

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
(COMMERCIAL DIVISION)**

**F.M.A.T. 341 of 2020  
With  
CAN 1 of 2021**

**Kyal Developers Private Limited.  
Vs.  
Arun Kumar Dutta & Ors.**

**Mr. Utpal Bose, Sr. Advocate  
Ms. Labanyasree Sinha ..... For the Appellant.**

**Ms. Sohini Chakraborty  
Ms. Prajaaini Das ..... For the Petitioner.**

**Mr. Srinjay Sengupta  
Mr. S. Roy ..... For the Respondent No. 5.**

**Re: CAN 1 of 2021**

As the issue involved in this appeal is very short we dispose of the appeal and the connected application today dispensing with all formalities.

This appeal is from a judgement and order dated 10<sup>th</sup> February, 2020 passed by the learned court below restraining both the parties from dealing with the property without the “consent of the learned arbitrator” or until “the learned arbitrator is appointed”. This judgement and order disposed of an application under Section 9 of the Arbitration and Conciliation Act, 1996. (the said Act I)

S.D.

A short history of the proceedings has to be recounted.

On 1<sup>st</sup> October, 2019 an ad-interim order of

injunction of similar nature was made by the said court which was vacated on 15<sup>th</sup> November, 2019.

In the self-same application on 10<sup>th</sup> February, 2020 the impugned order was made.

Mr. Utpal Bose, learned senior advocate appearing for the appellant made the following submissions:

The proceedings were initiated under the Commercial Courts Act, 2015.(the said Act II)

The dispute arose out of a development agreement dated 17<sup>th</sup> April, 2011 between the parties which provided for inter alia, construction of a residential building. Therefore, according to learned counsel, the dispute was not commercial under Section 2(1)( c) (vii) of the said Act II.

The second argument was that under Section 9(2) of the said Act, I the arbitral proceedings had to be commenced within a period of ninety days of an order made by the court under Section 9. Since the respondents did not initiate any arbitral proceedings under section 21 of the said Act, I within three months of 1<sup>st</sup> October, 2019, the impugned order ought not to have been passed and the Section 9 application dismissed.

Mrs. Sohini Chakraborty, learned advocate appearing for the respondent nos. 1 to 4 responded with regard to the second argument that the initial ad-interim

order of 1<sup>st</sup> October, 2019 was vacated on 15<sup>th</sup> November, 2019. The requirement of Section 9(2) of the said Act I was that the arbitral proceedings had to be commenced within ninety days from making of an order. The initial order of 1<sup>st</sup> October, 2019 became nonest on 15<sup>th</sup> November, 2019. The Section 9 application remained pending in the file of the court without any order.

Thereafter, on 10<sup>th</sup> February, 2020 the impugned order was made. Soon thereafter lock-down was imposed consequent to intervention of the COVID 19 pandemic. The respondents could not take the necessary step under Section 21 of the said Act I. However, on 5<sup>th</sup> February, 2021 the necessary notice was issued by them which was returned by the postal authority with the endorsement “left”. Learned advocate for the appellant, according to Mrs. Chakraborty, refused to accept the notice on behalf of the appellant.

A judgement and order of the Supreme Court dated 23<sup>rd</sup> March, 2020 made suo motu in a writ petition taking cognizance “for extension of limitation” read with the final order dated 8<sup>th</sup> March, 2021 disposing of the application extended the period of limitation in respect, inter alia, “termination of proceedings” till 14<sup>th</sup> March, 2021. Hence, in the absence of the Section 21 notice, the Section 9 application was not terminated, she submitted.

We shall deal with the second point first. The

language and intention of Section 9(2) of the said Act I, are quite plain that when a party obtains and enjoys an interim order from the court, he cannot keep on enjoying it, without taking steps to initiate proceedings before the alternative dispute redressal forum chosen by the parties, i.e. arbitration. Within a period of ninety days from the date of the order he has to take the steps to continue the arbitral proceedings.

Obviously, this provision was inserted by an amendment to save and protect the respondent from prejudice caused by an indefinite interim order passed by the court, without commencement of arbitral proceedings before the arbitrator. The third sub-section which was also inserted by way of an amendment explained this intention by providing that once the tribunal was constituted the court shall no longer to entertain a Section 9 application.

Although, the ad-interim order was made on 1<sup>st</sup> October, 2019 it was vacated on 15<sup>th</sup> November, 2019. From 15<sup>th</sup> November, 2019, there was no order in the file of the court. The impugned order was made on 10<sup>th</sup> February, 2020. The notice under Section 21 was issued on 5<sup>th</sup> February, 2021. Now, in the light of the exemption granted by the above Supreme Court decision this notice dated 5<sup>th</sup> February, 2021 was issued within three months of the order dated 10<sup>th</sup> February, 2020 but much

beyond three months of the initial order dated 1<sup>st</sup> October, 2019. If the order dated 1<sup>st</sup> October, 2019 remained in the file of the court, we would have no hesitation in holding that the 5<sup>th</sup> February, 2021 notice was bad and the Section 9 application liable to be dismissed with vacation of all orders made therein. Since there was no order in the file of the court when the impugned order was made on 10<sup>th</sup> February, 2020, the Section 21 notice had to be issued within three months from that date.

In our opinion, the notice dated 5<sup>th</sup> February, 2021 was a valid one, protected by the said order of the Supreme Court.

As far as the first point is concerned *prima facie* there appears to be substantial merit in the argument of Mr. Bose. However, this court on appeal is not a fact finding court. This point ought to have been properly argued and dealt with by the learned court below. We do not find such exercise in the impugned order.

In those circumstances, we remand the application to the learned court below to first determine its jurisdiction to entertain the Section 9 application under the Commercial Courts Act, 2015 and thereafter to consider the Section 9 application on merits, if it holds that it has jurisdiction.

Learned court below shall dispose of this Section 9 application positively within two months from

date or until further order of the learned court below whichever is earlier.

The status quo ordered by the court below shall continue.

It will always be open to the respondents if they are so advised to withdraw the proceedings before the court below and to file it before any other court.

We add that we have dealt with and disposed of the second argument of Mr. Bose on the footing that we have determination to hear appeals under Section 37 of the said Act I irrespective of whether the dispute is commercial or not.

The appeal (FMAT 341 of 2020) and the connected application (CAN 1 of 2021) are disposed of.

**(I.P. Mukerji, J.)**

**(Md. Nizamuddin, J.)**

