IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Arbitration Petition No.224 of 2014 (O&M)
DATE OF DECISION:16.10.2015

M/s Suvidhaa Info Serve Private Limited

…..Petitioner

versus

Dakshin Haryana Bijli Vitran Nigam Limited

.....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE

Present: Mr. Ashok Aggarwal, Advocate General, Punjab with
Mr. Gajinder Kumar, Mr. Chandra Shekhar and
Mr. Kajal Bhatti, Advocates for the petitioner

Mr. J.S. Bedi, Advocate for the respondent

..

S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

The petitioner, a service-commerce company, provides multiple services, such as, collection of utility bills, insurance premium and mobile and DTH recharge. It carries on its business through more than 65,000 franchised outlets across the country.

The respondent is a statutory corporation incorporated under the provisions of the Electricity Act, 2003, and is engaged in the distribution of electricity in the State of Haryana.

2. There is no doubt that the disputes and differences between the parties are arbitrable. The claims arise under and in terms of the underlying contract. The only question is whether the reference to arbitration ought to be refused in view of the allegations of fraud made by the respondent against the petitioner. I have come to the conclusion that the authorities essentially hold that a reference to arbitration may be resisted by the party against whom the allegations of fraud have been made and not

normally at least at the instance of the party making the allegations of fraud. I have, therefore, allowed the petition and appointed an arbitrator.

3. In the year 2009, the respondent invited tenders for collecting bills from its consumers. The respondent accepted the petitioner's bid and issued a work order dated 06.08.2009 for collection of energy bills through retail outlets set up by the petitioner. Clause 2(b) provided that at the start the firm should collect payment in Hisar as a pilot project and that, on satisfactory performance, the firm would be allowed to roll out its operations in other areas. Faridabad was also included subsequently. Clauses 3, 4, 5 and 22 read as under:-

> "**3. Process Flow:**
> Process flow in this regard shall be as under:-
>
> **(a) Billing Details**:-
> The billing in DHBVNL is being done by the HARTRON. Suvidhaa shall be collecting billing details from HARTRON for every billing cycle in desired format and upload the same on its portal. The web based portal is accessible from all the Retail outlets which have unique user id & password through broadband connection.
>
> **(b) Collection of Energy Bills:-**
> - The consumer walks in the Suvidhaa Retail Point along with his Bill and presents the same to the Retailer.
> - The Retailer, after login to the Suvidhaa portal, enters the sub division code and the account number from the bill presented by the consumer. All details pertaining to that particular consumer gets displayed on the screen which is automatically fetched from the data base.
> - The amount field is the writeable field if the consumer wants to deposit extra amount over the bill. The extra amount paid by the consumer will be credited in the consumer account and same will be suitably reflected in the MIS. No part payment of bill is allowed until duly authorized by the concerned SDO.

- After collecting the payment, the Retailer will put specific unique receipt stamp on the bill as well as the stub and entry will be posted on the portal. Retailer will issue system generated receipt to customer. The application software shall be so featured that it doesn't accept post dated/out station cheques (except cheques of government departments) and will not accept payment exceeding Rs.25000/- in cash.

(c) Remittance into Bank:-

The collection made by Suvidhaa on a particular day shall be paid to the DHBVNL on the next bank working day through single cheques in respect of each sub division. To clarify further, the collection made by Suvidhaa for five sub divisions shall be paid through five separate cheques/EFT/RTGS into the account of DHBVNL to facilitate reconciliation. Similarly, all cheques collected on a particular day shall be deposited into the designated account of each sub division on the next bank working day.

(d) **MIS:-**

The sub division-wise MIS of the energy bills collected in cash/cheques shall be supplied by the Suvidhaa to the each sub division along with the original stubs for its entry into the account of the consumer on weekly basis. The MIS will however be sent by email daily to every sub division as well as DGM (Collection).

(e) Payment of Bills to Suvidhaa:-

After the close of the month, the Suvidhaa will submit a consolidated bill directly to CGM (Finance) DHBVNL in respect of every sub division along with account-wise details of the bills collected. A copy of the bill shall also be submitted to the respective sub division/ division. DGM/Collection will confirm the receipt of the amount so collected into the DHBVNL account and verify the same on the bills. Thereafter, the payment shall be released by the AO(EAD) DHBVN, Hisar as per the payment term specified in Para 2(C) of this work order. The concerned sub division/division has to point out any discrepancy in the bill by end of the following month failing which it will be presumed that the claim of the Suvidhaa is in order. In case any discrepancy is pointed out, then the amount on this account shall be deducted from the next bill of the Suvidhaa.

