OCD-11

ORDER SHEET

AP-COM/701/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

KAKALI KHASNOBIS
VS
MRS REETA PAUL AND ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 21st August, 2024.

Appearance:
Mr. Aritra Basu, Adv.
Mr. Somnath Bose, Adv.
Mr. Shubham Khan, Adv.
..for the petitioner

Mr. Sanjay Mukherjee, Adv.
Mr. Arghadip Das, Adv.
..for the respondents

The Court: The present application under Section 11 of the Arbitration and Conciliation Act, 1996 has been challenged on two-fold grounds. First, on the ground that the same is barred by limitation and secondly, that the petitioner did not comply with the mandatory provision of Section 11(5) and Section 21 of the 1996 Act by issuing a prior notice to the respondents requesting the appointment of an Arbitrator.

Insofar as the first issue is concerned, learned counsel for the respondents places reliance on certain dates and points out that an application

under Section 9 of the 1996 Act was taken out by the petitioner on July 26, 2021 where an interim order was passed on July 27, 2021. Ultimately, the said application was dismissed for not taking effective steps for appointment of Arbitrator, on July 6, 2024. It is argued that the present application under Section 11 has been filed only on July 16, 2024 and, as such, is hopelessly time-barred.

On the issue of non-compliance of the pre-requisite of giving a notice to the respondents for appointment of an Arbitrator, learned counsel for the respondents cites a judgment of a learned Single Judge of the Delhi High Court in the matter of *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.* reported at *2017 SCC OnLine Del 7228*. Learned counsel also cites a co-ordinate Bench judgment of this Court in the matter of *Sri Arun Kumar Bhunia vs. Badal Midya* reported at *2019 SCC OnLine Cal 9410*.

In support of his contentions, learned counsel for the respondents also relies on a judgment of another co-ordinate Bench of this Court in the matter of *West Bengal Power Development Corporation Limited vs. Sical Mining Limited* reported at *2022 SCC OnLine Cal 3036* and a judgment of the Bombay High Court in *Malvika Rajnikant Mehta and Others vs. JESS Constructions* reported at *2022 SCC OnLine Bom 920*.

While controverting such arguments, learned counsel for the petitioner points out that the petitioner would be entitled to the Covid-19 relaxations granted by the Supreme Court in its judgments, which subsisted throughout the period between March 15, 2020 and February 28, 2022.

Moreover, learned counsel points out that the non-compliance of the provisions of Section 9 with regard to not referring the matter to arbitration could only affect the outcome of the Section 9 application. However, insofar as the present application is concerned, the same was filed on July 16, 2024 which in any event is before the expiry of three years from July 26, 2021, when the Section 9 application was filed.

Insofar as the second objection is concerned, learned counsel, by placing reliance on the invocation of arbitration clause by the petitioner dated July 20, 2021 and the reply thereto by the respondents dated August 16, 2021, submits that the same comprised of sufficient compliance of Section 11(5) of the 1996 Act. It is argued that although the petitioner's letter dated July 20, 2021 was addressed to the appointed Arbitrator, copies thereof were also forwarded to the present respondents, which according to the petitioner comprised of sufficient compliance of Section 11(5) and Section 21 of the 1996 Act.

The learned counsel for the petitioner also cites the stand taken by the respondents in their written reply dated August 16, 2021, where the request of the petitioner to appoint a particular person as an Arbitrator was clearly repudiated.

Learned counsel for the petitioner relies, in turn, on a judgment of a learned Single Judge of the Delhi High Court in the matter of *De Lage Landen Financial Services India Pvt. Ltd. vs. Parhit Diagnostic Private Limited and Others* reported at *2021 SCC OnLine Del 4160* and a coordinate Bench judgment of

this Court in *Universal Consortium of Engineers Pvt. Ltd. vs. Kanak Mitra and Another* reported at *AIR 2021 Cal 127.*

Heard learned counsel.

Insofar as the first issue of limitation is concerned, it is evident from the list of dates supplied by the respondents themselves that the application under Section 9 of the 1996 Act was filed by the petitioner on July 26, 2021 on which date, it may as such be construed, the cause of action for reference to arbitration first arose. As the application under Section 11 has been filed on July 16, 2024, just before the expiry of three years therefrom, it cannot be said that the same is *ex facie* barred by limitation. It has been held time and again by the Supreme Court and several High Courts that in the absence of any other provision, the residual provision of Article 137 of the Schedule to the Limitation Act is applicable to an application under Section 11 and as such, the period of three years having not elapsed, it cannot be said that the present application is time-barred.

