 company and the appointment of the respondent no.9 on the basis of the Board Resolution dated 2nd July, 2020 subsequently ratified at the AGM on 30th September, 2020 and the transfer of shares by the petitioner no.1 in favour of the respondent no.3 are matters which form

² Annexure-B of the Application

the subject matter of the Memorandum of Understanding and are therefore arbitrable in terms of the arbitration clause contained therein. The petitioners have approached the Hon'ble Tribunal with unclean hands and the ad interim order passed on the 24 December, 2020 should be vacated on this ground alone.

8. The applicants state that considering the existence of a valid arbitration agreement, the Hon'ble Tribunal should be pleased to refer the parties, being the petitioner no.1 and the respondents no.1, 2 and 3 to arbitration and to stay all further proceedings in the CP 1093/KB/2020 and vacate the ad interim order passed on 24th December, 2020.
9. The applicants have already invoked the Arbitration clause as contained in the said MOU dated 3rd October 2019 by a letter dated 15 January, 2021.³
10. The Applicant also submits that only for the purpose of obtaining the interim order, the Respondent herein claimed that the original share certificates were lying with them and when they were asked to produce the same, they had changed their stand and stated that no share certificates were ever issued by the Company. As the Respondent herein had not brought anything on record to demonstrate his shareholding in the company, therefore the main company petition is not maintainable.
11. It has been further argued by the learned Senior Counsel for the Applicant, the issue of non-existent and non-valid agreement can only be gone through by the arbitrator therefore the allegation of forgery and consequently it being an invalid agreement can only be seen before the Arbitrator. Reliance has been placed on a judgment passed by the Hon'ble Supreme Court in *Pravin Electricals Private Limited v. Galaxy Infra and Engineering Private Limited, (2021) 5 SCC 671*.
12. It was further argued that issue of fraud is also within the jurisdiction of Arbitrator. Reliance has been placed on a judgment passed by the Hon'ble Supreme Court in *Meguin GMBH and Company v. Nandan Petrochem Limited, (2016) 10 SCC 422*. The learned Senior Counsel has relied on *Indus Biotech Private Limited v. Kotak India Venture (Offshore) Fund and Ors., 2021 SCC OnLine SC 268*. Besides this reliance

³ Annexure-D of the Application

has been placed on another judgment passed by the Hon'ble Supreme Court in *Vidya Drolia and Ors. v. Durga Trading Corporation, (2021) 2 SCC 1* (paragraphs 154.4, 244.2-244.4). Learned Senior Counsel has laid emphasis on “*when in doubt, do refer*” (paragraph 244.4), while pressing for the reliefs prayed for in this Com. Application.

13. The applicants further submit that this Hon'ble Tribunal being a judicial authority before which the present proceeding being CP 1093/KB/2020 has been initiated by the petitioners should refer the disputes raised therein by the parties to arbitration, in terms of the arbitration agreement entered into between the parties.

Submissions on behalf of the Ld Senior Counsel appearing for the Respondent herein :-

14. It is stated by the Ld. Senior Counsel for the Respondent that the disputes as mentioned in the Company Petition are not arbitrable in nature. That owing to several actions and misdeed of the Applicants herein, such as attempt of unilateral removal of the Respondent herein (Petitioner No. 1 in the Company Application) from the post of Director of the Company, unilateral appointment of new Director in violation of several provisions of the Companies Act, 2013, non-issuance of notice of board meeting to the Petitioner No. 1 and several other actions are in complete violation of various provisions of the Companies Act, 2013, which address the wrongdoings of the Applicants herein, highlighting their mala fide intent to oppress the Respondent herein.
15. The present Company Application which has been filed under provisions of section 8 of the Arbitration Act, uses the expression "a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement. The operative word here appears to be "matter". The "matter" must be one in respect of which there is an arbitration agreement. This is what can be referred to arbitration. In an oppression and mismanagement "action" before this Hon'ble Tribunal, the "matter is the one that lies under Sections 241 and 242 and invokes the NCLT's powers under those sections and their statutory brethren. Therefore, disputes in a Section 241/242 action are such that they demand the exercise by the Hon'ble NCLT of its powers as prescribed under the provisions of Companies Act, 2013. These are not powers that can be exercised by a civil court. They certainly cannot be exercised by an arbitral forum.

