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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 3rd July, 2018

+ ARB.P. 168/2017

MANJUNATH V. HEBBAR

..... Petitioner

Through: Mr.Shambo Nandy, Adv.

versus

TARINA SEN & ORS.

..... Respondents

Through: Mr.Sanjay Jain, Sr. Adv. with
Mr.Rajiv Yadav, Ms.Sneh Suman and
Ms.Rajul Jain, Advs. for R-1.
Mr.Sudhir Nandrajog, Sr.Adv. with
Mr.Santosh Kumar and Mr.Manav
Gill, Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. The petitioner has filed the present petition under Section 11 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') praying for appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Agreement dated 11.02.2011 read with the Amendment thereof, which is undated, as also the Memorandum of Understanding dated 28.06.2011.
2. It is the case of the petitioner that an Agreement had been entered into between the petitioner and one Goamincorp, which was a Sole Proprietorship concern of Late Mr.Surojit Sen, for sale and purchase of Iron

Ore Fines, with Goamincorp being a seller and the petitioner being the purchaser thereof. The contract was amended by an undated document. Thereafter, by the MOU dated 28.06.2011, the Agreement was further amended and M/s Starways Logistic was added as a Confirming Party. This MOU was executed by Mr.T.P. Mishra who held a Power of Attorney from Late Mr.Surojit Sen.

3. As certain disputes arose between the parties, the petitioner sent a legal notice dated 24.09.2012 where Goamincorp was said to be represented by respondent no.1 as a Director thereof. As the disputes were not resolved, the petitioner invoked the Arbitration Agreement as contained in the Agreement dated 11.02.2011, by his notice dated 17.06.2013.

4. Again as no reply was received from the respondents, the petitioner filed a petition under Section 11 of the Act before this Court being Arb. P. No.395/2014. In the said petition repeated attempts to serve the respondents failed as the postal envelopes were being returned back with remark “addressee left”.

5. This Court vide its order dated 11.03.2015 disposed of the said petition granting permission to the petitioner to file a fresh petition as and when he is able to locate the correct and present address of the respondents. It is asserted that thereafter, on inquiry, the petitioner was able to trace out the current address of the respondents and filed the present petition on 25.02.2017.

6. The respondents have filed their reply to the petition wherein they *inter-alia* raised contentions that there is no Arbitration Agreement between the respondents and the petitioner and also that the present petition, in any case, is barred by the Law of Limitation.

7. As far as the first contention is concerned, learned senior counsels appearing on behalf of the respondents submit that the Agreement dated 11.02.2011 sought to be relied upon by the petitioner as containing the Arbitration Agreement between the parties, in Clause 24 thereof clearly stipulates that the terms of the Agreement would not be binding on the legal heirs of the parties thereof. As the respondents are being such as the legal heirs of late Mr.Surojit Sen, the terms of the Agreement dated 11.02.2011, including the Arbitration Agreement contained therein, cannot be relied upon against the respondents. It is further submitted that in any case, as per the case of the petitioner, the said Agreement was amended, vide MOU dated 28.06.2011. The said MOU does not contain any Arbitration Agreement and therefore, the present petition is not maintainable. It is further submitted that the said MOU is not valid as it is claimed to have been executed by one Mr.T.P.Mishra, as a Power of Attorney of Mr.Surojit Sen, however, as Mr.Sen had expired on 27.05.2011, the said Power of Attorney was no longer valid on the date of execution of the MOU, which is alleged to be 28.06.2011.

8. Learned counsel for the petitioner controverts the above argument by relying upon Section 40 of the Act to submit that the Arbitration Agreement does not stand discharged upon death of the parties under the Agreement and is enforceable against the legal representatives. As far as the MOU is concerned, he submits that as the MOU was executed after the death of Mr.Surojit Sen, the petitioner would not be making any claim thereon and the original Agreement would remain valid which admittedly contains an Arbitration Agreement between the parties.

9. I have considered the submissions of the learned counsels for the

parties. Clause 24 of the Agreement dated 11.02.2011 is reproduced herein below:

“This contract constitutes the entire agreement between the parties and supersedes all prior negotiations, understandings and agreements whether written or oral. This contract shall not be modified, amended or supplemented, except by an instrument in writing duly executed by each of the parties hereto. This contract does not in any way bind or engage the Seller or the Buyer with their respective Principals, Financers, administrators, executors; successors or assigns.”

