IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble Justice Shekhar B. Saraf

A. P. No. 980 of 2017

Ajit Kumar Saha & Anr.

VS

M/S Annapurna Developer & Ors.

For the Petitioners: Mr. Pinaki Dhole, Adv.
Mr. Debjit Bhattacharya, Adv.

For the Respondents: Mr. P. Bag, Adv.
Mr. Rhiddhiman Mukherjee, Adv.
Mr. Arnab Sardar, Adv.

Last heard on: March 23, 2023

Judgement on: April 05, 2023

1. This is an application under Section11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of an arbitrator. The petitioners, Mr. Ajit Kumar Saha and Sukhen Chandra Saha, are owners of a piece and parcel of land admeasuring about two cottahs and eight chittack lying and situated at Mouza Krishnapur, J.L. No.17, R.S. No. 180, Touzi No. 228/229 comprised in C.S. Dag No. 5083, R.S. Khatian No. 258, within the jurisdiction of Baguiati Police Station at Holding No. R/G/M/162/849 & R/G/M/103/2845 within the local limits

of Ward No. 32 of the Rajarhat Gopalpur Municipality in the District of North 24 Parganas [hereinafter referred to as 'the plot'].

2. The respondent no.1 is a partnership firm. Respondent no.2 [Mr. Sandip Sen] and no.3 [Mr. Arun Das] are partners in respondent no.1. They are hereinafter collectively referred to as 'the respondents'.

Relevant Facts

3. The petitioners and respondents entered into a development agreement dated January 3, 2010 with respect to the plot [hereinafter referred to as the 'development agreement']. It was agreed that a four storied building would be built over the plot and the petitioners shall be entitled to get three residential flats on the first floor of the proposed building having carpet area of 750 sq. ft. each.

4. Pursuant to the development agreement, a registered general power of attorney was registered between the parties.

5. The petitioners issued a letter of demand dated December 19, 2012 to the respondents, pursuant to alleged breaches of contract. The petitioners also registered a deed of revocation of power of attorney between themselves dated January 8, 2013.

6. The petitioners instituted an application under Section 12 of the Consumer Protection Act, 1986 before the Learned District Consumer Disputes Redressal Forum at Barasat wherein they had prayed for various reliefs. The Learned Forum ruled in favour of the petitioners vide order dated October 24, 2013. This ruling was appealed before the Learned State Consumer Disputes Redressal Commission, West Bengal wherein the order dated October 24, 2013 was set aside and the matter was remanded back to be heard afresh by the Learned District Forum.

7. The petitioners instituted an application under Section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] on April 30, 2014. In the same application, the Learned Court of Additional District Judge at Barasat was pleased to pass an interim order of injunction by directing the respondents to not carry out any further construction on the plot or dealing with the developed property.

8. The petitioners on June 16, 2014 [hereinafter referred to as the 'first letter'] invoked the arbitration clause and requested the respondents to agree to the arbitrator as named in the letter. Thereafter, on October 28, 2014, the petitioners issued another letter [hereinafter referred to as the 'second letter'] in favour of the respondents and intimated about the change of the name of the arbitrator.

9. Pursuant to lack of response by the respondents, the petitioners have filed the instant application [being A.P. 980 of 2017] on November 13, 2017 under Section 11 of the Act for appointment of an arbitrator.

Rival Submissions

10. Mr. Pinaki Dhole, appearing on behalf of the petitioners submitted the following arguments :-

a. The petition is not time barred as the second notice's date was sent on October 28, 2014 and the application was filed on November 13, 2017. The first notice should not be counted as it contained the name of the lawyer representing the respondents. The second notice should be factored into for calculation of the limitation period.

b. The law requires courts to only look into the existence of the arbitration agreement and nothing else. The point of limitation is for the arbitrator to decide.

c. The issue before the consumer forum are different from the disputes for which the arbitration has been sought for.

11. Mr. P. Bag, appearing on behalf of the respondents propounded the following submissions :-

a. The petition is barred by limitation as the arbitration proceeding was commenced by the first notice which was dated June 16, 2014. The period of 30 days as mandated under the statute for reply would expire on July 16, 2014 and the limitation of three years for filing the instant application for appointment of an arbitration would then expire on July 16, 2017. Reliance has been placed on ***Bharat Sanchar Nigam Limited v. Nortel Networks (India) Private Limtied ([2021] 5 SCC 738)*** *[Coram: Indu Malhotra and Ajay Rastogi, J.J.]* for the said proposition.
b. The petitioner has itself, in the written pleadings, admitted that the second notice was a reminder and the actual arbitral proceeding commenced vide the first notice.
c. A party may approach the consumer forum as well as the arbitral tribunal if the remedies sought for are different. However, in the instant dispute, the remedies and disputes to be adjudicated upon are the same. In such a case, by electing to file before the consumer courts, the petitioners have estopped themselves from approaching this court for initiation of arbitral proceedings. The judgement in ***Ireo Grace Realtech Private Limited v. Abhishek Khanna and Ors. (2021) 3 SCC 241*** *[Coram: Dr. D.Y. Chandrachud, Indu Malhotra and Indira Banerjee, J.J.]* has been placed for the said argument.

<u>Analysis</u>

12. First and foremost, it is necessary to decide the point of limitation that has been raised by the respondents with respect to filing of an application under Section 11 of the Act. The Apex Court in ***Bharat Sanchar Nigam Limited (supra)*** has already underlined the law on this aspect. Indu Malhotra, J., has succinctly laid down :-

> *"**19.** The reasoning in all these judgments seems to be that since an application under Section 11 is to be filed in a court of law, and since no specific Article of the Limitation Act, 1963 applies, the residual Article would become applicable. The effect being that the period of limitation to file an application under Section 11 is 3 years from the date of refusal to appoint the arbitrator, or on expiry of 30 days, whichever is earlier.*
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> ***22.** Applying the aforesaid law to the facts of the present case, we find that the application under Section 11 was filed within the limitation period prescribed under Article 137 of the Limitation Act. Nortel issued the notice of arbitration vide letter dated 29-4-2020, which was rejected by BSNL vide its reply dated 9-6-2020. The application under Section 11 was filed before the High Court on 24-7-2020 i.e. within the period of 3 years of rejection of the request for appointment of the arbitrator."*

<u>Conclusion</u>

13. The first notice was sent on June 16, 2014. It was not replied to by the respondents. Therefore, 30 days from the same would be July 16, 2014. The application should have been filed before July 16, 2017. The respondents' contention has merit. The arbitral proceedings commenced from the date the first notice was sent.

14. Notwithstanding the reason for sending the second notice, if the contention that the limitation period should start from the second notice is accepted, it would mean that the petitioner could have kept extending

the limitation period by simply sending different letters invoking arbitration. Such cannot be the case in law. Ergo, I am of the considered view that the instant application is ex-facie time barred and should be nipped in the bud.

15. Accordingly, the instant application, being A.P. 980 of 2017 is dismissed. There shall be no order as to costs.

16. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with requisite formalities.

(Shekhar B. Saraf, J.)

High Court
सत्यमेव जयते
Calcutta