

IN THE HIGH COURT AT CALCUTTA  
Ordinary Original Civil Jurisdiction  
ORIGINAL SIDE  
AP/92/2020

SRIJAN REALTY PRIVATE LIMITED  
VERSUS  
SUNEEL SWAIKA AND ANR.

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY  
Date : 14<sup>th</sup> December, 2020.

Appearance:

Mr. Rupak Ghosh, Adv.  
Mr. Raghunath Ghosh, Adv.  
... for the petitioner.

Mr. Bajrong Manot, Adv.  
Ms. Manju Agarwal, Adv.  
... for the respondent no.1.

The Court: In this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short "the Act of 1996"), the petitioner has prayed for an order of appointment of an Arbitrator to adjudicate the disputes arisen between the parties relating to the memorandum of understanding dated October 12, 2010 (herein after referred to as "the said memorandum of understanding").

The said memorandum of understanding was entered into between the petitioner and the father of the respondents acting as a 'Karta' of a Hindu undivided family, comprising himself and the respondents. The said memorandum of understanding contemplated for a development agreement to be entered into between the parties

thereto for development of the immovable property of the HUF situate at Premises No.9, Station Road, Liluah within the Bally Municipality (hereinafter referred to as "the Said Property") upon the said HUF making out a marketable title in respect of the said premises. The petitioner claims to have paid a sum of Rs.50 Lakh to the said HUF and/or its Karta under Clause 11(a) of the said memorandum of understanding. The father of the respondents who had entered into the said development agreement as Karta of the HUF has died. It is the case of the petitioner that the said HUF has failed to make out a marketable title in respect of the said property and as such it is entitled to obtain refund of the said sum of Rs.50 Lakh from the respondents jointly and/or severally. According to the petitioner, the present respondents are bound by the terms of the said memorandum of understanding including the arbitration clause contained therein. By notice dated August 08, 2019 the petitioner invoked the arbitration agreement and requested the respondents' to agree to the appointment of the arbitrator named therein. The respondent no.1 in his reply dated August 19, 2019 refused to accept the person named by the petitioners in the said letter dated August 8, 2019 as the sole Arbitrator. The said respondent further requested the petitioner to provide him with a copy of the said memorandum of understanding. The respondent no.2, however, did not reply to the said notice dated August 8, 2019.

Learned Counsel appearing for the petitioner submitted that in the present case the respondents are bound by the said arbitration clause contained in the said memorandum of understanding, but the parties have failed to agree to the appointment of the Sole Arbitrator to adjudicate the disputes relating to the said memorandum of understanding. Thus, it was urged that this Court in exercise of the power under Section 11(6) to the application a sole Arbitrator to adjudicate the disputes between the parties.

Learned counsel appearing for the respondent no.1, however, submitted that the respondents are not aware of the said memorandum of understanding dated October 12, 2010. She further submitted that in any event the claim of the petitioner against the respondents are hopelessly barred by limitation. It was lastly contended that since the said memorandum of understanding is not registered document this Court would not look into the same. Urging these grounds the respondent no.1 prayed for dismissal of the present application.

In reply, it was submitted by the petitioner that it has already filed an application before the learned District Judge at Howrah, under Section 9 of the Act of 1996. The respondents are well aware of the existence of the said memorandum of understanding a copy whereof has already been disclosed in the said proceeding pending before the learned District Judge, Howrah.

Thus, according to the petitioner, there is no merit in the contention of the respondent no.1 that the petitioner has not provided him with a copy of the said memorandum of understanding. It is further submitted that in the present case that the document dated October 12, 2010, as the Karta of the HUF in the memorandum of understanding and not a development agreement and as such, the same is not required to be registered.

I have considered materials on record as well as the arguments advanced by the learned Counsel appearing for the respective parties. It is to be noted that the respondent nos. 1 and 2, being two brothers reside at the same premises no.6, Moore Avenue, P.S.- Regent Park, Kolkata-700040. The respondent no.2 has received a copy of this application and in spite thereof has chosen not to appear before this Court. The respondent no.2 has not even replied to the said notice dated August 8, 2019 issued by the petitioner under Section 21 of the Act of 1996. The respondent no.2 has not disputed that his deceased father, Bijoy Kumar Swaika had entered into the said memorandum of understanding dated October 12, 2010 as Karta of the HUF. It is the respondent no.1 who is contesting the present application. However, it is not in dispute that the respondent no.1 has already received a copy of the application filed by the petitioner under Section 9 of the Act of 1996 disclosing the said memorandum of understanding dated October 12, 2010. In the facts of the present case, I am

satisfied with the existence of the said memorandum of understanding dated October 12, 2010 as well as the arbitration agreement contained therein which are binding upon the present respondents.

In view of the provision of sub-Section 6A of Section 11 of the Act of 1996 and the decision of the Supreme Court in the case of Duro Felguera, S.A. vs. Gangavaram Port Limited reported in (2017)9 SCC 729 it is well settled that whether the claim of a party in the arbitration is barred by limitation falls within the jurisdiction of the Arbitrator to decide such issue. Further the said memorandum of understanding contemplated that subject to the HUF making out marketable title, the parties would execute a development agreement. It is the said development agreement which would have been required to be registered under the law and not the said memorandum of understanding. I do not find any merit in the contentions raised by the respondent no.1. For the reasons aforesaid, the application succeeds.

In the present case, when the parties have failed to agree to the appointment of a Sole Arbitrator the petitioner has substantiated the ground justifying filing of the present application under Section 11(6) of the Act of 1996.

For the reasons as aforesaid, Mr Suman Kumar Dutt, Advocate of Bar Library Club (First Floor) is appointed as the sole Arbitrator to adjudicate the disputes between the parties relating

to the said memorandum of understanding. The Arbitrator will be free to fix his fees, as per the Fourth Schedule to the Act of 1996, and the same shall be borne by the parties in equal shares. The Arbitrator shall also be entitled to engage secretarial staff whose remuneration shall be paid by the parties in equal shares.

With the above direction A.P. No.92 of 2020 stands allowed.

Urgent certified website copies of this order be made available to the parties, if applied for, upon compliance with all requisite formalities.

(ASHIS KUMAR CHAKRABORTY, J.)

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