4. Obligation of the party:-

(a) Suvidhaa must:

i. Facilitate hardware and softrware at the cost of agencies appointed by it;

ii. Facilitate the installation, ownership and operation of the Retail outlets at the cost of agencies appointed by Suvidhaa;

iii) Suitably monitor the maintenance and service at the Retail outlet;

iv. Maintain and bear the expense of all required insurance coverage in relation to the CIT service provided, through agencies appointed by it;

v. Ensure the provision CIT services;

vi. Agree to a rollout schedule with DHBVN and coordinate rollout;

vii. Formulate and execute the publicity plan and schedule along with DHBVN on a mutually agreeable and case by case basis.

viii. Maintain details of transaction volumes within its System;

ix. Provide electronic transaction services, including, without limitation, transaction settlement and connectivity to the DHBVN payments network;

x. Co-ordinate the testing, installation and application of Retail outlets which it agrees to connect to the DHBVN Network;

xi. Provide supervisors where appropriate;

xii. Provide daily settlement of cash and cheques deposited into the Retail outlets on the following working day. Should Suvidhaa fail to do so it will pay DHBVN without question any interest loss that DHBVN would have received;

xiii. Provide weekly settlement reports to DHBVN in an appropriate format;

xiv. Provide additional support services that are agreed in writing with DHBVN from time to time. These services shall be reflected in the Statements of Work which are signed off by both DHBVN and Suvidhaa.

(b) DHBVN must:

i. allow Suvidhaa to connect to the DHBVN payments network through a secure environment;

ii. Work with Suvidhaa in preparing a service rollout schedule that takes into account the service area of DHBVN;

iii. provide graphics, logo's and receipt layouts to Suvidhaa;

iv. Support Suvidhaa in pushing customers to use the Retail outlets facility over the collection counters through publicity campaigns.

…… ……. ……. …….

22. ARBITRATION: All matters, questions, disputes and/or claim arising out of and/or concerning and/or in connection and/or in consequences or relating to the contract whether or not obligations of either of both parties under the contract has been terminated or proposed to be terminated or completed shall be referred to the mutually agreed arbitrator as per Indian Arbitration Act, 1996. The award of the arbitrator shall be final and binding on the parties to the contract."

4. The petitioner, in turn, appointed distributors and retailers for Hisar and Faridabad. The distributors were to provide the petitioner the services listed in Annexure-A thereto. As per Annexure-A, the distributors were to provide a variety of services including managing collections from retailers and depositing the same in designated bank accounts, collecting documents, cheques, forms, etc. from retailers on a daily basis and processing the same as per business process requirements. Clauses 11 and 12 of Annexure-A read as under:-

"11. Credit Management: All retailers appointed under the Distributor shall open a non operative collection account with designated bank which will have standing instructions to transfer the amount deposited to Suvidhaa's account on a daily basis. The Distributor shall ensure that the Retailers deposit their sales proceeds after deducting their commission in this account on a daily basis.

12. In the event the Retailer does not have access to a branch of designated bank, it shall be the responsibility of the Distributor to collect the sales proceeds from such Retailer and the

> Distributor shall deposit all payments collected from such Retailer on a daily basis and deposit the same into Suvidhaa's designated bank account and intimated Suvidhaa of the same by couriering the original deposit slip of the bank to Suvidhaa."

5. The petitioner's case is as follows:

As per the arrangement, the collection of the bills was to be done by a web based application wherein the backend system of the petitioner and its distributor were connected to those of the respondent; the petitioner used to send MIS reports in respect of all transactions to the respondent; the petitioner had provided web-based online software/application for entering data to its retailers. Whenever a bill was presented by a consumer for payment, the retailer by punching the consumer account number would get to know the name of the consumer and details of the bill including the mode of payment. On payment, the system used to generate receipts. The retailers were given the account numbers directly and password to the system by the respondent at the respondent's payment counters. Thereafter, the retailers used to transmit the transactions to the petitioner's server. The petitioner would also generate MIS files in the format prescribed by the respondent and e-mail the day-to-day collections to the respondent. The respondent was to verify and reconcile the data on a monthly basis.