16. It is submitted that several allegations levelled by the Petitioners in the Company Petition refer to a pattern of conduct of clandestine non-contractual actions that have resulted in the mismanagement of the company's affairs. Therefore, even if there was an arbitration agreement, it would not follow that every single act complained of must, ipso facto, relate to that arbitration agreement. Further, it is stated that just because an arbitration agreement exists does not always or necessarily imply that all disputes relate only to it, or that all parties' rights and remedies are circumscribed by that agreement.
17. It is submitted that the document on the basis of which the Applicants are seeking reference of the disputes and differences forming part of the above Company Petition to arbitration is a Memorandum of Understanding dated 3rd October 2019 which is a fabricated document which contains forged signatures of the Respondent herein and being a fraudulent document does not constitute a valid contract under the Indian Contract Act, 1872. A Criminal Complaint No. 761/2021 before the Chief Judicial Magistrate of Ranchi, Jharkhand against the Applicants has already been filed by the Respondent on 8th February 2021 for cheating, forgery, forgery of the Respondent's signatures on the Impugned MOU, forgery for the purpose of cheating, and criminal conspiracy by manufacturing the Impugned MOU.
18. It is further submitted that since the Respondent has never signed the Impugned MOU, the arbitration agreement in Clause 5 therein does not constitute a valid arbitration agreement as per Section 7 of the Arbitration and Conciliation Act, 1996 where signatures of all parties to the dispute are required. Therefore, there is no question of referring the disputes raised and claims made in the Company Petition to arbitration.
19. It is also submitted that the Applicants indulged into the illegal and unauthorised acts on behalf of Pali Hills Breweries Pvt Ltd (*Respondent No.1 in the Company Petition*) suppressing information from the Respondent herein by taking loans from various banks, withdrawing cash from the account of Pali Hills Breweries Pvt Ltd (*Respondent No.1 in the Company Petition*) to their personal accounts.
20. The Applicants also wrote to Kingfisher (*Licensor of Pali Hills Breweries Pvt Ltd*) falsely intimating that operation at Pali Hills Breweries Pvt Ltd's plant has been closed

which created prejudice in the confidence of the licensor on Respondent No. 1. Apart from this they also sent an email to Bank of India, Club Side Branch, falsely intimating the banker that operation at Pali Hills Breweries Pvt Ltd's plant has been closed. The applicants also filed an e-form DIR-2 with a fake resignation letter with forged signatures of the Respondent herein on the MCA portal resulting in his removal from Directorship of Pali Hills Breweries Pvt Ltd's etc. Being aggrieved by the said Actions of the Applicants, the Respondent had filed a Criminal Complaint No. 11306 of 2020 before the Chief Judicial Magistrate, Ranchi against the Applicants for cheating, misappropriation and forgery.

21. Thereafter, on 7th October 2020, the main Company Petition was filed by the Respondents herein before this Hon'ble Tribunal for oppression and mismanagement against the Petitioner No. 1 as more specifically stated therein.
22. Subsequently the Respondents herein received a letter dated 15 January 2021 addressed by the Applicants, in relation to the disputes and differences arisen between the Respondent herein and the Applicants (forming part of the Company Petition), invoking arbitration under Clause 5 of the Impugned MOU whereby they nominated one Mr. Rabindra Narayan Singh as the nominee arbitrator on behalf of the Applicants and called upon the Respondent herein to nominate an arbitrator within a period of 30 (thirty) days of receipt of the said letter. However, without waiting for 30 days, after 3 days i.e., on 18th January 2021, the Applicants filed the present Application and the same was served on 23 January 2021. The same was accompanied with the impugned MoU which contained the arbitration clause.
23. Thereafter, on 25th January 2021, the Respondent herein addressed a letter to the Applicants denying its signature on the Impugned MOU and / or even executing any such Impugned MOU with the Applicants. In the said letter, the Respondent herein also stated that the Impugned MOU was a forged document and was manufactured by the Applicants with mala fide intention and had called upon the Applicants to refrain from using the said forged Impugned MOU and to withdraw the same from every place as well as the one filed before this Hon'ble Tribunal in the Company Application.

