

AP/779/2022

IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTIONSREI EQUIPMENT FINANCE LIMITED
VERSUS
RAVI UDGYOG PVT. LTD. & ANR.BEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
DATE : 1ST DECEMBER, 2022.

APPEARANCE:

Mr. Swatarup Banerjee, Advocate
Mr. Sariful Haque, Advocate
Mr. Rajib Mullick, Advocate
Ms. Sonia Mukherjee, Advocate
*.....for the applicant.**Ms. Nilanjana Adhya, Advocate*
Mr. Arindam Paul, Advocate
Ms. Parna Mukherjee, Advocate
..for respondents

The Court: This application under Section 11 read with Section 14 of the Arbitration and Conciliation Act, 1996 has been filed for appointment of the arbitrator to resolve the disputes between the parties.

Learned counsel for the applicant has pointed out that initially the agreement dated 22nd June, 2014 was entered into between the parties. Thereafter, some disputes had arisen, therefore, the settlement took place and the Settlement Agreement No.133278 dated 31st March, 2017 was arrived at between the parties, which contained the following arbitration clause:

“8.5 Arbitration

8.5.1 Any disputes or differences arising out of or in connection with or relating to the Agreement including any disputes and differences relating to the interpretation of the Agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (and any amendment, modification, statutory enactment thereto from time

to time) by a sole arbitrator to be mutually appointed by both the Parties, within a period of thirty (30) days from the date of notice by either Party for such appointment.

8.5.2 The venue of arbitration proceedings will be at Kolkata and on objection shall be entertained from any parties in this regard. The cost of the arbitration proceedings shall be equally borne by the parties to this agreement.

8.5.3 The award of the arbitrator shall be final, conclusive and binding on all the Parties.”

He has further submitted that the applicant had served the notice dated 28th April, 2022, Annexure-D at page 67 of the AP, under Section 21 of the Act. He has further submitted that the arbitrator was appointed by the applicant and in the proceedings before the arbitrator, the respondent had filed an application under Section 13(2) of the Act, therefore, the arbitrator had recused, hence, the present AP has been filed.

Learned counsel for the respondents has raised the preliminary objection that no notice in terms of Section 21 of the Act has been served upon the respondent.

Answering to the objection of the learned counsel for the respondent, the learned counsel for the applicant submits that the notice dated 28th April, 2022, Annexure-D at page 67, is the notice under Section 21 and that the respondent had filed an application under Section 13(2) of the Act, therefore, it is clear that the notice was duly served upon the respondent.

Having heard the learned counsel for the parties and on perusal of the records, it is noticed that the document dated 28th April, 2022, Annexure-D at page 67 of the AP, which the applicant is relying upon, is a communication which was sent by the applicant to the arbitrator with a request to the arbitrator to enter into the reference. A copy of this communication was marked to the respondent. Such a communication cannot be said to be a notice under Section 21 of the Act. Section 21 in clear terms provides for commencement of the arbitration proceedings on the date “on which a request

for that dispute to be referred to arbitration is received by the respondent”. The document, Annexure-D at page 67, does not contain any request by the applicant to the respondent to refer the dispute to the arbitration. That apart, it also does not contain the correct number and description of the arbitration agreement. It is the settled law that service of notice in terms of Section 21 of the Act is mandatory. This Court by order dated 11th November, 2022 passed in AP/621/2022 in the matter of **Merlin Projects Limited -vs- Bhargab Sales Pvt. Ltd. & Anr.**, has held :-

“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.”

Thus, it is settled that the service of notice in terms of Section 21 is mandatory for invoking the arbitration clause which in the present case has not been served.

In the application under Section 13(2) of the Act, filed by the respondent before the arbitrator, also the respondent had clearly raised the objection that the notice in terms of Section 21 was not served upon the respondent. Hence, the objection, which the respondent has taken, is also contained in the application under Section 13(2) of the Act.

Therefore, I am of the opinion that the present application under Section 11 of the Act is premature. Hence, the AP is dismissed, however, with liberty to the applicant to serve due notice on the respondent in terms of Section 21 of the Act and file a fresh application, if required.

(PRAKASH SHRIVASTAVA, C.J.)