The software did not accept post-dated or outstation cheques or payment in excess of Rs.25,000/- in cash. The distributors were to deposit the cheques collected from the customers in the bank account designated by the respondent. The cheques were to be issued in the name of the respondent and not in the name of the petitioner or its retailers/distributors. At the end of the month, the petitioner used to submit the consolidated

bills/invoices directly to the respondent who was to confirm receipt of the amount in its account and on verification pay the service fee to the petitioner. After the lapse of one month, it was the sole responsibility of the respondent in case of any discrepancy.

6. Upon the petitioner's work being found to be satisfactory, the respondent by a letter dated 09.02.2011 extended the period of work order as well as the area of operation to include certain divisions of Faridabad. This work order also specified that on satisfactory performance, the petitioner would be allowed to roll out its operations in other areas.

7. By a letter dated 16.04.2013, the respondent informed the petitioner that there were differences in the cash and online scrolls. The petitioner claims to have replied to the letter. The petitioner also conducted an enquiry and found that some of its retailers and distributors were involved in these discrepancies. The petitioner accordingly filed a complaint dated 09.07.2014 with the Commissioner of Police alleging offence of criminal misappropriation of public money and entrusted money, cheating, criminal conspiracy, forgery and fraud in collusion with others. The subject of the complaint itself alleges that the retailers/distributors had committed fraud and that one of the allegations in the complaint was that there was a "misappropriation of funds, fraud, cheating, etc." The petitioner stated in the complaint that the respondent's enquiry up to 27.04.2013 indicated an embezzlement of Rs.65.07 lacs which the petitioner had to deposit with the respondent; that by the respondent's letter dated 13.09.2013 misappropriation of funds through cheques was also

revealed; that by 31.08.2013, the amount of misappropriation i.e. the amount received but not deposited in the respondent's account increased to Rs.3.24 crores and that the petitioner made payment of Rs.2.59 crores to the respondent under protest pending a full investigation. The complaint further states that thereafter, the petitioner conducted detailed enquiry and investigation as to who were the real culprits "who had committed this big fraud of misappropriation of consumer money" for which the petitioner was penalised.

In paragraph-7 of the complaint, the petitioner stated that the result of the enquiry indicated that there were retailers and distributors who were involved in cheating, misappropriation, tampering with the online software/application system, inserting fake entries in the system, misusing and affixing fake seal and stamp of the petitioner on the bills and in playing the whole financial fraud. Some of the alleged culprits were named. The tenor of the complaint throughout indicates, *prima facie* at least, that the petitioner acknowledged that there was a fraud on various accounts including misappropriation of the money and tampering with the software system. The petitioner acknowledged that the extent of the fraud may increase upon further investigation. The fraud, even according to the petitioner, was committed in more ways than one. The complaint also alleges criminal misappropriation and criminal breach of trust on part of the distributors and their employees.

8. It is also important to note that in paragraph 2N of this petition, the petitioner states that it continued with the enquiry and found that the distributors and retailers had defrauded and cheated the petitioner and the respondent. It is not necessary

to set out the *modus operandi* stated by the petitioner in this regard.

9. The respondent filed an FIR against the petitioner. The petitioner states that upon payment of the said sum of Rs.65.13 lacs to the respondent a cancellation report dated 17.09.2013 was filed before the Court.

10. The petitioner then refers to the negotiations and the alleged settlements arrived at between the parties. According to the petitioner, it had deposited the amount of Rs.65.13 lacs under pressure and without prejudice only as an act of goodwill and to foster its relationship with the respondent. The respondent thereafter alleged that the extent of the fraud had increased and demanded a sum of Rs.3.24 crores on account thereof from the petitioner. Thereafter, several meetings were held between the parties and the accounts maintained by each of them were exchanged.

On 31.03.2014, a meeting was held between the parties to discuss and settle the outstanding issues relating to the collection of bills by the petitioner on behalf the respondent in Faridabad and Hisar distribution circles. The minutes of the meeting record the agreement arrived at between the parties. The Minutes which were signed by both the parties comprise of only the following clauses:-

> "After detailed deliberations the following was agreed between the parties:
>
> 1. **On the part of M/s Suvidha Infoserve Ltd.Mumbai**:
>
> The firm agreed to pay an amount of Rs.1.74 crores (Rupees one crore seventy four lacs) to DHBVN on account of loss suffered after adjusting the amount of bank guarantee Rs.80 lacs (Rupees eighty lacs) already got encashed by DHBVN and and (sic) Rs.5 lacs (Rupees five lacs) towards provisional amount of collection charges payable by DHBVN to the firm.

