

IN THE HIGH COURT AT CALCUTTA

Ordinary Original Civil Jurisdiction

Original Side

AP/1276/2015

IA no.: GA/2/2019 (Old no.GA/1194/2019)

AMSTAR INVESTMENTS PVT. LTD.

VS.

SHREE SHREE ISWAR SATYANARAYANJEE & ORS.

EC/599/2018

SHREE SHREE ISWAR SATYANARAYANJEE & ORS.

VS.

AMSTAR INVESTMENTS (P) LTD.

For petitioner	:	Mr. Joy Saha, sr. adv. Ms. Urmila Chakraborty, Adv. Mr. Aasish Choudhury, Adv. Mrs. Aindirila Basu, Adv.
For respondent nos. 1 to 4	:	Mr. Promit Ray, sr. Adv. Ms. Saheli Sen, Adv. Ms. S. Dutta, Adv. Mr. Animesh Paul, Adv. Ms. Fatima Hassan, Adv.
Heard on	:	23.08. 2018, 19.02. 2019, 03.04. 2019, 10.04 2019, 10.12. 2019, 02.01.2020, 04.02.2020, 24.03.2021 and 07.04.2021.
Judgment on	:	8 th June, 2021.

Arindam Sinha, J. : Petitioner has challenged award dated 21st April, 2015, for it to be set aside. Mr. Saha, learned senior advocate appeared on behalf of petitioner/award debtor and submitted, his client is tenant for non-residential purpose and protected under West Bengal Premises Tenancy Act, 1997. He relied on judgment of Supreme Court in **Ranjit Kumar Bose vs Anannya Chowdhury** reported in **(2014) 11 SCC 446**, paragraphs 10 to 12 and 20 to submit, section 6 of the 1997 Act overrides a contract between landlord and tenant, including arbitration agreement. His client had earlier applied under section 16 of Arbitration and Conciliation Act, 1996 challenging jurisdiction of the arbitral Tribunal. He relied on paragraphs 10, 13 and 16 of his client's subsequent section 16 application. The paragraphs are set out below.

"10. The subject matter of the arbitration is the eviction of the Respondent from Premises nos. 23, 23/1 and 24, J. N. Mukherjee Road, Hourah. The issues involved in the Suit are governed by the provisions of West Bengal Premises Tenancy Act, 1997, section 44 of the said Act provides as follows:

"No civil court shall entertain any suit or proceeding in so far as it relates to fixation of fair rent in relation to any premises to which this Act applies or to premises to which this Act applies or to eviction of any tenant therefrom or to any other matter which the Controller is empowered by or under this Act to decide and no injunction in respect of any action taken or to be taken by the Controller under this Act shall be granted by any Civil Court."

11. ...

12. ...

13. The Respondent states that the bar contained in section 44 of the West Bengal Premises Tenancy Act, 1997, extends to arbitration proceedings as well.

14. ...

15. ...

16. *In the circumstances, it is just and proper that the arbitration proceedings be terminated and dismissed for want of jurisdiction.”*

Mr. Saha also relied on judgment of Supreme Court in **Vidya Drolia & Ors Vs Durga Trading Corporation** decided on **14th December, 2020 (Civil Appeal 2402 of 2019)** paragraph 66, reproduced below.

“In view of the aforesaid, we overrule the ratio laid down in Himangni Enterprises and hold that landlord-tenant disputes are arbitrable as the Transfer of property Act does not forbid or foreclose arbitration. However, landlord-tenant disputes covered and governed by rent control legislation would not be arbitrable when specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations. Such rights and obligations can only be adjudicated and enforced by the specified court/forum, and not through arbitration.”

He reiterated his client is tenant under claimants. The tenancy is covered and governed by rent control legislation and therefore, not arbitrable. Specific Court or forum has been given exclusive jurisdiction to try and decide the special rights and obligations.

