

OD-4

ORDER SHEET

AP/549/2023

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

RAJESH SAHA AND ANR.
VS
SOMA SAHA (KIRTANIA)

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 26th September, 2023

Appearance:

Mr. Souradip Banerjee, Adv.

Mr. Ashis Kr. Chowdhury, Adv.

Mr. Rajib Ghosh, Adv.

...for the petitioners

Ms. Arundhati Roy Barman, Adv.

Mr. Sutanu Karmakar, Adv.

...for the respondent

The Court: The dispute between the parties, according to the petitioners, arises out of a development Agreement dated 3rd February, 2017. The Agreement was apparently registered on 7th February, 2017. The Agreement contains an arbitration clause in Article XVII. The petitioners executed a general power of attorney in favour of the respondent to give effect to the development Agreement. The development Agreement essentially was for construction of a multi-storied building by the respondent. The Agreement describes the petitioners as owners and the respondent as the developer. The petitioners thereafter cancelled the Agreement on 8th June, 2023 on the alleged

delay and non-performance on the part of the respondent. The respondent denied the allegations of the latter in its reply of 30th June, 2023 and the petitioners ultimately invoked the arbitration Agreement in terms of a Notice under Section 21 of The Arbitration and Conciliation Act, 1996 on 7th July, 2023.

Learned counsel appearing for the respondent says that the claims are *ex facie* barred by the laws of limitation. According to counsel, the arbitration Agreement is of 2017 whereas the petitioners did not take any steps under the said Agreement till 8th June, 2023. Counsel relies on Article 137 in the Schedule to the Limitation Act, 1963 on this score.

Upon hearing learned counsel appearing for the parties, the Court accepts and agrees with the contention made on behalf of the petitioners on the continuing breach on the part of the respondent. Article VII of the Agreement provides that the developer (the respondent) shall complete the owner's allocation within 24 months from the date of starting construction work and will be granted an extension of six months if the developer fails to complete the construction within the first time-period provided. It is undisputed that the construction work is yet to start and hence the time for completing the owner's allocation has not started to run as on date.

Even otherwise, Article 55 of the Schedule to the Limitation Act provides for a limitation of three years for compensation for breach of any contract and spreads out to three limbs for computation of time from which the period of limitation would begin to run. The first is where the contract is broken; the

second is where there are successive breaches and the third is where the breach is continuing on the date of cessation of the contract. Section 22 of the Limitation Act contemplates continuing breaches of a contract and provides for a fresh period of limitation at every moment of the time during which the breach continues. The statutory provision with regard to continuing breach was taken note of by the Supreme Court in *Samruddhi Cooperative Housing Society Limited vs. Mumbai Mahalaxmi Construction* (2022) 4 SCC 103. Factually, the respondent was to arrange for certain statutory clearances including application for a sanctioned building plan before start of the construction which the respondent allegedly did not do. The contract is not also a fixed-time contract read with Article VII thereof which only provides for a time period from the date of commencement of construction. These facts persuade the Court to hold that the contention of alleged continuing breach on the part of the respondent may have some weight.

Even otherwise the Court will only refuse to refer a matter for arbitration or appoint the Arbitrator to decide a dispute between the parties where the claims are *ex facie* time-barred and the Court finds it difficult to come to any other conclusion in that respect. This definitely is not such a matter and the Supreme Court in *Bharat Sanchar Nigam Ltd. & Anr. vs. M/s. Nortel Networks India Pvt. Ltd.* (2021) 5 SCC 738 held that any doubtful question of limitation would have to be decided by the Arbitrator.

The dispute would be evident also from the submissions made on behalf of the parties. It is surprising that the respondent who suffered consequences

of a cancelled contract does not wish to go to arbitration. The petitioners' Section 21 Notice and the respondent's reply thereto reinforce the view that a dispute exists between the parties.

The facts would hence fall under Section 11(6) of the 1996 Act and call for appointment of an Arbitrator.

AP/549/2023 is, accordingly, allowed and disposed of by appointing Mr. Shyamal Gupta, former District Judge (Mob : 9433151786) to act as the Arbitrator subject to the learned Arbitrator communicating his consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioners' advocate-on-record shall communicate this order on the learned Arbitrator by 28th September, 2023 along with the requisite details of the contact person of the petitioners.

(MOUSHUMI BHATTACHARYA, J.)