

ODC-12

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
[Commercial Division]

AP-COM/716/2024
THE SECRETARY GANAUDYOG BAZAR UNNAYAN AND SERVICE CO-OPERATIVE
SOCIETY LIMITED
VS
IRIS HEALTH SERVICES LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 11th September, 2024

Appearance:
Mr. Arup Nath Bhattacharyya, Adv.
Ms. Sreetama Biswas, Adv.
...for petitioner.

Mr. Abhrajit Mitra, Sr. Adv.
Ms. Radhika Singh, Adv.
Mr. Sourojit Dasgupta, Adv.
...for respondent.

The Court:- Heard learned Counsel for the parties. A question has arisen as to whether the present application under Section 11 of the Arbitration and Conciliation Act 1996 and the prior notice under Section 21 of the said Act, on the premise of which the present application has been filed, are maintainable in their present form.

Learned Senior Counsel appearing for the respondents has taken an objection as to maintainability, primarily on the ground that the agreement in question was not entered into between the respondent and the petitioner, who is only the Secretary of the Ganaudyog Bazar Unnayan & Service Cooperative Society limited, which is a registered Cooperative society, being a separate entity in its own right, but between the present respondent and the said society itself. However, both in the present application and the preceding Section 21 notice, it is the Secretary who has espoused the cause of the separate juristic entity/Society.

Learned Senior Counsel cites a Coordinate Bench unreported judgment of this Court in the matter of *Secretary, Pragati Engineers Cooperative Society Limited versus The State of West Bengal and others [WP No. 20212(W) of 2007]* for the proposition that in view of the provisions in Section 23 of the West Bengal Cooperative Societies Act, 1983, a writ petition taken out by the Secretary of a cooperative society on behalf of the society is not maintainable. It was held that the Secretary is not competent to institute proceedings on behalf of the cooperative society, a body corporate and as such being required to sue in its own name.

Learned Senior Counsel appearing for the respondent also takes the Court through the Section 21 notice. It is argued that in the self-same notice, the present petitioner has sought to club several distinct and different agreements/documents. However, the parties to the said documents/agreements are different from each other. Only a few of the said agreements are exclusively between the present petitioner and the respondent. In the others, either the present respondent is not a party or there is also an additional third party apart from the present petitioner and respondent. It is argued that such disparate causes of action cannot be joined together in the same notice under Section 21 or in the self-same arbitral proceeding.

Learned Senior Counsel for the respondent further reiterates that in terms of Section 17 of the West Bengal Cooperative Societies Act, a society is a separate juristic entity having its own stamp and seal and is required to sue and be sued in its own name.

As such, it is contended that the present application ought to be dismissed.

Learned Counsel appearing for the petitioner, while controverting the objection as to maintainability, cites *Purushottam Umedbhai and Co. vs. M/s. Manilal And Sons* reported at (AIR 1961 SC 325). It is argued that in the said judgment, the Supreme Court went on to hold that if under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm, they are mis-describing themselves as the suit instituted is by them, they being known collectively as a firm. Thus, it is argued that in case of a mis-description, the same is merely to be treated as a technical objection and is required to be permitted to be cured. It is contended that a liberal approach is required to be taken by the Court in respect of such technical objections.

Learned Counsel further argues that even in the notice under Section 21 of the 1996 Act issued in the instant case, separate agreements having the underlying same dispute have been joined.

Learned Counsel seeks to place the contents of some of the agreements to argue that although third parties have been joined, they did not have any effective role to play in the context of the agreements.

It is further pointed out that in the notice itself, the learned advocate issuing the notice has mentioned the cooperative society as his client. Although the client has been mentioned to be the Secretary of the said Cooperative Society, the repeated reference to the properties of the society as belonging to the client clearly indicates that it was intended that the society itself is to be treated as the client and not its Secretary.

Upon hearing learned Counsel for the parties, the Court comes to the following conclusions:

Insofar as the present application under Section 11 is concerned, the same has, in unambiguous terms, been filed by the Secretary of the society as the petitioner. There is not a single phrase in the cause title to indicate that the Secretary intended to file it on behalf of the Society. Even in the affidavit, the concerned Secretary has described herself as the petitioner in the present application.

Thus, there is no scope of construing that the Secretary has filed the application on behalf of the society. Accordingly, there is doubt as to whether the very premise of the application can be permitted to be altered merely by way of amendment. It is well-settled that by amendments, the very basis and premise of the original case of an applicant cannot be permitted to be altered. The defect, as such, is not merely technical but touches the merits of the matter, all the more so, since a cooperative society is a separate juristic entity in its own right and can at best be represented by its Secretary but it cannot be that the Secretary describes herself as the petitioner.