Second point argued by Mr. Saha is, the award was passed out of time without his client having had consented to extension of time for the Tribunal to make and publish award. The reference was on appointment under section 11 of the Act. Subsequent to commencement of the reference there was order dated 22nd February, 2012 made, in which clear agreement of parties to have the reference concluded within six months from date [22.2.2012] was recorded. After expiry of the period there was passed order dated 7th March, 2013, whereby time for concluding the reference was extended by three months from that date. A further petition for extension of time was dismissed by order dated 13th June,

2013. Respondent/claimant preferred appeal unsuccessfully. Mr. Saha relied on appellate order dated 26th August, 2013.

He submitted, on there having had been express agreement to conclude the reference within six months and subsequent extension, thereafter when no further extension was agreed to by the parties nor directed by Court, mandate terminated, before making and publishing of the award. From orders made by co-ordinate Bench, regarding agreement for extension of time for the reference to be concluded and order in appeal arisen therefrom, it will appear that 7th June, 2013 was terminus of agreed time for the Tribunal to make and publish its award. Impugned award dated 21st April, 2015 was made long after the terminus. Provisions in the Act, prior to its amendment, stand attracted. The unamended Act did not provide for time frame regarding period, in which the reference was to be concluded. So, it is judgment law that should decide the issue in favour of his client. He relied on judgment of Supreme Court in **NBCC Ltd. vs JG Engineering (P) Ltd.** reported in **(2010) 2 SCC 385**, paragraphs 27 and 28. He submitted, mandate of the arbitrator automatically terminated on 7th June, 2013 and the award made thereafter is liable to be set aside on that ground as well.

Mr. Ray, learned senior advocate appeared on behalf of respondents/ award holder. He submitted, subsequent contention of petitioner, raised in challenging jurisdiction of the Tribunal, was on admission of registered lease dated 1st December, 1982 having had expired by efflux of time. On such expiry, allegedly a new tenancy was created in favour of petitioner. In context of this contention, argument made of protection under West Bengal Premises Tenancy Act, 1997. He submitted, no new tenancy was created. He reiterated, this point of arbitrability and, therefore, jurisdiction was subsequently raised before the Tribunal. It was dealt with by the Tribunal on order dated 24th July, 2012. Clear finding was that no case of tenancy had been made out by petitioner. He relied on following extracted from said order and reproduced below.

“The notice issued by the claimants upon the respondent and the replies issued thereto by the respondent were also mentioned in the

*statement of defence and even in such letters similar disputes as contained in the statement of defence were raised by the respondent neither in the said letters issued on behalf of the respondent in or about November or December, 2004 or in the statement of defence any case of tenancy governed by the West Bengal Premises Tenancy Act, 1997 has been made out. **The respondent in course of their oral submissions did not point out any averments from the counter statement that the plea of tenancy governed by the West Bengal Premises Tenancy Act, 1997 raised in section 16 application was already raised in the pleadings earlier.***

Finally it is worth noting that the nature of claims made by the respondent and the prayers made in such counter claim are set out hereinbelow.

- (i) *An award declaring that the deed of lease dated 1st December, 1982 be adjudged null and void and of no effect and be delivered up and cancelled;*
- (ii) *An award declaring that the respondent is the rightful owner of the premises no.24, Jogendra Nath Mukherjee Road, Salkia, Howrah;*
- (iii) *An award directing the claimants to return a sum of Rs.3 lacs along with interest calculated @ 18% per annum which as on 31.12.2004 works out to Rs.4,77,252/=*
- (iv) *An award for a sum of Rs.10,00,000/= being the damages suffered by the respondent on account of mis-statement and fraudulent inducement to the claimant to enter into the deed of lease;*
- (v) *Such further and/or other order or orders be passed as this Hon'ble Court may deem fit and proper.*

.....” (emphasis supplied)

He submitted, dispute between the parties arose in respect of the lease. The lease was not disputed by petitioner. It was for a definite period and expired

by efflux of time. Petitioner continued in spite of expiry of the lease. Arbitration agreement in the lease was invoked and arbitral proceedings concluded by impugned award. Petitioner was never tenant under respondents, for them to initiate proceedings for eviction under the Rent Act. Counter claim of petitioner in the Tribunal was of petitioner being purchaser.