The amount of Rs.1.74 crores deposited by the firm in DHBVN bank accounts in Axis Bank No.260010200000444 through cheque No.537326 dated 31/03/2014. The terms of this settlement shall come into force only after credit of this amount in DHBVN account duly verified.

2. On the part of DHBVN:

DHBVN has accepted Rs.1.74 crores (Rupees one crore seventy four lacs) from the firm towards all present/future liabilities against the firm raised by the consumers on account of electricity bill collection made by the firm on behalf of DHBVN in Hisar and Faridabad Distribution circles after following adjustments:
-Rs.80 lacs of BG already encashed by DHBVN
-Rs.5 lacs on account of provisional payments on account of collection charges payable by DHBVN to the firm. ….. ….. ……. …….
This amount of Rs.1.74 crores is received towards final settlement of the outstanding amount from the firm on account of payment collected from the consumers on behalf of DHBVN and DHBVN will not raise any further claims on this account. All consumers related liabilities on this account will be met by DHBVN. The DHBVN further agreed to inform about this settlement to all its offices/SDO so as to deal with the cases on the subject accordingly.

i) The DHBVN agreed to inform concerned subordinate offices to file settlement cases in view of this MoM. The DHBVN further agreed not to file any criminal/civil suits against the firm on the account of energy bills collected from the consumers on behalf of DHBVN in Faridabad and Hisar distribution circles.

ii) In case any amount out of Rs.2.59 crores found in DHBVN bank accounts in future as a result of further reconciliation or otherwise, the same shall be paid to M/s Suvidha Infoserve by DHBVN.

iii) The DHBVN agreed to reconcile and settle the firm's claims on account of commission/charges for bill collection with in a period of 30 days after submission or relevant details/claims by the firm.

iv) The DHBVN further agreed to provide the details of Rs.2.59 crores not credited in its bank accounts with supporting documents i.e. copies of bank statements and reconciliation and also extend cooperation in this matter.

The parties have set their hands on the minutes at Hisar on this day 31st March, 2014."

The amount of Rs.1.74 crores was deposited by the petitioner in the respondent's bank account. The terms of the settlement were to come into force only after the amount was credited. Admittedly, the amount was credited.

11. The respondent, however, by a letter dated 31.05.2014 alleged that certain cases of fraud/embezzlement of public money had come to its notice recently and were under investigation by the appropriate authorities and that in view thereof it had decided to review the entire transactions made by the external collection agencies including the petitioner. The respondent, therefore, revoked and rescinded the said minutes of the meeting held on 31.03.2014. The respondent requested the petitioner to associate it and its bankers in the investigation process to ascertain the exact quantum of loss caused to the public utility on account of fraudulent transactions routed through the petitioner in public interest.

12. Correspondence thereafter ensued between the parties in the course of which the petitioner contended that the revocation of the settlement was illegal and improper. The respondent, on the other hand, contended that after its letter of revocation dated 31.05.2014, the petitioner sent a team on 12.06.2014 to the respondent who collected the relevant records with an assurance that the data matching from the records shared with the respondent would be carried out and the outcome would be shared with the respondent within 15 days. The respondent stated that the petitioner was liable for and was bound to indemnify it against all losses/claims due to fraud/embezzlement/misappropriation or any

other unlawful activity by the employees/persons employed by the petitioner for the assigned job. The letter concluded as follows:-

> "As the minutes of meeting dated 31st March, 2014 already stand revoked from DHBVN side for all intents and further loss of public money is involved by adopting fraudulent practices at the end of the collection agency, we call upon M/s Suvidha Infoserve to immediately join us in the investigation/reconciliation process to arrive at the exact liabilities to be settled between the parties in the public interest, failing which DHBVN will initiate process of blacklisting of M/s Suvidha infoserve besides resorting to other remedies at our disposal including filing criminal cases against the firm/its promoters/key personnel."

This indicates not an allegation of fraud against the petitioner but against the petitioner's franchisees. If the allegation was that the petitioner was guilty of the fraud, the respondent would never have called upon the petitioner to investigate/reconcile the process.