That apart, the petitioner is also justified in arguing that the Pandemic relaxations granted by the Supreme Court from the period between March 15, 2020 and February 28, 2022 are also applicable to the petitioner, upon which the period in between has to be added to the limitation period. Thus, the first objection raised by the respondents is turned down.

Insofar as the second issue is concerned, a perusal of the judgment of the Delhi High Court in *De Lage Landen* (supra) shows that there were certain other circumstances which also coloured the judgment of the Delhi High Court.

As for example, it has been narrated in the said judgment that the arbitration clause in the said case, as worded, conferred complete discretion on the petitioner–lender to make an appointment. The Court proceeded to observe that in the light of the facts of the said case, it would be a non-issue as to whether a notice under Section 21 was necessary in the said case. That apart, the Court also took into consideration the fact that the petitioner had written to the respondents therein independently of the unilateral invocation of arbitration, by a communication/notice dated May 13, 2019, that it intended to take recourse to legal proceedings under the agreement which was construed by the learned Single Judge of the Delhi High Court as sufficient indication to invoke the arbitration clause. Such considerations being absent here, it cannot be said that the ratio laid down therein can be applied to the present case in an undiluted form.

The learned coordinate Bench, in the matter of *Universal Consortium of Engineers Pvt. Ltd.* (supra), had arrived at the finding that the Court was unable to read into Section 21 any mandate to the effect that a Section 11 application will not be maintainable unless a notice under Section 21 has been served by the petitioner on the respondent. The Court also placed reliance on the judgment of *Alupro Building Systems* (Supra) in support of its observations. Further, the learned Single Judge relied on a decision of the Apex Court in *State of Goa* where it was held, according to the learned Single Judge, that an application under Section 11 of the 1996 Act is itself a request by the petitioner for arbitration.

However, with utmost respect, the ratio of *Alupro Building Systems* appears to be a little bit different to me.

With regard to Section 21 not containing any provision that a Section 11 application will not be maintainable unless a notice under the said section was served, the said logic does not, with utmost respect, appeal to me since restriction, if any, in such context would be required to be embodied not in Section 21 but in Section 11 itself.

Insofar as *Alupro Building Systems* (supra) is concerned, the same would presently be dealt with here and I agree with the proposition that the decision of the Delhi High Court in the said case does not squarely apply in the present context.

In *State of Goa* (supra) as pointed by respondents' counsel in the present case, the context was counter claims, where it was held that an application under Section 11 of the 1996 Act is itself a request for arbitration.

It would be a circular logic and take us into infinite regress if such logic is adopted in the present context. If adopted, it would mean that an application under Section 11 should be construed as a notice for itself, which is an absurd proposition. Moreover, the said observations were not only made in the context of counter claim but also in the context of Section 21 of the 1996 Act, which commences an arbitral proceeding.

It would be apt to consider a different aspect of the matter at this juncture. There is a difference between the requirements of Section 21 and Section 11 as well as in the context in which the two Sections operate.

Whereas Section 21 is the commencement of the arbitral proceeding itself, Section 11(5) contemplates a different requirement, being once step prior to the commencement of the arbitral proceeding. Section 11(5) requires a request of appointment of Arbitrator to be made whereas Section 21 requires such a request to be made for the purpose of reference to arbitration.

Whereas the request under Section 11(5) is merely a precursor for the actual appointment of Arbitrator by the Court, only upon which the arbitral proceeding commences, the Section 21 operates as the commencement of the arbitral proceeding itself.

Thus, there is no scope of confusing the requirements of Section 21 on the one hand and Section 11 on the other, which operate in somewhat different perspectives.

Seen in such perspective, the judgment rendered by the Delhi High Court in *Alupro Building Systems* (Supra) might acquire some relevance.

However, a caveat ought to be entered at this stage. *Alupro Building Systems* (supra) was not rendered in the context of Section 11 of the 1996 Act, as correctly pointed out by learned counsel for the petitioner herein. The context of the same was a challenge under Section 34 of the 1996 Act where the Court was considering whether a notice under Section 21 is mandatory.

