

OCD-7

ORDER SHEET

AP/764/2023

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

SREI EQUIPMENT FINANCE LTD.
Versus
BOPPANNA CIVIL CONSTRUCTION AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 1st December, 2023.

Appearance:

Mr. Swatarup Banerjee, Adv.

Mr. Sariful Haque, Adv.

Mr. Rajib Mullick, Adv.

Mr. Biswaroop Ghosh, Adv.

..for the petitioner

Mr. Mainak Bose, Adv.

Ms. Somali Mukhopadhyay, Adv.

..for the respondents

The Court: This is an application for appointment of an Arbitrator under Section 11 of the 1996 Act.

The petitioner claims that the petitioner disbursed an amount of approximately Rs.2.82 crores to the respondents by way of a loan Agreement dated 28th September, 2019. The petitioner, through learned counsel, says that the respondent/borrower repaid 9 out of 58 instalments but failed to repay an outstanding amount, together with interest, which amounts to approximately Rs.5.47 crores as of today. Counsel places the relevant

agreement to show that there is no jurisdictional problem therein and that the parties have signed on all the relevant pages of the agreement.

Learned counsel appearing for the respondents denies the basis of the demand as well as the notices issued under Section 21 of the Act on the ground that despite the parties executing the loan agreement, the petitioner failed to disburse the agreed amount. Counsel places the relevant parts of the replies of the respondents to the two invocation notices.

The dispute in the present matter revolves around whether the Court can come to any conclusion, prima facie or otherwise, on the existence of a dispute. The respondents have called upon the Court to direct disclosure of relevant documents to show that the petitioner indeed gave effect to the loan agreement of 28th September, 2019.

The Court is not inclined to accept the stand taken on behalf of the respondents. The reason for this is that a Section 11 Court will only look at whether there is a dispute between the parties and one that is relatable to the arbitration agreement. The law is now settled that the scope of enquiry of a Section 11 Court has been substantially curtailed and the Court will not delve into the factual layers of the dispute more than what is necessary to determine as to whether a dispute exists between the parties. Calling upon the petitioner to produce documents of disbursement would in effect trespass into the domain of the Arbitrator.

The signatures of the borrower and the guarantor on the pages of the loan agreement, the replies of the respondents to the notices of demand as well

as to the invocation notices are reason enough to conclude that the respondents have strenuously disputed the demands of the petitioner. Whether the petitioner has failed to give effect to the loan agreement is a matter which is entirely within the jurisdiction of the Arbitrator. The loan agreement contains an arbitration clause with Kolkata as the place/seat of arbitration.

The issue with regard to “deadwood” should also be answered by the Court. The expression “deadwood” was first eloquently mentioned in the decision of *Vidya Drolia and Ors vs. Durga Trading Corporation*, (2021)2 SCC 1 and was later reiterated by the Supreme Court in *DLF Home Developers Limited vs. Rajapura Homes Private Limited and Anr.*, 2021 SCC OnLine SC 781. “Deadwood” essentially means any clear, unequivocal and undisputed evidence shown to the Court where the Court would arrive at a firm conclusion that the claim for arbitration is frivolous and vexatious. This would include cases where there is no arbitration agreement between the parties or a serious doubt exists as to the parties agreeing to the terms of the agreement by absence of signatures or otherwise or where one of the parties has invoked the jurisdiction of the Court knowing fully well that there is a jurisdictional infirmity in the matter. The “deadwood”, in essence, must be apparent from the agreement between the parties and cannot be assumed from correspondence exchanged between the parties.

The present case is certainly not one of “deadwood” or a case where a Section 11 Court can come to an unbeatable conclusion that no dispute exists between the parties.

It may also be added that the respondents can raise a counter-claim in the arbitration for making good any unsubstantiated demand made by the petitioner.

The submissions made on behalf of the parties discloses that there is indeed a dispute and one that is covered by the arbitration agreement between them.

AP/764/2023 is allowed and disposed of by appointing Mr. Subhro Kamal Mukherjee, former Chief Justice of the Karnataka High Court, 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 petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 3rd December, 2023 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)