13. However, by a further letter dated 06.08.2014, the respondent alleged that the petitioner and its staff/employees were guilty of the fraud and had embezzled the amounts. Further the respondent addressed a letter dated 11.09.2014 in reply to the petitioner's Advocate's notice dated 27.08.2014 invoking the arbitration agreement. In this letter, the respondent expressly alleged that the petitioner was involved in the fraud. The respondent stated that it was established that the petitioner, in collusion with its various dealers, had embezzled the said amounts and that the petitioner had paid the amounts as stated by it earlier by admitting its guilt. The respondent further stated that the extent of the fraud/embezzlement became known to it only in stages and that the matter was still being investigated.

The respondent filed a complaint which was registered as FIR No.629 dated 11.09.2014 under Sections 406/420/467/468/471 and 120-B of the Indian Penal Code.

The allegations of fraud are repeated in the respondent's written statement.

14. The petitioner's application for anticipatory bail in CRM-M No.33055 of 2014 was dismissed as withdrawn as recorded in the order dated 13.11.2014. By an order dated 21.11.2014, the Additional Sessions Judge dismissed the subsequent application for bail. A petition under Section 482 of the Criminal Procedure Code for quashing the FIR is pending. The petitioner's application under Section 9 of the Arbitration and Conciliation Act, 1996, was dismissed by an order and judgment dated 15.09.2014 of the Additional District Judge, Hisar.

15. The petitioner had filed the application under Section 9 *inter alia* for an injunction restraining the respondent from giving effect to the letters dated 31.05.2014 revoking the settlement and the letters dated 23.07.2014 and 06.08.2014 and from initiating any coercive action till the disposal of the arbitration proceedings. It is not necessary to make any observation on the tenability of such an application for interim relief. The learned Judge noted the submissions on behalf of the respondent, *inter alia*, to the effect that the petitioner was guilty of cheating and criminal misappropriation of huge amount of public money. The learned Judge noted that it was admitted that a huge amount of public money had been embezzled but that the petitioner denies any role in the same. The petitioner places blame for the same upon its distributors and retailers.

16. There is no doubt that the disputes raised fall within the ambit of the arbitration agreement. The petitioner, on the one hand, seeks recovery of the amounts due to it under the agreement. The respondent, on the other hand, seeks recovery of the amounts that ought to have been paid by the petitioner/petitioner's franchisees under and in terms of the agreement. It sought to recover earlier and even now seeks to recover the amounts payable by the petitioner to it under the agreement. These disputes, undoubtedly, are arbitrable. The petitioner claims that a full and final settlement was arrived at between the parties in terms of the agreement dated 31.03.2014. The respondent, however, admittedly, rescinded the same contending that it discovered later that further amounts had been embezzled and that it is entitled to the payment in respect thereof as well. Such payments are also demanded under and in terms of the agreement and fall within the ambit of the arbitration agreement.

17. The only question is whether the parties are bound to refer such disputes to arbitration. Mr. Bedi, the learned counsel appearing on behalf of the respondent, contended that such issues of fraud ought to be decided by a public forum in a Civil Court and not by a private forum, namely, the arbitral tribunal.

18. In support of this contention, Mr. Bedi relied upon a judgment of the Supreme Court in *N. Radhakrishnan vs. Maestro Engineers and others, (2010) 1 Supreme Court Cases 72*. I would preface a reference to this judgment by noting that it was the party seeking the reference in that case that made the allegations of fraud. In that case, the appellant had entered into a partnership with the respondents. Differences arose between the

partners. The appellant addressed a notice to the respondents alleging malpractices on their part as also collusion among them to drive the appellant out of the firm. The appellant also alleged that the respondents had forged the accounts. The appellant offered to retire from the firm and asked for his share of the profit. The appellant also alleged collusion between respondents in order to siphon the money from the firm for their personal gain. The respondents denied the allegations. The appellant, therefore, by a further notice reiterated the allegations and invoked the arbitration agreement. The Supreme Court held that the disputes fell within the ambit of the arbitration agreement. The Supreme Court, however, upheld the respondents contention that the case involved substantial questions involving detailed material evidence documentary and oral and that allegations such as those made by the appellant ought to be tried in Court and not in arbitration. The Supreme Court upheld the contention "in view of the facts and circumstances of the case". The Supreme Court followed an earlier decision in the case of *Abdul Kadir Shamsuddin Bubere vs. Madhav Prabhakar Oak and another, AIR 1962 Supreme Court 406*. The Supreme Court also noted the judgment of a learned single Judge of the Madras High Court *in H.G. Oomor Sait and another vs. O. Aslam Sait, (2001) 3 CTC 269.*

It is important to note that in *N. Radhakrishnan's* case (*supra*) and in *Abdul Kadir's* case *(supra)* the allegations of fraud were made by the party who had sought the reference to arbitration. In the case before me it is not so – it is the party opposing the reference to arbitration i.e. the respondent who has made the allegations of fraud.