Since Section 21 is the commencement of the arbitral proceeding itself, the rigours applicable to the same are of a much higher standard than a request under Section 11(5) of the 1996 Act, since the latter is merely a prior step intimating the intention to arbitrate and appoint an Arbitrator to the

respondents, which would indeed be followed by the actual appointment of Arbitrator and the Arbitrator thereafter entering into the arbitral proceeding.

Thus, the tests applicable to Section 11(5) ought to be tested on a much liberal anvil in favour of arbitration, as contemplated in the object and purpose of the Arbitration Act, 1996, than that of Section 21, which is the actual commencement of the arbitral proceeding itself and has its effect on nothing less than the veracity and validity of the arbitral proceeding and the award.

While considering a challenge under Section 34, the Delhi High Court in *Alupro Building Systems* (supra) held that a plain reading of Section 21 indicates that except where the parties have agreed to the contrary, the date of commencement of arbitration proceedings would be the date on which the recipient of the notice receives from the claimant a request for referring the dispute to arbitration. The Court held that inherently the arbitration clauses do not contemplate the unilateral appointment of an Arbitrator by one of the parties and there has to be a consensus for which the notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

The Court also held that for the purposes of Section 11(6) of the 1996 Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond.

However, with utmost respect to the erudition *par excellence* of the learned judge who rendered the said judgment, being Justice Muralidhar, this Court is of the clear and unambiguous opinion that the said observation vis-à-vis Section 11(6) of the 1996 Act in the judgment was palpably obiter dictum, since the entire context, as enumerated in the judgment itself, was an application under Section 34 of the 1996 Act and not a Section 11 scenario.

That apart, the Court cannot read into the statute something which is not intended by the Legislature itself. Section 11 nowhere stipulates that there has to be a prior request of reference to arbitration under Section 21 of the 1996 Act. Section 11(5) clearly envisages a prior request for appointment of an Arbitrator, which would necessarily be followed by the actual appointment and thereafter commencement of the arbitral proceeding.

Seen in such context, *Alupro Building Systems* (supra) cannot be a binding precedent in the present case.

In *Sri Arun Kumar Bhunia* (supra), a learned Single Judge of this Court, inter alia, observed, although in a different context, that Section 11(6)(a) of the 1996 Act stipulates that when the procedure for appointment of the Arbitrator has been agreed upon by the parties, the Chief Justice or his designate can appoint an Arbitrator only when one of the parties fails to act as required under the agreed procedure. In such light, it went on to observe that there cannot be any doubt that issuance of a valid notice under Section 21 of the Act of 1996 for referring the dispute between the parties to arbitration is a condition precedent for commencement of a valid arbitral proceeding.

The context there was somewhat different than the present. Although the incentive for the Court to embark on the judgment was an application under Section 11(6) of the 1996 Act, in the said case, the parties had already participated in an arbitral proceeding upon entering into a reference. Thereafter, an issue was raised by the respondents therein to the effect that the appointment of the Arbitrator was unilateral which, in the absence of a valid notice under Section 21, was held by the learned Single Judge to be invalid. At the risk of repetition, as discussed above, the context of commencement of an arbitral proceeding being invalid in absence of a prior notice under Section 21 and in view of a unilateral appointment of Arbitrator is entirely different from a Section 11(5) situation, where only a prior notice is required for the purpose of appointment of an Arbitrator and not for the initiation of the proceeding itself.

In *Malvika Rajnikant Mehta* (supra) the Bombay High Court was considering an application under Section 11(5) read with Section 15 of the 1996 Act. There it was observed that without a notice under Section 21 of the Act, a party seeking reference of the disputes to arbitration would be unable to demonstrate that there was a failure by one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. In the said case, there was no dispute as to whether there was actually a prior request under either Section 21 or Section 11(5) of the 1996 Act. The Court considered that there were several correspondences between the parties which was ultimately relegated to the arbitrator himself by the Court for consideration whether there was a prior notice under Section 21 of the 1996 Act. Thus, I do

not find any reason to proceed on the premise that the ratio of the said judgment is conclusive for the present purpose.

Coming back to the present case, we are to look into the documents annexed to the present application to assess whether there was substantial compliance with Section 11(5) of the 1996 Act. Section 11(5) does not contemplate, under any stretch of imagination, the commencement of a valid arbitral proceeding but is merely a precursor and the *sine quo non* for appointment of an arbitrator which would then lead to commencement of the proceeding subsequently and as such, has to be taken in much more liberal context than Section 21, which itself marks the commencement of the arbitral proceeding.

