

AP/92/2022

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTIONMRS. NUPUR MODAK
VERSUS
M/S. LILA ENTERPRISE AND ORS.BEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
DATE : 11TH NOVEMBER, 2022APPEARANCE:
Mr. Partha Chakraborty Advocate
Mr. Archisman Charkaborty, Advocate
....for the petitioner
Mr. Arnab Chakraborty, Advocate
Mrs. Pragya Bhowmick, Advocate
...for the respondents 2, 3 & 4

The Court:- This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the applicant for appointment of Arbitrator to resolve the disputes between the parties.

The arbitration agreement in the form of partnership deed dated 2nd September, 1996 is not in dispute. The said deed contains the following arbitration clause:

“25. That all disputes or differences of opinion which may arise between the parties with regard to the construction, meaning and effect of the deed or any part thereof, or respecting the accounts, profits and losses of the business or rights and liabilities of the partner under this deed or dissolution or winding up off the business or any other matters relating to the firm shall be decided in arbitration as provided of the Arbitration Act 1940.”

Submission of counsel for the petitioner is that since the dispute had arisen between the parties, therefore, the petitioner had served notice dated 10th January, 2022 invoking the arbitration clause and thereafter has filed the present application.

Learned counsel for the respondents has not disputed the arbitration agreement but has raised a preliminary objection that the valid notice invoking the arbitration clause under Section 21 of the Act has not been issued.

The correctness of the notice dated 10th January, 2022 has been questioned by the counsel for the respondents on the ground that the said notice does not bear the signature of the petitioner or her counsel or anyone else. He submits that the service of such notice cannot be treated to be a valid notice under Section 21 of the Act. It is undisputed that unsigned notice dated 10th January, 2022 being Annexure 'J' was sent to the respondents by the applicant.

Learned counsel for the respondents in support of his objection has placed reliance upon the judgement of the Delhi High Court in the matter of *Alupro Building Systems Pvt. Ltd. Vs. Ozone Overseas Pvt. Ltd.* reported in MANU/DE/0495/2017 and submitted that the compliance of Section 21 is mandatory and has also placed reliance upon the judgment of Bombay High Court in the matter of *Farooq Vs. Rafiq and Ors.* reported in MANU/MH/2578/2016. He has also placed reliance upon the judgment of Punjab and Haryana High Court in the matter of *Ganesh Dass Vs. Joga Singh and Ors.* reported in MANU/PH/0300/1975 in support of his submission that the service of duly signed notice is necessary.

As against this, the applicant has placed reliance upon the judgment of the Supreme Court in the matter of *Ghanshyam Dass and Others Vs. Dominion of India and Others* reported in AIR 1984 SC 1004 and the judgment of the Karnataka High Court in the matter of *Sha Jetmal Vs. The General Manager, Southern Railways and Another* report in AIR 1995 Karnataka 219.

Having heard the learned counsel for the parties and on perusal of the records, it is noticed that for invoking the arbitration clause, service of notice under Section 21 is mandatory as the same relates to commencement of the arbitral proceedings. Delhi High Court in the matter of *Alupro Building*

Systems Pvt. Ltd.(supra) considering the mandatory nature of notice under Section 21 has held,

“24. Section 21 of the Act reads as under:

“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.

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.

26. Thirdly, and importantly, where the parties have agreed on a procedure for the appointment of an arbitrator, unless there is such a notice invoking the arbitration clause, it will not be possible to know whether the procedure as envisaged in the arbitration clause has been followed. Invariably, arbitration clauses do not contemplate the unilateral appointment of an arbitrator by one of the parties. There has to be a consensus. The notice under Section 21 serves an important purpose of facilitating a consensus on the appointment of an arbitrator.

27. Fourthly, even assuming that the clause permits one of the parties to choose the arbitrator, even then it is necessary for the party making such appointment to let the other party know in advance the name of the person it proposes to appoint. It is quite possible that such person may be ‘disqualified’ to act an arbitrator for various reasons. On receiving such notice, the recipient of the notice may be able to point out this defect and the claimant may be persuaded to appoint a qualified person. This will avoid needless wastage of time in arbitration proceedings being conducted by a person not qualified to do so. The second, third and fourth reasons outlined above are consistent with the requirements of natural justice which, in any event, govern arbitral proceedings.

28. Lastly, for the purposes of Section 11(6) of the Act, without the notice under Section 21 of the Act, a party seeking reference of disputes to arbitration will be unable to demonstrate that there was a failure by

one party to adhere to the procedure and accede to the request for the appointment of an arbitrator. The trigger for the Court's jurisdiction under Section 11 of the Act is such failure by one party to respond."