19. In *Abdul Kadir*'s case *(supra)*, eventually, on 27.2.1953, an agreement was entered into between the appellant and the two respondents under which certain disputes with one of the respondents were settled and it was agreed that the forest be cut in accordance with an earlier agreement dated 27.10.1948. This agreement of 27.02.1953 also contained an arbitration agreement. Disputes, however, arose between the parties to this agreement of 27.02.1953. The respondents, therefore, filed an application under Section 20 of the Arbitration Act, 1940, to have the disputes referred to arbitration. The appellant opposed reference to arbitration *inter alia* on the ground that the respondents had made allegations of fraud against him in their application. Thus, it was the respondents who sought a reference to arbitration, who had made the allegations of fraud against the appellant. In respect of this contention, the Supreme Court held:-

> "(13) Learned counsel for the appellant, however, contends that serious allegation of fraud has been generally held by courts to be a sufficient ground for not ordering the agreement to be filed and not making the reference. He relies in this connection on the leading case of *Russell* v. *Russell* (1880) 14 Ch D 471. That was a case of partnership between two brothers containing an arbitration clause. One of the brothers gave notice to the other for dissolving the partnership. The other brother thereupon brought an action alleging various charges of fraud and claiming that the notice should be declared void and no announcement of the dissolution of partnership should be allowed. Thereupon the brother who was charged with fraud moved that the matter be referred to arbitration under the arbitration clause. That was resisted and the court held that "in a case where fraud is charged, the court will in general refuse to send the dispute to arbitration <u>if the party charged with the fraud desires a public inquiry. But where the objection to arbitration is by the party charging the fraud, the court will not necessarily accede to it, and will never do so unless a prima facie case of fraud is proved</u>".
>
> (14) This case certainly lays down that where allegations of fraud are made, <u>the party against whom such allegations are made may</u> successfully resist the reference to arbitration.

(15) The principle of this case was followed in *Osenton and Company* v. *Johnston*, 1942 AC 130. In that case a firm of estate agents and surveyors resisted the reference to an official referee under Section 89 of the Judicature Act of 1925. The decision of an official referee could not be called in question by appeal or otherwise except, on a point of law as provided by Section 1 of the Administration of Justice Act, 1932. The firm therefore contended that as their professional reputation was involved the matter should not be referred to the official referee and the House of Lords held that as the professional reputation of the appellants was involved, that question should not be left to the final decision without appeal of an official referee but should be tried before the normal tribunal of a High Court with a jury.

(16) The principle of these cases has also been followed in India with reference to cases coming under Sections 20 and 34 of the Act. (See, *Manindra Chandra Nandy* v. *H.V. Low & Co. Ltd.,* AIR 1924 Cal 796, *Narsingh Prasad* v. *Dhanraj Mills,* ILR 21 Pat 544 : (AIR 1943 pat 53), *Union of India* v. *Firm Vishydha Ghee Vyopar Mandal,* ILR (1953) 1 All 423 : (AIR 1951 All 541) *Sudhangsu Bhattacharjee* v. *Ruplekha Pictures,* AIR 1954 Cal 281.

(17) There is no doubt that where serious allegations of fraud are made against a party and the party who is charged with fraud desires that the matter should be tried in open court,that would be a sufficient cause for the court not to order an arbitration agreement to be filed and not to make the reference. But it is not every allegation imputing some kind of dishonesty, particularly in matters of accounts, which would be enough to dispose a court to take the matter out of the forum which the parties themselves have chosen. This to our mind is clear even from the decision in *Russell's case* (1880) 14 Ch D 471. In that case there were allegations of constructive and actual fraud by one brother against the other and it was in those circumstances that the court made the observations to which we have referred above. Even so, the learned Master of the Rolls also observed in the course of the judgment at p. 476 as follows:-

"Why should it be necessarily beyond the purview of this contract to refer to an arbitrator questions of account, even when those questions do involve misconduct amounting even to dishonesty on the part of some partner? I do not see it. I do not say that in many cases which I will come to in the second branch of the case before the Court, the Court may not, in the exercise of its discretion, refuse to interfere; but it does not appear to me to follow of necessity that this clause was not intended to apply to all questions, even including questions either imputing moral dishonesty or moral misconduct to one or other of the parties."