On mandate he submitted, the reference was concluded by impugned award dated 21st April, 2015, prior to coming into effect of the 2015 amendments to the Act. As such the pre-amended Act governed the reference. Mandate thereunder, of the Tribunal, was without limitation of time. Provisions in the unamended Act of 1996 are not affected by breach of agreement regarding time of mandate, entered into by parties on the side.

Mr. Ray, relied on judgment of Supreme Court in **Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan** reported in (1999) 5 SSC 651. He submitted, petitioner had, in its statement of defence, raised counter-claim for specific performance of contract. Specific performance of contract can be had by arbitration, is the declaration of law in **Olympus** (supra). As such, petitioner's contention that the dispute is not arbitrable must be adjudicated in context of the counter-claim made in the reference. He then relied on **Hindustan Construction Company Ltd. Vs. Union of India (UOI)** reported in AIR 2020 SC 122, paragraphs 47 to 55 to submit, the reference wherein impugned award was passed, was not affected by amendments to the Act made in year 2015.

Petitioner appears to be aggrieved, firstly, by decision dated 24th July, 2012 of the Tribunal rejecting the plea that it does not have jurisdiction. Such a plea is to be raised by a party like petitioner, who was respondent in the reference, not later than submission of its defence. What does transpire from said decision of the Tribunal is that statement of defence stood filed and did not contain pleading of fact nor contention regarding tenancy in respect of the premises. The Tribunal, in its said decision dated 24th July, 2012, went on to say that petitioner could not point out any averment from the counter statement that plea of tenancy governed by West Bengal Premises Tenancy Act, 1997, raised in

the section 16 application, was already raised in the pleadings earlier. As such, contention raised by the section 16 application does not appear to have been founded on pleadings in the counter statement of petitioner. In fact, the Tribunal found that claims in the counter claim were for declaration of the lease as void and petitioner, rightful owner of the premises. The Tribunal accordingly decided on its jurisdiction, rejecting the plea. Implied is that the Tribunal found the plea to be one of afterthought. The circumstances and the reasons given in said decision cannot be said to be perverse or in any way qualify as a ground under sub-clause (ii) in clause (b) of sub-section (2) in section 34.

The executed contract between the parties is the lease, where petitioner had pleaded that it was fraudulently induced to enter into. The deed was registered and the lease expired by efflux of time. The arbitration agreement was contained in it. Petitioner in paragraph 11 of its application under section 16 said as follows:-

“11. The purported Agreement of Arbitration on the basis whereof the present proceedings have been instituted are contained in Deed of Lease dated 01.12.1982. Admittedly, the said Deed of Lease has come to an end in the year 1997. Upon the expiration of the period covered by the said Deed of Lease dated 01.12.1982, a new tenancy has been created in favour of the Respondent in respect of premises nos. 23 and 23/1, J.N. Mukherjee Road, Howrah.”

As such the Tribunal adjudicated on the contract to be a lease for the term expired. There cannot be, at this stage, further probe on merits to ascertain whether the lease was subject to provisions in West Bengal Premises Tenancy Act, 1997. Such was nobody's case before the Tribunal. In **Ranjit Kumar Bose** (supra) the contract between parties thereto was a tenancy agreement between landlord and tenant, wherein Supreme Court declared that section 6 of said Act would override it, including arbitration agreement contained in it. Also, petitioner's reliance on **Vidya Drolia** (supra) is of no aid to it since disputes

between the parties arose out of the deed of lease, being arbitrable as the Transfer of Property Act, 1882 does not forbid or foreclose arbitration.

Moving on to the second point it is seen that Supreme Court in **Hindustan Construction Company Ltd.** (supra) said that the salutary amendments made by the 2015 amendment Act be applicable to all Court proceedings initiated after 23rd October, 2015. This arbitration petition was filed on 20th July, 2015. Clearly, amendments made by the 2015 amendment Act do not apply for purpose of adjudication of this petition.