24. The Applicants responded to the letter dated 25 January 2021 by addressing a letter dated 2nd February 2021 to the Respondent herein denying the illegality of the Impugned MOU and insisted that the Impugned MOU was signed by the consent of the all parties. As the Applicants failed to withdraw the Impugned MOU, the letter dated 15 January 2021, and the Company Application, the Respondent on 8th February 2021 filed a Criminal Complaint No. 761/2021 before the Chief Judicial Magistrate of Ranchi, Jharkhand against the Applicants for the offences of cheating, forgery, forgery for the purpose of cheating, and criminal conspiracy by manufacturing the MOU and forgery of signature on the Impugned MOU. A copy of the Complaint No. 761/2021 filed before the Chief Judicial Magistrate of Ranchi, Jharkhand.⁴
25. The Respondent herein submits that through the Company Application and the Impugned MOU, the Applicants are bringing on record false evidence, and since the proceedings before this Hon'ble Tribunal are judicial proceedings under Section 424(4) of the Companies Act, 2013, an inquiry must be made under Section 340 read with Section 195 of the Code of Criminal Procedure, 1973 for having made use of fabricated, false evidence under Section 193 and 196 of the Indian Penal Code and thereby the present application shall be liable to be dismissed.

Analysis & Findings

26. Heard the Ld. Counsels appearing for both the parties and perused the records.
27. Comp Appl No. 36 of 2021 under Section 8 of the Arbitration and Conciliation Act, 1996 came to be filed before this Court on 18.01.2021 whereas the criminal complaint being Complaint No. 761 of 2021 alleging false signature has been filed before the Chief Judicial Magistrate of Ranchi, Jharkhand on 08.02.2021.
28. When the application under Section 8 of the Arbitration and Conciliation Act, 1996 was filed, it was only then when the Applicant placed on record the arbitration agreement in support of its plea that the matter be referred to arbitration in view of the arbitration agreement whereas the criminal complaint was filed by the non-applicant/respondent

⁴ Exhibit-B of the Reply Affidavit to the Application

on 08.02.2021 which is subsequent to filing of the above application Section 8 of the Arbitration and Conciliation Act, 1996. The fact of this having been filed by the Respondent and the pendency of it has not been disputed or denied by the Applicants.

29. Ld. Senior Counsel appearing for the respondent herein, argued that he came to know of the purported arbitration agreement only through the medium of the application filed by the applicant and filed a criminal complaint before the Chief Judicial Magistrate of Ranchi, Jharkhand stating that the signatures are forged.
30. *Per contra*, the Ld. Senior Counsel appearing for the applicant argued that the criminal complaint filed by the non-applicant/respondent is only an attempt to wriggle out of the arbitration agreement and allegation of forgery is therefore false and merely an afterthought.
31. Now, coming to the plea of forgery, as raised by the non-applicant/respondent in its Reply Affidavit, we note the following allegations have been raised in support of this plea:-
- a) *That the MoU dated 03.10.2019 which contains the purported arbitration agreement contains forged signatures of the Respondents herein and a criminal complaint being Criminal Complaint No. 761/2021 has been filed before the Chief Judicial Magistrate of Ranchi, Jharkhand*
 - b) *That the Applicant had also forged the signatures of the Respondent and filed an e-form DIR-2 with a fake resignation letter with forged signatures of the Respondent herein on the MCA portal resulting in his removal from Directorship of Pali Hills Breweries Pvt Ltd's regarding which a criminal complaint being Complaint No. 11306 of 2020 was filed before the Chief Judicial Magistrate, Ranchi.*
32. The allegations of forged signature are mainly contained in para 12, 13 and 14 of the Reply Affidavit. It is also stated in the Reply Affidavit that criminal complaint has been filed against the applicant on 08.02.2021 for cheating, forgery, forgery of Respondent's

signature on the impugned MoU, forgery for the purpose of cheating and criminal conspiracy by manufacturing the impugned MoU.

