

S/L 6
09.01.2023
Court No.652
SD

CO 2063 of 2021

Sri Kushal Kumar Das & Anr.
Vs.
Sri Anil Kumar Bhuiya & Ors.

Mr. Sounak Bhattacharyya

...for the Petitioners.

Mr. Sudip Palit

...for the Opposite Parties.

Being aggrieved and dissatisfied with the Order dated 30.3.2021 passed by the learned Additional District Judge, Fast Track Court-II, South 24 Parganas at Alipore in Misc. Case No.796 of 2017 arising out of Title Suit No.2 of 2007, present revisional application has been preferred.

The petitioner contended that the opposite party herein is a promoter/developer and the original and erstwhile owner of the property, i.e., mother of the petitioner entered into a development agreement dated 09.6.1997 with the opposite party and it was agreed that the opposite party will complete the project within a period of (12+3) months from the date of handing over the possession of the land and would hand over owner's allocation therein to the erstwhile owner/mother of the parties.

A building plan concerning the said project was sanctioned on 25.7.1997 and the original erstwhile owner took tenancy for residing with the members of her family inclusive of the petitioners at a rented accommodation. The opposite party, as a part of the said development agreement,

was duty bound to pay for the alternative accommodation of the said original owner. It was further agreed upon in between the parties to the said development agreement that within six months and a half from the date of handing over the vacant possession of the said work site by the said owner, the opposite party would accommodate the said owner and her family temporarily on the ground floor.

The petitioners state that due to sheer incompetency of the opposite party in the matter of fulfilling the said contract dated 09.6.1997 for which the said erstwhile owner had to suffer along with her family, was the root cause of all the delay in the matter of progress. The opposite party could not complete construction within 15 months from 21.9.1997 and could not even complete the project in a time span of 8 years since 21.9.1997. The opposite party paid for only 18 months rent at the rate of Rs.2,000/- to the erstwhile owner but after that she was compelled to maintain herself with the rented accommodation while the opposite party causing inordinate delay.

The petitioners state that as the entire property of the petitioners was at stake at the hands of the unscrupulous opposite party, she was compelled to loose her patience. However, at the request of the opposite party, time was extended for six months from 01.9.2005 with the hope of getting their said property back complete in every respect as stipulated therein.

The petitioners submit that the reasons best known to him; the opposite party without completing the said structure within an extended period of six months from 01.9.2005, withdrew all his men, masons and labourers and left the said property in its said incomplete state in the year 2006.

Petitioners' further case is suddenly the petitioners received summons of the aforesaid Title Suit No.28 of 2007 being a proceeding against them initiated by the opposite party concerning his alleged and purported rights arising out of said development agreement being one under Section 9 of the Arbitration and Conciliation Act wherein he prayed for injunction in respect of the said property alleging the said original development agreement dated 09.6.1997 contained a clause of arbitral adjudication over any dispute arising therefrom and upon failure of any amicable settlement thereof.

The petitioners submits that learned Judge, 2nd Fast Track Court at Alipore disposed of the Title Suit No.28 of 2007 which was renumbered as Title Suit No.2 of 2007 vide order dated 30.8.2007 thereby directing both the petitioners and the opposite party to submit to the process of arbitration and restrained the petitioners by way of an order of injunction from transferring, alienating, encumbering the said property or entering into any further agreement for sale or transfer and by delivering possession of the said property to any third party.

Petitioners' counsel states that there was no order of injunction against the petitioners in the matter of completing and finishing the suit building and as such petitioners at their cost and peril over the past ten years have finished the construction work and are in absolute possession. He further submits that before initiation of his suit the opposite party did not notify the petitioners of referring any dispute he felt for arbitration and even after passing much more than ten years since passing of the order by the court dated 30.8.2007 and within the period of limitation, cause to make or notify any referral of his claim to arbitration as directed.

Now, the petitioners submit that over the aforesaid long period of time of more than 20 years ever since 09.6.1997 or 12 years over since 01.9.2005 and of 10 years ever since 30.8.2007, in the backdrop of all the aforesaid events, facts and circumstances for the continuous breach of agreement and/or contract and trust the matter has not yet been referred before the arbitration and his alleged monetary claim became barred by limitation and principles of estoppel, waiver and acquiescence to be operated as a bar to all such claim and as such the aforesaid order dated 30.8.2007 passed by the court has become inoperative, redundant, ineffective and not binding upon the petitioners.

Mr. Bhattacharya, learned counsel appearing on behalf of the petitioners submits that even after securing the order of injunction from court on 30.8.2007 in the aforesaid suit, opposite party had failed to take any step for referring

the dispute to arbitration, Petitioners herein and the proforma opposite parties had filed an application under Order 47 Rule 1 of the Code of Civil Procedure praying for review of the judgment dated 30.8.2007 which was registered as Misc. Case No.26 of 2011. The court below was pleased to dismiss the said application for review by order dated 27.01.2015. The petitioners state that even after the order dated 27.01.2015 which was passed by the learned court below, the opposite party did not take any step for referring the dispute to arbitration and for which the petitioners had filed another application for vacating the interim order dated 30.8.2007 obtained by the opposite party in Title Suit No.2 of 2007. The said application was registered as Misc. Case No.796 of 2017. The said application was heard on several occasions and the learned trial judge by the impugned order dated 30.3.2021 was pleased to dismiss the said application on the ground that since the petitioner and the proforma opposite party had not challenged the order dated 30.8.2007 passed in Title Suit No.2 of 2007 and as the said vacating application has been filed after three years, so the misc. case is not entertainable.