In the communication dated July 20, 2021 made by the petitioner to the perceived Arbitrator, it was clearly indicated that the petitioner invokes the arbitration clause and names the Arbitrator as the principal noticee to settle the dispute as indicated in the said communication itself. There is no dispute to the fact that copies thereof were forwarded to the present respondents as well. The receipt of the said communication by the respondents is undisputed, since the respondent chose the give a reply thereto in writing which is also annexed the present application at page 43. In the reply dated August 16, 2021, the respondents, for all practical purposes, also construed the said notice as one seeking invocation of the arbitration clause. However, what was challenged by the respondents in the said reply was not that the said communication of the petitioner was not a request under Section 11(5), being

addressed to the Arbitrator and not to the respondents, but that the said unilateral appointment which was witnessed by the communication was not valid in the eye of law.

Thus, the challenge in the reply of the respondents was confined to the unilateral appointment of the Arbitrator himself, which has been obviated by virtue of the petitioner seeking the appointment of an independent Arbitrator by the present application under Section 11. Insofar as the last paragraph of the reply of the respondent dated August 16, 2021 is concerned, the respondents stated that question of acceptance of the alleged office of arbitration and/or to initiate a proceeding as per provision of law with any immediate effect *by the unilateral named Arbitrator* does not and/or cannot arise at all. Further, the respondents stated that they denied and disputed the same and as such the appointment of the particular learned advocate as Arbitrator from the petitioner's side belonging to the same Bar Association was not beyond question and the respondents did not accept the same since there was every likelihood of manipulation and pressure on the mind of the said learned advocate being the Arbitrator from the petitioner's side.

Thus, the matrix contemplated in Section 11(5) is fully satisfied in the facts of the case. Section 11(5) envisages the failure of any agreement referred to in sub-Section (2) and if the parties fail to agree on the Arbitrator within 30 days from receipt of a request by one party from the other party to so agree, for the appointment to be made.

Here, the petitioner wrote a letter addressed in the first person to the named Arbitrator but also addressed copies thereof to the respondents who admittedly received the same and replied to the same. In the reply, apart from challenging the unilateral appointment, the respondents made their intention clear that they failed to agree on the Arbitrator, which is the specific language and requirement of sub-Section (5) of Section 11 of the 1996 Act.

Thus, the respondents cannot now take the specious objection of non-compliance of Section 11(5) at this stage and argue that the Section 11 application is premature.

Despite taking into consideration the ratio laid down in all the judgments cited by the parties, we cannot lose sight of the object and purpose of the 1996 Act, in consonance with the contemplation of the UNCITRAL Model Law of Arbitration. Such object and purpose, in no uncertain terms, encourages and facilitates arbitration and seeks to make India an international hub for alternative dispute resolution by the process of arbitration. The purpose of Section 11(5) is not to throw a spanner in the wheels of arbitration but to encourage and facilitate arbitration. As such, the interpretation of the said section which would be congenial and conducive to arbitration can only be accepted by the Court as valid.

In the context of the above discussions, I am of the clear opinion that the requirements of Section 11(5) have been complied with in the present case and the application is not premature.

Hence, both the objections taken by the respondents to the present application are turned down.

A bare perusal of the arbitration clause indicates that the same covers the dispute now sought to be raised between the parties and the dispute so raised is otherwise arbitrable.

Accordingly, AP-COM/701/2024 is allowed, thereby appointing Mr. Sagar Bandyopadhyay (Mob No. 9830068294), an Advocate practising in this Court, as the sole Arbitrator to resolve the disputes between the parties, subject to obtaining a disclosure under Section 12 of the Arbitration and Conciliation Act, 1996 from the said Arbitrator. The learned Arbitrator shall, in consultation with the parties and in consonance with the provisions of the 1996 Act and its Fourth Schedule, fix his own remuneration.

It is further made clear that all questions are kept open for being adjudicated by the learned Arbitrator on merits and this Court has not entered into the merits any of the issues involved, including any objection regarding maintainability of the claims, if raised by the respondents, and all such issues will be decidedly independently by the learned Arbitrator.

(SABYASACHI BHATTACHARYYAJ.)

bp/R Bhar/B.Pal