

IN THE HIGH COURT AT CALCUTTA

Original Civil Jurisdiction
(Original Side)

AP 279 of 2020

Universal Consortium of Engineers Pvt. Ltd.

Vs.

Sri Kanak Mitra & Anr.

Before: The Hon'ble Justice Arijit Banerjee

For the Petitioner : Mr. Uday Chandra Jha, Adv.
Mrs. Maheswari Sharma, Adv.
Ms. Tulika Roy, Adv.

For the Respondents : Mr. Manab Ranjan Sarbadhikari, Adv.
Mr. Soupal Chatterjee, Adv.

Heard On : 04.02.2021, 10.02.2021 & 12.02.2021

CAV On : 12.02.2021

Judgment On : 07.04.2021

Arijit Banerjee, J.:

1. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short '*the Act of 1996*'), for appointment of an arbitrator for adjudication of disputes and differences that have arisen between the parties in relation to a Development Agreement dated December

15, 2006 (in short, '*the said Agreement*') entered into by and between the parties. It is not in dispute that the said Agreement contains an arbitration clause for resolution of disputes and differences between the parties touching the said Agreement.

2. Schedule 'F' to the Development Agreement dated 15.12.2006 which contains the Arbitration Clause reads as follows:

“

SCHEDULE 'F'

ARBITRATION

1. *All disputes and differences between the parties hereto arising out of this agreement regarding this constructing or interpretation of any of the terms and conditions herein contained or determination of any liability or touching these presents shall be referred to the arbitration and the same shall be deemed to be a reference within the meaning of the Arbitration and Conciliation Act, 1996 or any statutory enactment or modification thereunder and the Award so delivered shall be conclusive and binding on the parties hereto.*
2. *The Arbitrator shall have summary power.*
3. *The parties hereto agree and covenant with each other that they have full trust and faith in the Arbitrator and agree not to challenge and / or dispute the same in any manner whatsoever or howsoever.”*

3. The respondents opposed the application primarily on two grounds. Firstly, it was argued that no notice under Section 21 of the Act of 1996 was given by the petitioner to the respondents. In the absence of such a notice, the present application is premature and not maintainable. Secondly, the respondents have filed a complaint against the petitioner before the National Consumer Forum, New Delhi, in relation to disputes arising out of the said Agreement. It was submitted that initiation of an arbitration proceeding by appointment of an arbitrator would mean that there will be parallel proceedings which ought not to be permitted. Although a third ground has been indicated in the written notes of argument filed by the respondents, i.e., the said Agreement is not registered as required under Section 17 of the Registration Act, this point was not argued when the matter was heard. In any event, this point can be rejected at the threshold since the said Agreement being of the year 2006, there was at that time no requirement for registering the said Agreement.

4. In support of his contention that for initiation of an arbitration proceeding, issuance of notice under Section 21 of the Act of 1996 is mandatory, learned Counsel appearing for the respondents has relied on several decisions. Prior to noting such decisions, it may be helpful to set out Section 21 of the Act of 1996:

***“21. Commencement of arbitral proceedings.*—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on**

which a request for that dispute to be referred to arbitration is received by the respondent. ”

5. Learned Counsel relied on the decision of the Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.:** **2017 SCC Online Del 7228**. Learned Counsel particularly relied on Paragraphs 25 and 30 of the said judgment which are set out hereunder:

“25. A plain reading of the above provision 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 (the Petitioner herein) receives from the claimant a request for referring the dispute to arbitration. The object behind the provision is not difficult to discern. The party to the arbitration agreement against whom a claim is made, should know what the claims are. It is possible that in response to the notice, the recipient of the notice may accept some of the claims either wholly or in part, and the disputes between the parties may thus get narrowed down. That is one aspect of the matter. The other is that such a notice provides an opportunity to the recipient of the notice to point out if some of the claims are time barred, or barred by any law or untenable in fact and/or that there are counter-claims and so on.

30. Considering that the running theme of the Act is the consent or agreement between the parties at every stage, Section 21 performs an important function of forging such consensus on several aspects viz. the scope of the disputes, the determination of which disputes remain unresolved; of which disputes are time-barred; of identification of the claims and counter-claims and most importantly, on the choice of arbitrator. Thus, the inescapable conclusion on a proper interpretation of Section 21 of the Act is that in the absence of an agreement to the contrary, the notice under Section 21 of the Act by the claimant invoking the arbitration clause, preceding the reference of disputes to arbitration, is mandatory. In other words, without such notice, the arbitration proceedings that are commenced would be unsustainable in law. ”

6. Learned Counsel relied on a decision of the Bombay High Court in the case of ***Bombay Gas Company Ltd. v. Parmeshwar Mittal & Ors.: AIR 1998 Bombay 118***. Reliance was placed particularly on Paragraph 10 of the said judgment. With great respect I have not been able to appreciate as to why the said judgment was relied upon. In the context of Sections 34 and 21 the Arbitration Act, 1940, the learned Judge held that an application under Section 34 surely implies readiness and willingness of the party to go for arbitration, but it cannot be equated with a notice under Section 21 which

constitutes commencement of an arbitral proceedings. In my opinion the said decision is not relevant for the purpose of the present case.