Mr. Sounak Bhattacharyya, learned counsel appearing on behalf of the petitioners, submits that the trial court acted illegally and with material irregularity by passing the impugned order without going into the merits of the matter and by only advertng to technical grounds. The learned court below had shown non-application of mind by rejecting

the Misc. Case No.796 of 2017 only on the ground that the petitioner had never challenged the order dated 30.8.2007 passed in Title Suit No.2 of 2007 and the learned trial court also was not justified in rejecting the Misc. Case No.796 of 2017 holding that the said application is barred under Article 137 of the Limitation Act.

He further submits that the trial court ought to have vacated the order of injunction appreciating that the petitioners are suffering for long 17 years without getting any relief whatsoever.

Mr. Sudip Palit, learned counsel appearing on behalf of the opposite parties, referred Section 37 of the Arbitration and Conciliation Act and contended that even if the petitioners got aggrieved by the order of injunction, they should have preferred an appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 and when there is a specific provision for preferring an appeal he cannot prefer present application before this Court, seeking interference under Article 227 of the Constitution of India.

He further submits that the term “court” under Section 2(e) of the Act has been defined as principal civil court and as such, this Court should not interfere with the impugned order since the petitioner has not prayed for appropriate remedy, if any, against the impugned order.

I have considered the submissions made by the learned counsel appearing on behalf of the parties.

At the time of hearing, learned counsel for the petitioners submits that he has not preferred this revisional application being aggrieved by the injunction order passed by the court below on 30.8.2007. In fact, at the point of passing the impugned order, the provisions as laid down in Section 9(2) was not there which was introduced in 2016. The amended provisions of Section 9(2) came into force on and from 23.10.2015. Even from 23.10.2015 till this date, admittedly the opposite party has not referred the issue for arbitration and they are simply enjoying the order of injunction and accordingly, he has sought for interference of this court under Article 227 of the Constitution of India.

In view of changed circumstance appeared due to amendment of Section 9, petitioners have made application for vacating the interim order of injunction, which was rejected by the trial court on the ground that the prayer for vacating the order is barred under Article 137 of the Limitation Act and furthermore, on the earlier occasion before the said amendment, petitioners' prayer for review the interim order was rejected by this court. Accordingly, present application before this court is for seeking interference in respect of rejection of the petition for vacating interim, order is very much maintainable under Article 227 of the Constitution of India. In this context, it is also to be mentioned that the opposite party has not assigned any reason as to why, even after the amendment Act which came into force on 23.10.2015, till date, he has not

referred the matter for arbitration, when admittedly he is enjoying the interim order.

In this context, in ***Firm Ashok Traders and another vs. Gurumukh Das Saluja and others*** reported in ***AIR 2004 SC 1433***, The Apex Court has clearly of the view that *the party invoking S. 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting S. 9 read in the light of the Model Law and UNCITRAL Rules is to provide ‘interim measures of protection.’ The order passed by the court should fall within the meaning of the expression ‘an interim measure of protection’ as distinguished from an all-time or permanent protection.*

It was further observed by the Apex Court in paragraph 18 of the said judgment which runs as follows:-

“18. *Under the A&C Act, 1996, unlike the predecessor Act of 1940, the Arbitral Tribunal is empowered by Section 17 of the Act to make orders amounting to interim measures. The need for Section 9, in spite of Section 17 having been enacted, is that Section 17 would operate only during the existence of the Arbitral Tribunal and its being functional. During that period, the power conferred on the Arbitral Tribunal under Section 17 and the power conferred on the court under Section 9 may overlap to some extent but so far as the period pre- and post- the arbitral*

proceedings is concerned, the party requiring an interim measure of protection shall have to approach only the court. The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the “proximately contemplated” or “manifestly intended” arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made “before” i.e. in contemplation of arbitral proceedings. The court, approached by a party with an application under Section 9, is justified in asking the party and being told how and when the party approaching the court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the court to do so. The court may also while passing an order under Section 9 put the party on terms and may recall the order if the party commits breach of the terms.”

In this context, in ***Sundaram Finance Ltd. vs. NEPC India Ltd.*** reported in (1999) 2 SCC 479, the Apex Court was pleased to held, when an application under Section 9 is filed, before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to have recourse to the arbitral proceedings, if at the time when the application under Section 9 is filed, the proceedings have not commenced under Section 21 of the 1996 Act.

In the impugned order passed by the court below he has given much emphasis upon Article 137 of the Limitation Act and contended that as the application is barred by the limitation so the petitioner is not entitled to get any relief. The principle of law in this context is well-settled in ***Collector, Land Acquisition, Anantnag and another Vs. Mst Katiji and Others*** reported in AIR 1987 SC 1353:

3. The legislature has conferred the power to condone delay by enacting Section 5 [Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the

appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.] of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

- "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
- 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
- 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
- 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
- 5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*
- 6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.*

In view of the facts and circumstances and the settled proposition of law, and by total inaction, when opposite party by his own conduct has clearly manifested that since getting injunction order on 30.8.2007 he has got no intention at all to commence the arbitral proceeding and he has also not assigned any reason as to why he has not commenced arbitral proceeding till now, I find that due to causing unexplained inordinate delay in commencing the arbitral proceeding the judgment reported in *Firm Ashok Traders and another (supra)* is squarely applicable in the

present context and as such, the revisional application is liable to be allowed.

Accordingly, CO 2063 of 2021 is allowed.

The interim order dated 30.8.2007 passed in Title Suit No.2 of 2007 is hereby vacated.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)