This Court also in the matter of *Merlin Projects Limited Vs. Bhargab Sales Pvt. Ltd. & Anr.* vide order dated 11th November, 2022 in AP 621 of 2022 by taking note of earlier judgment on the point has held :

*"10. In the matter of **Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited** reported in (2021) 5 SCC 738, Hon'ble Supreme Court considering the issue of commencement of limitation in reference to Section 21 of the Act has held that :*

"15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11 can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment."

*11. Hence, before filing an application under Section 11 of the Act, it is necessary to serve a notice in terms of Section 21 of the Act. This Court in the matter of **West Bengal Power Development Corporation Limited vs. Sical Mining Limited** reported in 2022 SCC OnLine Cal 3036 after referring to the judgments of the Delhi High Court in the matter of **Alupro Building systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.** reported in 2017 SCC OnLine Del 7228 and Bombay High Court in the matter of **Malvika Rajnikant Mehta and Others vs. JESS Construction** reported in 2022 SCC OnLine Bom 920 has taken the view that for want of compliance of requirement of Section 21 of the Act, an application under Section 11 of the Act is premature."*

Since the notice dated 10th January, 2022 sent by the applicant to the respondent is an unsigned document, therefore, the question arises whether it can be treated to be a valid notice under Section 21 of the Act. Bombay High Court in the matter of *Farooq (Supra)*, while considering the issue of valid service of notice under Section 138(b) of the Negotiable Instruments Act in a case where a typed document in the form of notice without any signature was sent, has reached to the conclusion that it cannot

be said to be a valid notice. In this regard, the view of the Bombay High Court in the matter of Farooq (Supra) is as under :

“When there is no signature of anybody, it appears difficult to find that there is compliance of clause (b) of Section 138 of the Act which requires that notice should be given in writing. If the Advocate was to write the notice in his own hand, or if the complainant was to write notice in his own hand and send in which signature remains, it could be still said to be notice of the Advocate or the complainant. But when there is typed document in the form of Notice with no signature (not even an initial) of anybody, it cannot be said to be a legal notice. Nobody could be said to own up the correctness of the contents.”

As against the judgment of the Bombay High Court in the case of Farooq (Supra), SLP being Special Leave to Appeal CrI. No. 1090/2017 was preferred which was dismissed by order dated 13th February, 2017.

The same issue came up before the Punjab and Haryana High Court also in the matter of Ganesh Dass (Supra) in reference to valid service of notice under Section 106 of Transfer of Property Act wherein a typed copy in Hindi script by some typist was sent to the respondent without any signature of the petitioner or his counsel. The Rent Controller and the Appellate Authority had found that it was not a valid notice. Taking note of the fact that service of notice under Section 106 of the Transfer of Property Act is mandatory, Punjab and Haryana High Court came to the conclusion that the decision of the Rent Controller that there was no valid notice was correct.

Hence, in view of the judgments noted above and considering the fact that the point of service of notice under Section 21 relates to commencement of the arbitration proceedings which has bearing on the scope of claim before the arbitration and also taking note of the mandatory nature of the Section 21, this Court finds that the unsigned typed copy of the document being Annexure ‘J’ sent by the applicant to the respondent cannot be treated to be a valid service of notice.

Learned counsel for the applicant has placed reliance upon the judgment of the Supreme Court in the case of Ghanshyam Dass and Others

(Supra), but that was a case where a valid notice in terms of Section 80 of the CPC was served upon the opposite party by the father of the plaintiff who after service of notice had unfortunately died. Therefore, the plaintiff had instituted the suit on the strength of the said notice. Therefore, in that background, the Hon'ble Supreme Court had observed that there was substantial compliance and the said notice fulfilled the requirement of Section 80 of the Code. So far as the judgment of the Karnataka High Court in the matter of Sha Jetmal (Supra) is concerned, that was also a case of service of notice under Section 80 of the CPC wherein the reliance upon the judgment of the Supreme Court in the matter of Ghanshyam Dass and Others (Supra) was placed. It has been pointed out to this Court that the scope and purpose of service of notice under Section 80 of the CPC is entirely different from the one under Section 21 of the Arbitration Act. Therefore, the above judgments relied upon by the learned counsel for the applicant are distinguishable on their own facts and cannot be attracted in the present case.

In view of the above analysis, I am of the opinion that the present application under Section 11 of the Act has been filed by the applicant without complying with the provision of Section 21 of the Act. Therefore, the application is premature which is, accordingly, dismissed, however, with liberty to the applicant to serve a proper notice to the respondent in terms of Section 21 of the Act and file a fresh application.

(PRAKASH SHRIVASTAVA, C.J.)