

M/S Devicebook Innovation Pvt. Ltd vs M/S Turaco Mobile Private Limited & Ors on 27 February, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 937/2022
M/S DEVICEBOOK INNOVATION PVT. LTD.

..... Petitioner

Through: Mr. Vivek Kohli, Sr. Adv. with
Mr. Aishwarya Kaushik, Mr.
Prashant M.S., Mr. Pranav
Wahi, Advs.

versus

M/S TURACO MOBILE PRIVATE LIMITED & ORS.

..... Respondents

Through: Mr. Rajesh Rai, Mr. Abhishek
Awasthi, Ms. Srishti, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 27.02.2023

1. This petition seeks the constitution of an Arbitral Tribunal pursuant to the disputes which have arisen and emanate from the Business Transfer Agreement which had been signed between the parties. The Business Transfer Agreement is dated 18 February 2021.

2. As would be evident from the notice invoking arbitration which was issued by the Petitioner here, it is their assertion that they were misrepresented and fraudulently induced into investing monies in a software titled "GreatBuyz" which was owned by the Respondents. In view of the aforesaid, the Petitioner invokes the jurisdiction of the Court for constitution of an Arbitral Tribunal.

3. Learned counsel for the Respondent, however, submits that as is evident from the contents of the notice under Section 21 of the Arbitration and Conciliation Act, 1996, the Petitioner alleges fraud and misrepresentation in respect of which criminal proceedings have also been instituted separately. It was his submission further that since the Agreement itself does not refer to fraud or misrepresentation and contemplated conveyance of the software on an "as is where is" basis, the issue is rendered non-arbitrable. The Court finds itself unable to sustain the aforesaid submission

for the following reasons.

4. It must at the outset be noted that both fraud and misrepresentation would always and possibly have a civil element and which may entitle the Petitioner here to seek monetary reliefs in respect of the losses that may have been allegedly caused. The mere fact that the sale was made on an "as is where is" is in any case not an issue which should detain the constitution of an Arbitral Tribunal.

5. However, the issue of fraud and when it would transcend to become a non-arbitrable issue was lucidly explained by the Supreme Court in Vidya Drolia vs. Durga Trading Corpn.¹ in the following terms:-

"60. N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] upheld the order rejecting the application under Section 8 of the Arbitration Act on the ground that it would be in furtherance of justice that the allegations as to fraud and manipulation of finances in the partnership firm are tried in the court of law which is more competent and has means to decide a complicated matter. However, in A. Ayyasamy [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , notwithstanding the allegations of fraud, the civil appeal was allowed, the civil suit was stayed and reference to arbitration under Section 8 of the Arbitration Act was made. Dr A.K. Sikri, J. held [Ed. : The opinion authored by Sikri, J. in A. Ayyasamy, (2016) 10 SCC 386, is also signed by Chandrachud, J. Chandrachud, J. delivered a supplementing opinion as well.] that the Arbitration Act does not make any specific provision for excluding any category of disputes terming them as non-arbitrable but there are a number of pronouncements which hold that fraud is one such category where the dispute would be considered as non-arbitrable. Elucidating on the exclusion, he observed that pleading of a mere allegation of fraud by one party is not enough. The allegation of fraud should be such which makes a virtual case of a criminal offence.

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61. On the question of non-arbitrability when there are allegations of fraud, Dr A.K. Sikri, J. in A. Ayyasamy [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] observed : (A. Ayyasamy case [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC p. 407, para 25) "25. ... 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 sidetrack 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. ... 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."

62. Dr D.Y. Chandrachud, J. in his concurring judgment [Ed. :

The opinion authored by Sikri, J. in A. Ayyasamy, (2016) 10 SCC 386, is also signed by Chandrachud, J. Chandrachud, J. delivered a supplementing opinion as well.] unclashed the mandatory nature of Section 8 of the Arbitration Act to observe that allegations of fraud can be made a subject-matter of arbitration by relying on Russell on Arbitration, Redfern and Hunter on International Arbitration and Gary B. Born in International Commercial Arbitration. Reliance was placed on the principle of separation and legal effect of the doctrine of competence-competence, to observe :

(A. Ayyasamy case [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC p. 414, para 44) "44. ... „13. Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law -- *generalia specialibus non derogant*. In such a situation, the approach shall under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court. [Ed. : As observed in Sundaram Finance Ltd. v. T. Thankam, (2015) 14 SCC 444, at p. 449, para 13.] "

