

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION
(Original Side)

A.P. No. 621 of 2022

Reserved on: 04.11.2022
Pronounced on: 11.11.2022

Merlin Projects Limited

...Applicant

-Vs-

Bhargab Sales Pvt. Ltd. & Anr.

...Respondents

Present:-

Mr. Satadeep Bhattacharyya,
Mr. Saptarshi Datta,
Mr. Pourush Kanti Pal, Advocates
... for the applicant

Mr. Sukanta Chakrabarty,
Mr. Anindya Halder, Advocate
... for the respondent no. 1

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

Prakash Shrivastava, CJ:

1. This application has been filed under Section 11 read with Section 14 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') with the prayer to terminate the mandate of the respondent no. 2 to act as an Arbitrator and further prayer to appoint a sole Arbitrator to resolve the dispute between the parties.

2. The case of the applicant is that on 9th of March, 202, an agreement in the form of Term Sheet was executed with the respondent no. 1 in respect of development of the immovable property. Execution of the Term Sheet was followed by the execution of the Memorandum of Understanding (MoU) dated 4th of May, 2021.

The MoU contained the Arbitration Clause. Some dispute had arisen between the parties. On receipt of the communication dated 3rd of June, 2022, the applicant had come to know that the respondent no. 2 was appointed as Arbitrator unilaterally by the respondent no. 1 to adjudicate the dispute arising out of the MoU. The plea of the applicant is that the respondent no. 2 is the chamber junior of the advocate who has been engaged by the respondent no. 1 as Advocate-on-Record in the proceedings instituted against the applicant under Section 9 of the Act, hence, the respondent no. 2 had interest in the matter, therefore, he could not have been appointed as the sole Arbitrator. Applicant vide communication dated 8th of July, 2022 had objected to the appointed of respondent no. 2 as Arbitrator. Meanwhile, the respondent no. 1 had filed an application under Section 9 of the Act in the Court of the learned District & Sessions Judge at Alipore, South 24 Parganas wherein ad interim injunction was refused vide order dated 5th of July, 2022. The applicant had forwarded a copy of the communication dated 8th of July, 2022 to the respondent no. 2 also which was duly received by him. Thereafter, vide communication dated 5th of July, 2022, applicant had cancelled the Term Sheet and MoU. To the surprise of the applicant, the communication dated 15th of July, 2022 was received from the respondent no. 2 initiating the arbitral proceedings and requiring the parties to file claim and counter-claim. In the aforesaid background, present application has been filed.

3. The sole objection raised by learned counsel for the respondent no. 1 is that no notice in terms of Section 21 of the Act

invoking the Arbitration Clause has been served by the applicant, therefore the application is premature.

4. Submission of learned counsel for the applicant is two-fold. Firstly, the communication of the respondent no. 1 dated 23rd of June, 2022 can be treated the notice under Section 21 of the Act invoking the Arbitration Clause and secondly, the proceedings under Section 9 of the Act initiated by the respondent no. 1, is sufficient compliance of Section 21 of the Act.

5. I have heard the learned counsel for the parties and perused the record. The Term Sheet dated 9th of March, 2021 and the MoU dated 4th of May, 2021 are not in dispute. The MoU contains following Arbitration Clause:

“**XIII.** If any dispute and differences are arisen between the parties herein touching the terms and conditions as contained herein shall be solved between the parties herein by mutual understanding. If the parties are unable to mutually resolve the dispute the same shall be referred by the parties to the Arbitrator, as per the Arbitration and Conciliation Act 2015.”

6. So far as the first prayer in respect of terminating the mandate of the respondent no. 2 is concerned, learned counsel for the applicant has pointed out that the respondent no. 2 has resigned on 26th of August, 2022, therefore, the first prayer does not survive.

7. For the purpose of commencement of the arbitral proceeding, an applicant is required to make a request to refer the dispute to arbitration to the respondent. Section 21 of the Act relating to commencement of the arbitral proceedings provides 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.”

8. In the present case, no other procedure has been agreed between the parties, therefore, the procedure prescribed under Section 21 of the Act will be applicable. In terms of Section 21 of the Act, the arbitral proceedings in respect of a particular dispute commences on the date on which a request “for that dispute to be referred to arbitration” is received by the respondent.

9. Hon’ble Supreme Court in the matter of **Geo Miller and Company Private Limited vs. Chairman, Rajasthan Vidyut Utpadan Nigam Limited** reported in **(2020) 14 SCC 643**, after taking note of Section 21 of the Act has held that:

“**10.** It is settled law that the date of commencement of arbitration proceedings for the purpose of deciding which Act applies, upon a conjoint reading of Section 21 and Section 85(2)(a) of the 1996 Act, shall be regarded as the date on which notice was served to the other party requesting appointment of an arbitrator [see *Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*; *Shetty's Constructions Co. (P) Ltd. v. Konkan Railway Construction*].”

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.

12. In the present case, undisputedly no notice invoking Arbitration Clause and making a request to the respondent to appoint the Arbitrator has been served by the applicant to the respondent. The communication dated 23rd of June, 2022 sent by the respondent no. 1 to unilaterally appoint respondent no. 2 with a copy to the applicant cannot be treated to be a notice in terms of Section 21 of the Act. In that communication, there is no request by one party to another for referring the dispute to the Arbitrator but it is a communication sent to the proposed Arbitrator to accept the office of arbitration and proceed with the Arbitral Tribunal and pass an award. Similarly, mere initiation of proceedings under Section 9 of the Act by respondent no.

1 cannot be treated to be sufficient compliance of Section 21 of the Act as from those proceedings, nothing is reflected that there was a request made by the concerned party to refer the dispute to arbitration. Hence, I am of the opinion that in the present case, no communication invoking the Arbitration Clause in terms of Section 21 of the Act has been sent. Hence, the application under Section 11 of the Act is premature which is accordingly dismissed with liberty to the applicant to file a fresh application after duly complying with the requirement of Section 21 of the Act.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

Kolkata
11.11.2022

PA(RB)