> We are clearly of opinion that merely because some allegations have been made that accounts are not correct or that certain items are exaggerated and so on that is not enough to induce the court to refuse to make a reference to arbitration. It is only in cases of allegations of fraud of a serious nature that the court will refuse as decided in *Russells case* (1880) 14 Ch D 471 to order an arbitration agreement to be filed and will not make a reference. We may in this connection refer to *Minifie* v. *Railway Passengers Assurance Company,* (1881) 44 LT 552. There the question was whether certain proceedings should be stayed; and it was held that notwithstanding the fact that the issue and the evidence in support of it might bear upon the conduct of a certain person and of those who attended him and so might involve a question similar to that of fraud or no fraud, that was no ground for refusing stay. It is only when serious allegations of fraud are made which it is desirable should be tried in open court that a court would be justified in refusing to order the arbitration agreement to be filed and in refusing to make a reference." *(emphasis supplied)*

20. The judgment far from supporting the respondents, in fact, supports the petitioner. In *Russell vs. Russell, (1880) 14 Ch D 471*, which was followed by the Supreme Court, the brother who was charged with fraud had invoked the arbitration agreement. It was resisted by the party alleging fraud on the ground that allegations of fraud ought not to be referred to arbitration and must be tried in a public enquiry. It was held that where objection to arbitration is by the party charging the fraud, the Court will not necessarily accede to it. In the case before me also, it is the party alleging fraud that has resisted the reference to arbitration. This was, however, clarified in paragraph-14 by the Supreme Court that where the allegations of fraud are made, the party against whom such allegations are made may successfully resist the reference to arbitration.

21. Thus, in the case before me, it is the petitioner against whom allegations of fraud have been made who could resist the application. The application cannot be resisted at the

instance of the respondent, which is the party making the allegations. The petitioner has not made any allegations of fraud against the respondent.

22. It is also clear from paragraph-17 of the judgment that the reference can be refused normally at least only at the instance of the party against whom allegations of fraud have been made.

23. A view to the contrary would enable a party to resist successfully an application for reference to arbitration merely by alleging fraud.

24. The last sentence in paragraph-13 in *Abdul Kadir's* case (supra), thus, suggests that a reference to arbitration may be resisted successfully even at the instance of the party that makes the allegations. That however, is only in cases where a *prima facie* case of fraud is proved against the party seeking the reference. In the facts of the present case, I do not find the respondent's allegations of fraud having been proved *prima facie*. The petitioner has indeed itself alleged fraud against its franchisees. The petitioner may well be liable to indemnify the respondent for the loss caused to it on account of the fraud on the part of its franchisees. The financial liability of the petitioner on account of the fraud of the third party is an entirely different thing from saying that the petitioner is guilty of the fraud. Such a situation does not warrant refusal of a reference to arbitration. Further, it is not clear as to whether the respondent is clearly of the view that the petitioner is also guilty of fraud or whether the petitioner is merely liable to the respondent on account of the fraud committed by its franchisees. An FIR has been filed against the petitioner. Though it is possible that the respondent believes

that the petitioner has committed a fraud in collusion with its franchisees, it appears that the respondent is not absolutely clear itself regarding the role played by the petitioner. Further investigations are on. Moreover, one of the main issues to be tried is the effect of the settlement dated 31.03.2014.

25. In this view of the matter, it is not necessary for me to consider the effect of the order passed in *Swiss Timing Limited vs. Commonwealth Games 2010 Organising Committee,(2014) 6 SCC 677* where the Supreme Court observed that the judgment of the Supreme Court in *N. Radhakrishnan vs. Maestro Engineers and others (supra)* is *per incurium*.

26. The petition is, therefore, disposed of by appointing Justice Mukul Mudgal, former Chief Justice of the Punjab & Haryana High Court, as the sole Arbitrator.

16.10.2015 **(S.J. VAZIFDAR)**
parkash* **ACTING CHIEF JUSTICE**

Note: Whether reportable: YES