7. Learned Counsel also referred to a decision of this Court in the case of ***Magma Leasing Ltd. v. NEPC Micon Ltd. & Anr: AIR 1998 Calcutta 1994***. Again in my opinion, this case has no relevance to the case in hand. The learned Judge was considering the meaning of the phrase '*not later than when submitting his first statement on the substance of the dispute*', which appears in Section 8(1) of the Act of 1996.

8. Mr. Sarbadhikari then referred to the Hon'ble Supreme Court decision in the case of ***M/s. Sundaram Finance Ltd. v. M/s. NEPC India Ltd.: AIR 1999 SC 565***. Again, with great respect, that case is in no way germane to the facts of the present case. In that case the Hon'ble Supreme Court explained that the Court can pass interim orders under Section 9 of the 1996 Act before or during the arbitral proceedings, i.e., even before notice under Section 21 of the 1996 Act is received by the respondents.

9. Finally learned Counsel referred to the judgment of the Hon'ble Supreme Court in the case of ***Union of India v. Parmar Construction Company: 2019 (3) CHN (SC) 343***. This case also, in my opinion, is in no way relevant for the purpose of deciding the issue in hand.

10. The facts of the case as placed before the Court by Learned Counsel for the petitioner and not disputed by Learned Counsel for the respondents, are that a Development Agreement dated 15.12.2006 was entered into by and between the petitioner (the Developer) and the respondents (owners of

the land in question). Construction of the proposed building was completed and the owners' share was handed over to them on 20.01.2018, 24.02.2018 and 11.04.2018.

11. By a letter dated 08.01.2019 the respondent no.1 raised certain disputes pertaining to the area of the owner's allocation, the amount to be received by him in terms of the Development Agreement, quality of the building materials, etc. In the said letter it was stated that unless the grievances were redressed, the respondent no.1 would take appropriate steps. The said letter was replied to by the petitioner by its letter dated 28.01.2019 followed by a letter dated 01.02.2019. In the letter dated 01.02.2019, it was specifically stated that the respondent no.1 had been handed over more area than what he was entitled to under the Agreement and he was required to pay for the same. It was further stated that the petitioner had invested a huge amount of money for removing the tenants (which was the responsibility of the owners as per the Agreement) and further that the unnecessary allegations against the petitioner were causing loss of reputation and goodwill to the company. It was further stated as follows:

“Even after receipt of this letter if you are not satisfied about the explanation you have option to refer the dispute to the Arbitrator. In case you feel the matter should be referred to the Arbitrator, we are ready to do the same in terms of the Agreement entered into by and between the parties.”

12. Learned Counsel for the petitioner submitted that after receipt of the said letter, the respondent no.1 wrote a letter dated 19.03.2019 repeating the same allegations. As such, it is clear that there are disputes between the parties which are continuing.

13. Learned Counsel submitted that the letter dated 01.02.2019 was sufficient compliance with Section 21 of the Act of 1996. In this connection he relied on the following two decisions: (i) **Nea Agrex S.A. v. Baltic Shipping Company Ltd.: 1976 2 ALL ER 842**, (ii) Unreported judgment of Delhi High Court in the case of **Badri Singh Vinimay Pvt. Ltd. v. MMTC Ltd.**, delivered on 06.01.2020 in O.M.P 225 / 2015. Learned Counsel also relied on the Supreme Court decision in **State of Goa v. Praveen Enterprises: (2012) 12 SCC 581** in support of his submission that an application under Section 11 of the Act of 1996 is itself a request for arbitration and is sufficient compliance with Section 21 of the Act.

14. As regards the other contention of the respondents, Learned Advocate for the petitioner submitted that the Consumer Forum does not have jurisdiction to entertain the petitioner's counter claim. Hence, if the petitioner's request for arbitration is declined on the ground that proceedings between the parties are pending before the National Commission under the Consumer Protection Act, the petitioner's claim will suffer casualty without being adjudicated.