33. While considering these allegations and plea of the Respondent, we have gone through the judgment of the Hon'ble Supreme Court in **Rashid Raza v Sadaf Akhtar**⁵, which directly deals with the issue of allegations of forgery in arbitration agreement in application of section 8 of the Arbitration and Conciliation Act, 1996, relevant paragraphs of which are reproduced as hereunder:-

“3. Having heard the learned counsel for both the sides, it is clear that the law laid down in A. Ayyasamy case is in para 25 and not in para 26. Para 25 of the said judgment states as follows: (SCC pp. 406-407)

"25. In view of our aforesaid discussions, we are of the opinion that mere allegation of fraud simpliciter may not be a ground to nullify the effect of arbitration agreement between the parties. It is only in those cases where the court, while dealing with Section 8 of the Act, finds that there are very serious allegations of fraud which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil court on the appreciation of the voluminous evidence that needs to be produced, the court can side track the agreement by dismissing the application under Section 8 and proceed with the suit on merits. It can be so done also in those cases where there are serious allegations of forgery/fabrication of documents in support of the plea of fraud or where fraud is alleged against the arbitration provision itself or is of such a nature that permeates the entire contract, including the agreement to arbitrate, meaning thereby in those cases where fraud goes to the validity of the contract itself of the entire contract which contains the arbitration clause or the validity of the arbitration clause itself. Reverse position thereof would be that where there are simple allegations of fraud

⁵ (2019) 8 Supreme Court Cases 710

touching upon the internal affairs of the party inter se and it has no implication in the public domain. the arbitration clause need not be avoided and the parties can be relegated to arbitration. While dealing with such an issue in an application under Section 8 of the Act, the focus of the court has to be on the question as to whether jurisdiction of the court has been ousted instead of focusing on the issue as to whether the court has jurisdiction or not. It has to be kept in mind that insofar as the statutory scheme of the Act is concerned, it does not specifically exclude any category of cases as non-arbitrable. Such categories of non-arbitrable subjects are carved out by the courts. keeping in mind the principle of common law that certain disputes which are of public nature, etc. are not capable of adjudication and settlement by arbitration and for resolution of such disputes, courts i.e. public fora, are better suited than a private forum of arbitration. Therefore, the inquiry of the Court, while dealing with an application under Section 8 of the Act. should be on the aforesaid aspect viz. whether the nature of dispute is such that it cannot be referred to arbitration, even if there is an arbitration agreement between the parties. When the case of fraud is set up by one of the parties and on that basis that party wants to wriggle out of that arbitration agreement, a strict and meticulous inquiry into the allegations of fraud is needed and only when the Court is satisfied that the allegations are of serious and complicated nature that it would be more appropriate for the Court to deal with the subject-matter rather than relegating the parties to arbitration, then alone such an application under Section 8 should be rejected."

(emphasis implied)

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.

5. Judged by these two tests, it is clear that this is a case which falls on the side of "simple allegations" as there is no allegation of fraud which would vitiate the partnership deed as a whole or, in particular, the arbitration clause concerned in the said deed. Secondly, all the allegations made which have been relied upon by the learned counsel appearing on behalf of the respondent. pertain to the affairs of the partnership and siphoning off of funds therefrom and not to any matter in the public domain."

34. In the present case we are of the view that there are serious allegations of forgery which require determination by leading evidence before the Court where the criminal complaint has already been filed. In view of this position and in view of the law laid down by the Hon'ble Supreme Court, it would not be appropriate to refer the parties to arbitration..
35. It may also be added here that the allegations are of such nature, which if proved will go to vitiate the MoU including the arbitration agreement relied upon by the Applicants.
36. In view of this position as delineated above, we have no option except to dismiss this application. **Comp.Appl No. 36 /KB/2021** is hereby **rejected**.
37. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rohit Kapoor
Member (Judicial)

This order is pronounced on the 8th day of May, 2023

FA, (LRA)