The reliance of learned Counsel for the petitioner on sub-clauses (47) and (64) of Section 4 of the West Bengal Cooperative Societies Act is misplaced. The description of officer in Section 4(47), although includes a secretary, the officer is only empowered, as provided in Section 4(64), to manage the affairs of the cooperative society.

However, in the present case, it is not that the Secretary has managed the affairs of the society by filing the present application on behalf of the society, but the Secretary describes herself to be the petitioner and attributes the cause of action for the petition to herself, which is *de hors* the law since a registered cooperative society is a juristic entity in its own right.

The petitioner's case worsens when we move on to the Section 21 notice. Insofar as the said notice is concerned, the caption thereof clearly mentions in no uncertain terms that the client of the learned advocate issuing the notice is not the society but the Secretary of the society. The very first sentence of the said notice mentions that the same was issued under instruction from and *on behalf of* (emphasis supplied) the client, which has been previously described to be the Secretary.

Throughout the said notice, the client has been mentioned to be the owner of the properties of the society. However, such mistake by itself cannot be read into the notice so as to cure the incurable defect therein, which is that the notice was issued not only by the Secretary but on behalf of the Secretary as well, as opposed to the society, as per the very first sentence of the notice and its caption.

Moreover, a perusal of the several agreements which have been mentioned for a composite reference to arbitration in the Section 21 notice goes on to show that the parties thereto are different from each other. Although in some of the said agreements, in particular two, only the petitioner and the respondent are the parties, in the others, either the respondent is not a party or, in addition to the petitioner and the respondent, there is a third party signatory to the said agreement.

Such disparate causes of action cannot be joined. Joining the said dispute would be as absurd as clubbing together in the hotchpot of a partition suit separate properties owned by different persons, either severally, jointly or individually.

For example, in a dispute arising out of the tripartite agreement between the petitioner, the respondent and the third party juristic entity, the third party

would be a necessary party to the arbitration as well as the preceding Section 11 application. However, the case would be different in respect of the agreement where only the petitioner and the respondent are parties, where they and only they are required to be included in the arbitral proceeding and in all connected proceedings and applications. Thus, joining the two would hit at the very root of party autonomy as well as confidentiality, which are two basic tenets of the concept of arbitration. Induction of a third party in the arbitral proceeding between the present parties, who is not a signatory to the agreements between the petitioner and the respondent, would be not only absurd but the very antithesis of the concept of alternative dispute resolution by way of arbitration as contemplated in the 1996 Act. Doing so would contravene concepts of privity.

Also, at least two of the said agreements, regarding which a composite reference has been sought by the petitioner, envisage a three member arbitral tribunal as the first choice of the parties. The same militates against the modality of sole arbitrator chosen by the present petitioner and the respondent in the other agreements. Thus, the confusion and conflict is not restricted to the subject matters of the agreements and the parties, but also touches upon the very constitution of the arbitral tribunal.

The said discrepancies are irreconcilable and as such, a composite reference as sought in the present Section 21 notice is also impossible. Thus, the very basis of the present application, that is, the notice invoking the arbitration clauses, is also vitiated in law and on facts, and cannot be a valid basis of the present application.

Insofar as the judgment cited by the petitioner is concerned, the facts of the same are patently not applicable to the present case. There, the issue before

the Supreme Court was that a partnership firm, which was the propounder of the action, was represented by its partners, the latter having filed the proceeding in their own name.

However, in case of a partnership firm, the very concept and premise is that the partners have joint and several liability and a partnership is merely a façade of the individual interests of the partners, when joined together. In the reported case, all the partners themselves had filed the suit in their names instead of in the name of the partnership firm and, as such, the Supreme Court penetrated such facade and held that the defect was curable.

As opposed to the same, in the present case, a society registered under the West Bengal Cooperative Societies Act is not a mere illusory façade of individuals but is a separate and concrete juristic entity in itself, having a separate artificial juristic existence in the eye of law which is completely severable from its Secretary. A Secretary, as defined in the Act, is not even a stakeholder in the cooperative society as such, but is merely a functionary and an employee of the society.

Thus, no line of equation can be drawn between the judgment cited by the petitioner and the present case at all.

Rather, the judgment of the coordinate Bench cited on behalf of the respondent is apt in the context of the present case. Since only the Secretary of the Society and not the Society itself has initiated the present proceeding and the proceeding is preceded by a Section 21 notice [which is a mandate under Section 11(3) in the sense that an appointment of arbitration had to be sought and refused prior to 30 days of making the application under Section 11] also by the Secretary, the present proceeding is bad in law and in its present form.

Accordingly, on the grounds as indicated above, AP-COM/716/2024 is dismissed on contest. However, it is made clear that nothing in this order takes away the right of the petitioner, if otherwise available, to invoke the arbitration clause in any of the agreements between the parties and to initiate *de novo* proceedings from the pre-Section 11 stage by a notice as contemplated in Section 11(3) and/or Section 21 of the 1996 Act.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

SK.