Petitioner relied on 4 orders for its this contention. Orders dated 22nd February, 2012, 7th March, 2013 and 13th June, 2013 were made by a coordinate Bench. Order dated 26th August, 2013 was made in appeal preferred against one of said orders, dated 13th June, 2013.

Order dated 22nd February, 2012 was made in AP 118 of 2008. The petition invoked sections 14 and 15. Said order records agreement of parties to have substitute arbitrator and for the reference to be concluded within six months from date. Following from said order is reproduced below.

“A.P. No.118 of 2008 is a subsequent petition under sections 14 and 15 of the Arbitration and Conciliation Act, 1996. The parties have agreed that upon Justice R Bhattacharyya (retired) having indicated his disinclination to continue with the matter, the reference will now be before Mr. Jayanta Banerjee, Advocate at a consolidated remuneration of Rs.1.5 lakh be shared equally by both sets of parties. The parties have agreed that the reference will be concluded within six months from date.”

Relevant texts of subsequent orders dated 7th March, 2013 and 13th June, 2013, of the coordinate Bench, are reproduced below.

“7th March, 2013.

The Court: The petition is misconceived in that there is no provision in the Arbitration and Conciliation Act, 1996 similar to section 28 of the

Arbitration Act, 1940 for extension of time for the making and publishing of an award.

It is recorded, however, that the respondent has agreed that it has no objection to the time for making and publishing the award being extended by a period of three months from today.”

“13th June, 2013

The Court: The petition is misconceived since there is no provision in the Arbitration and Conciliation Act, 1996 similar to section 28 of the Arbitration Act, 1940 for extension of time for making and publishing an award.

A.P. No.630 of 2013 is dismissed.”

Thus far it is found that coordinate Bench had not made any direction fixing the time for the Tribunal to make and publish its award.

Appeal from aforesaid order dated 13th June, 2013 was preferred by respondents. It was dismissed by order dated 26th August, 2013. However, it would be relevant to reproduce certain observations made by the appeal Court in said order.

“Even if we would agree with Mr. Ghosh there was waiver we cannot extend any relief as the law is silent on this issue. If the principle of waiver is accepted by the Arbitrator, it would be for the Arbitrator to continue. We cannot confer any additional blessing. It is really unfortunate, the Arbitrator was not allowed to conclude the reference. From the list of dates placed before us, we do not find any laxity on the part of the Arbitrator. If we look to section 14, we would find, the Arbitrator was to conclude the reference without undue delay. We are not concerned with the proceeding before the erstwhile Arbitrator. Mr. Saha would suggest, proceeding has been continuing since 2004. He is not prejudiced. He is enjoying the property

paying a little. However, for want of appropriate provision, we cannot extend any relief although we are fully impressed with the facts.”

Petitioner relied on **NBCC Ltd.** (supra). Paragraph 22 in the judgment is reproduced below.

“22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently there is no provision under the Act for the Court to fix a time-limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.”

It cannot be said, by either order dated 22nd February, 2012 or 7th March, 2013, coordinate Bench exercised inherent power to fix the time on applications dealt with by those orders. What stood recorded was agreement of parties. From order dated 13th June, 2013, at best it can be inferred that said coordinate Bench refused to exercise inherent power to fix the time. Appeal therefrom stood dismissed as aforesaid.

NBCC Ltd. (supra) is clear in declaring Court did not have any power to extend the time under the unamended Act, unlike under section 28 of the 1940 Act. Also declared was, inter alia, Court can opt to fix the time limit for conclusion of the arbitration proceeding, in exercise of inherent power, on application of either party. However, this exercise cannot be where the arbitration clause provides for a procedure. The arbitration clause or agreement between the parties here, does not provide for a procedure regarding fixation or extension of

the time. What emerges is that, as correctly submitted by Mr. Ray, parties had an agreement on the side regarding fixation and extension of time. This agreement cannot be enforced under the unamended provisions of the Act. As such there cannot be a finding that the arbitrator lost his mandate or it stood automatically terminated at any point of time before impugned award was made and published.

There is no merit found in the petition and it is dismissed. The execution case be listed before the regular Bench.

(Arindam Sinha, J.)