"43. Hence, the allegations of criminal wrongdoing or of statutory violation would not detract from the jurisdiction of the Arbitral Tribunal to resolve a dispute arising out of a civil or contractual relationship on the basis of the jurisdiction conferred by the arbitration agreement." (A. Ayyasamy case [A. Ayyasamy v. A. Paramasivam, (2016) 10 SCC 386 : (2017) 1 SCC (Civ) 79] , SCC p. 414, para 43)

73. A recent judgment of this Court in Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 :

2020 SCC OnLine SC 656] has examined the law on invocation of "fraud exception" in great detail and holds that N. Radhakrishnan [N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72 : (2010) 1 SCC (Civ) 12] as a precedent has no legs to stand on. We respectfully concur with the said view and also the observations made in para 34 of the judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] , which quotes observations in Rashid Raza v. Sadaf Akhtar [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] : (Rashid Raza case [Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710 : (2019) 4 SCC (Civ) 503] , SCC p. 712, para 4) "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."

to observe in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 :

2020 SCC OnLine SC 656] : (SCC para 35) "35. ... 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 questions arising from the contract itself or breach thereof but questions arising in the public law domain."

74. The judgment in Avitel Post Studioz Ltd. [Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd., (2021) 4 SCC 713 : 2020 SCC OnLine SC 656] interprets Section 17 of the Contract Act to hold that Section 17 would apply if the contract itself is obtained by fraud or cheating. Thereby, a distinction is made between a contract obtained by fraud, and post-contract fraud and cheating. The latter would fall outside Section 17 of the Contract Act and, therefore, the remedy for damages would be available and not the remedy for treating the contract itself as void.

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:

76.1. (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. 76.2. (2) When cause of action and subject-matter of the dispute affects

third-party rights; have erga omnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (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.

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

76.5. 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.

76.6. However, the aforesaid principles have to be applied with care and caution as observed in Olympus Superstructures (P) Ltd. [Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan, (1999) 5 SCC 651] : (SCC p. 669, para 35) "35. ... Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman [Keir v. Leeman, (1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter (Soilleux v. Herbst [Soilleux v. Herbst, (1801) 2 Bos & P 444 : 126 ER 1376] , Wilson v. Wilson [Wilson v. Wilson, (1848) 1 HL Cas 538] and Cahill v. Cahill [Cahill v. Cahill, (1883) LR 8 AC 420 (HL)])."

77. Applying the above principles to determine non- arbitrability, it is apparent that insolvency or intracompany disputes have to be addressed by a centralised forum, be the court or a special forum, which would be more efficient and has complete jurisdiction to efficaciously and fully dispose of the entire matter. They are also actions in rem. Similarly, grant and issue of patents and registration of trade marks are exclusive matters falling within the sovereign or government functions and have erga omnes effect. Such grants confer monopoly rights. They are non-arbitrable. Criminal cases again are not arbitrable as they relate to sovereign functions of the State. Further, violations of criminal law are offences against the State and not just against the victim. Matrimonial disputes relating to the dissolution of marriage, restitution of conjugal rights, etc. are not arbitrable as they fall within the ambit of sovereign functions and do not have any commercial and economic value. The decisions have erga omnes effect. Matters relating to probate, testamentary matter, etc. are actions in rem and are a declaration to the world at large and hence are 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] 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] which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."

6. It becomes pertinent to note that the Court at the Section 11 reference stage and while undertaking a prima facie view must resist from undertaking an in depth review of the rival claims. Complicated issues and those which would warrant detailed consideration should be left to be tried by the Arbitral Tribunal which in any case would be empowered to rule on the question of non-arbitrability. Whether the petitioners are correct in their allegation that the formation of the contract was itself vitiated by fraud is an issue relating to non- arbitrability and which can be gone into by the Tribunal itself. Accordingly, the objections as taken are overruled. The Court preserves the issue of non-arbitrability to be examined by the Arbitral Tribunal. All contentions of respective parties are kept open in that regard.

7. The Court hereby appoints Mr. Justice Pradeep Nandrajog [Official Address: K 29, Ground Floor Hauz Khas Enclave, Delhi] [Mobile No. 09818000130] [email: nandrajogpradeep@gmail.com] as the sole arbitrator for resolution of the disputes which have arisen.

8. The parties are directed to appear before the learned arbitrator, as and when notified. This is subject to the learned arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

9. The fees of the arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

FEBRUARY 27, 2023 neha