10. A reading of the above would clearly show that the intention of the parties was to bind the parties to the said Agreement personally and not the successors and assignees of the parties. Section 37 of the Indian Contract Act, 1872 provides that promises bind the representatives of the promisors in case of the death of such promisors before performance, ‘unless a contrary intention appears from the contract’. In the present case, such contrary intention is evident from Clause 24 of the Agreement, relied upon by the petitioner.

11. In view of such specific stipulation, Section 40 of the Act would not come to the aid of the petitioner to seek enforcement of such Arbitration Agreement against the successors of Mr.Surojit Sen.

12. The second contention raised by the learned senior counsels for the respondents is that the present petition is barred by the Law of Limitation. In this regard they submit that the notice invoking arbitration was issued on 17.06.2013 and the present petition has been filed only on 25.02.2017.

13. The learned counsel for the petitioner submits that the petition is filed within the period of limitation. He submits that based on the invocation of

the Arbitration Agreement, the petitioner had filed the earlier petition under Section 11 of the Act on 25.07.2014. The same had been disposed of by this Court vide its order dated 11.03.2015 granting permission to the petitioner to file a fresh petition once the address of the respondent is located. After the passing of the said order, the petitioner was advised to get proof of the current address of the respondents at Bhubaneswar and the said process took some time due to which there was delay in filing of the petition. However, as the petition was filed within two years of passing of the order dated 11.03.2015 the petition would be within the period of limitation.

14. I have considered the submissions made by the counsels for the parties. The petitioner had addressed its legal notice dated 24.09.2012, as far as Goamincorp is concerned at its Goa address and on respondent no. 1 at her Bhubaneswar address. The notice invoking arbitration was also addressed by the petitioner in the same manner. Admittedly, when the earlier petition under Section 11 was filed, respondent no. 1 herein was the only party impleaded and the address given was of Goa and not of Bhubaneswar. There is no cogent reason given by the petitioner for such omission except for stating that this was an oversight of the lawyer representing the petitioner in the earlier petition. The petitioner did not take steps to rectify this mistake even when repeated attempts to serve respondent in the earlier petition were failing, eventually resulting in disposal of that petition vide order dated 11.03.2015.

15. Even after passing of the order dated 11.03.2015, the petitioner did not immediately approach this Court by way of a fresh petition or by way of an application in the said petition seeking service thereof on the respondent no. 1 at her Bhubaneswar address. This was in spite of the fact that the

petitioner in the meantime had received a reply to the legal notice invoking arbitration from respondent no.1, wherein respondent no.1 had clearly mentioned her address to be at Bhubaneswar.

16. Another important factor to be considered in the present petition is that, as stated earlier, the first petition was filed only against respondent no.1. Respondent nos.2 to 4, who have been impleaded now in this present petition, were not made parties in the first petition. Respondent nos.2 to 4 have now been impleaded as legal heirs of Mr.Surojit Sen. The learned senior counsels for the respondents have drawn my attention to the legal notice dated 24.09.2012 sent by the petitioner wherein the petitioner clearly shows his awareness of Mr.Surojit Sen having left behind respondent nos.2 and 3, therefore, as far as respondent nos.2 and 3 are concerned, in any case, the petitioner is not entitled to claim benefit of filing of the earlier petition as far as the period of limitation is concerned.

17. From the above referred document it is evident that the petitioner was aware of the respondent no. 1 residing at Bhubaneswar and for reasons unknown, did not take steps for service of the notice on her at the said address. This was so even when the Court disposed of the petition due to non service of the notice at respondent no. 1. Further, no reason has been given for not impleading respondent nos.2 and 3 in the earlier round of litigation. The petitioner therefore, was not prosecuting his earlier petition with due diligence and is not entitled to seek any benefit of filing the first petition for computation of the period for the purpose of limitation. Reliance of the learned counsel for the petitioner on the permission granted in the order dated 11.03.2015 cannot also be accepted as such permission was based on the concealment of the fact that the petitioner was well aware that

the respondent was residing at Bhubaneswar and in spite of such knowledge did not give such address in his petition.

18. In view of the above, I find no merit in the present petition and same is accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

JULY 03, 2018/Arya