15. I have given my anxious consideration to the rival contentions of the parties.

16. With reference to the second contention of the respondents regarding pending of proceedings between the parties hereto before the National Commission, the same is wholly meritless. The petitioner is a Developer and contends that it has mistakenly handed over more constructed area to the respondents than they were entitled to under the Development Agreement. On that account, the petitioner has a money claim against the respondents. This cannot be adjudicated by the National Commission under the Consumer Protection Act. The petitioner, by no stretch of imagination can be considered to be a 'Consumer' within the meaning of the Consumer Protection Act. Hence, pendency of the proceedings before the National Commission cannot be a ground for disallowing the present application.

17. As regards the main contention of the respondents that this application cannot be allowed since the petitioner has not served any notice under Section 21 of the Act of 1996 on the respondents, the same also is unacceptable. Section 21 merely lays down as to when the arbitral proceedings in respect of a particular dispute will be deemed to have commenced, which is when a request for the dispute to be referred to arbitration is received by the respondent. I am 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. To that extent, with respect, I am unable to agree with the decision of the Delhi High Court in the case of **Alupro Building Systems Pvt. Ltd. (Supra)**. Further, as I have understood the decision of the Hon'ble Apex Court in **State of Goa (Supra)** it is, *inter alia*,

to the effect, that an application under Section 11 of the Act of 1996 is itself a request by the petitioner for arbitration.

18. However, the above discussion becomes academic since, in my opinion, the letter dated 01.02.2019 written by the petitioner, when read in a commercial perspective, clearly constitutes a notice under Section 21 of the Act of 1996. Too much technicality should not be resorted to in interpreting such a notice. If the intention of the party issuing the notice is clear that he desires arbitration, that should suffice. An overly legalistic approach is not to be adopted. In a commercial dispute, a notice asking for arbitration ought not to be construed too strictly. In the case of **Nea Agrex S. A. (Supra)** which involved a charterparty, the charterers' agents presented to the owners' agents a detailed claim for damages demanding immediate payment and then they said "*please advise your proposals in order to settle this matter, or name your arbitrators.*" The English Court of Appeal consisting of Lord Denning, M.R., Goff L.J. and Shaw L.J., while considering whether such a communication could be considered as a notice requiring arbitration, held as follows:

"30. Mr. Rokison says that the request is equivocal. It gives the ship-owners an alternative. It does not amount to an unequivocal request for arbitration. So it cannot be deemed to be the commencement of the arbitration. That seems to me too legalistic an approach. In a commercial dispute, a letter requesting arbitration should not be construed too strictly. The writer should not be impaled on

a time-bar because he writes in polite and courteous terms, or because he leaves open the possibility of settlement by agreement. Suppose the characters had written to the owners: “Unless you are prepared to settle the matter amicably, we must ask you to agree to the appointment of an arbitrator”. That would, to my mind, be quite sufficient. When such a letter follows upon a genuine claim promptly made, it should be interpreted as a request for arbitration – a request made then and there – coupled with a willingness to come to an amicable settlement. The arbitration is deemed to commence with the sending of the letter, and time no longer runs against him.

31. Likewise with the letter in this case, it can and should be construed as a request for the difference to be submitted to arbitration – with a saving that the request will be withdrawn if a settlement can be reached. That is sufficient to commence the arbitration.”

19. The decision in ***Alupro Building Systems Pvt. Ltd. (Supra)*** has been distinguished by a Learned Judge of the Delhi High Court in the case of ***Badri Singh Vinimay Pvt. Ltd. (Supra)***. In that case, Prateek Jalan, J. held that the communication issued by the party wanting arbitration was clear enough and amounted to a notice under Section 21 of the Act of 1996. The Learned Judge distinguished the decision in ***Alupro Building Systems Pvt. Ltd. (Supra)*** on facts and noted that in that case there was no notice to

the respondents at all. However, in the present case, as I have recorded my opinion above, the petitioner's letter dated 01.02.2019 clearly contemplated disputes between the parties and resolution of such disputes through the process of arbitration, in the event the disputes were not resolved amicably.

20. In view of the aforesaid, all the objections raised by the respondents to resist this application fail. This application is allowed.

21. Mr. Samrat Sen (9830173356), Senior Advocate, Bar Library Club, Calcutta High Court, is appointed as sole Arbitrator to adjudicate the disputes between the parties in relation to the Development Agreement dated 15.12.2006. The Arbitrator will be free to fix his own remuneration. He will also be at liberty to engage secretarial staff to assist him in conducting the arbitral proceedings and to fix their remunerations. The remuneration of the Arbitrator and the secretarial staff will be borne equally by the parties. Since, no venue of arbitration is mentioned in the arbitration clause, the arbitration will be held in Calcutta at a place to be decided by the Arbitrator.

22. AP 279 of 2020 is accordingly disposed of.

Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)