

OD- 8 and 9

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

AP/195/2023

RUPA MUKHERJEE
VS
M/S. SIMPLEX INFRASTRUCTURES LIMITED

AND

AP/196/2023

RUPA MUKHERJEE
VS
M/S. SIMPLEX INFRASTRUCTURES LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : April 17, 2023.

Appearance:

Mr. Arijit Dey, Adv.

Mr. Nilratan Banerjee, Adv.

...for the petitioner

Mr. Abhishek Banerjee, Adv.

....for the respondent

The Court: The petitioner contends that in view of there being arbitration clauses in both the matters and there being separate invocations under Section 21 of the Arbitration and Conciliation Act, 1996, the respondent had the duty to

reply to the same, which the respondent did not do. As such, occasion has arisen to appoint an arbitrator under Section 11 of the 1996 Act.

Learned counsel appearing for the respondent, at the outset, takes three objections to the maintainability of the applications under Section 11. First, it is argued that the provisions of Section 8(2) of the 1996 Act should apply, in principle, to Section 11 applications as well, since the Court, although may not be acting as a 'Court', acts as a judicial authority within the contemplation of Section 8(1) of the 1996 Act.

It is secondly argued that despite the arbitration clauses being incorporated in several agreements, a single invocation notice was issued by the petitioner which vitiates such application under Section 11.

Thirdly, it is contended in the invocation notice that the petitioner did not specifically grant time to the respondent for the stipulated period of 30 days to agree or refuse to the appointment of arbitrator, which vitiates the application under Section 11 itself.

Upon hearing learned counsel for the parties, it transpires that the three orders of a Learned Coordinate Bench, which have been relied on by the learned counsel for the petitioner to underscore the argument of non-maintainability in the absence of the original of the arbitration agreement having been annexed, cannot be said to have decided any proposition of law. The three orders respectively dated December 14, 2017 passed in AP/197/2016, June 20, 2018 passed in AP/101/2018 and the order of even date passed in AP/149/2018 were passed on a preliminary consideration. In the first, the Learned Single Judge

had observed that the application was not in proper form as it appeared that neither the original agreement nor the certified copy thereof had been disclosed in the application.

In the other two applications, opportunity was given to file fresh applications due to lack of certified copies being annexed to the applications.

Although the said orders were passed in the context of the applications under Section 11 of the 1996 Act, it is clear from the orders that the point of maintainability of an application under Section 11 of the Arbitration and Conciliation Act, 1996 vis-à-vis the issue of importing the provisions of Section 8(2) of the said Act was not argued or considered by the Learned Single Judge while passing the said orders. As such, it cannot be said that any ratio of law or proposition of law was laid down in the said orders to the effect that an application under Section 11 of the 1996 Act is not maintainable in the absence of the original agreement.

A scrutiny of the provisions of Section 8 clearly indicates that sub-section (1) thereof stipulates that the judicial authority before which an action is brought, shall not refer the parties to arbitration, unless it finds that, *prima facie*, no valid arbitration agreement exists. Section 8(2) contemplates that the application referred to in sub-section (1) of Section 8 shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

It is, thus, clearly seen that the authority referred to under Section 8(1) is a “judicial authority”. However, in view of the well-settled principle as laid down in

Vidya Drolia and others Vs. Durga Trading Corporation, reported at (2021) 2 SCC 1 and as per Section 11(6A) of the 1996 Act, the scope of consideration by the High Court under Section 11 of the 1996 Act is extremely limited; hence it is doubtful whether the orders passed under the said provision are 'judicial' orders. As such, it is debatable whether this Court can be referred to as a 'judicial authority' within the contemplation of Section 8(1).

More importantly, sub-section (2) of Section 8 clearly refers back to sub-section (1) thereof. As such, it cannot be said that the same rigour is applicable to a Section 11 application as well, particularly, in the absence of a similar provision in the latter Section.

Hence, since the provisions of Section 11 do not contemplate any such bar, there is no reason why the rigour imposed on Section 8(2) should be imported thereto.

That apart, as held earlier, this Court is not functioning as 'judicial authority' in the true sense of the term.

Secondly, it is seen from the two applications under Section 11, which are being dealt with together, that separate invocations were made, albeit on the same date. Thus, it cannot be said that a single invocation was made, vitiating the reference.

In so far as the non-mention of the period of 30 days being given to the respondent for the purpose of agreeing to appointment of an arbitrator is concerned, the statute does not mandate the specific reference to such number of days in the invocation notice itself. It is seen from the invocation notices that

those were issued on May 10, 2022 and were apparently received soon thereafter. Such a presumption can be drawn, since the photocopies of the postal receipts and the track reports have been annexed along with the copies of the said notices in the respective applications under Section 11 of the 1996 Act. As the petitioner has waited for more than 30 days after the receipt of the said notices for filing the present applications under Section 11, it cannot be said that the said provision of the statute has been contravened by the petitioner in any manner whatsoever.

Thus, I find that there is no ground for holding the present Section 11 applications to be not maintainable.

Since the disputes raised in both the applications pertain to similar issues and between the same parties, the issues to be decided in the two arbitration proceedings shall be substantially similar. As such, it would only be prudent if a single arbitrator is appointed in both the cases for deciding the dispute between the parties.

Accordingly, AP 195 of 2023 and AP 196 of 2023 are disposed of by appointing Mr. Rajarshi Dutta, a practising Advocate of this Court and a Member of the Bar, as sole Arbitrator in both the matters respectively to resolve the dispute raised between the parties in both the said matters, subject to obtaining the consents/declarations from the proposed Arbitrator under Section 12 of the 1996 Act.

(SABYASACHI BHATTACHARYYA, J.)