

OCD-10

ORDER SHEET

AP/817/2023

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

M/S. WORTHY CONSTRUCTION
Vs
M/S. BERGER PAINTS INDIA LTD.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 11th December, 2023.

Appearance:

Mr. Chanchal Kr. Dutta, Adv.

Mr. Basudeva Naidu, Adv.

Ms. Sormi Dutta, Adv.

..for the petitioner

Mr. Anirban Ray, Adv.

Mr. Snehashis Sen, Adv.

Mr. Danyal Ahmed, Adv.

..for the respondent

The Court: The respondent takes a preliminary objection to the maintainability of the application filed by the petitioner under Section 11 of the 1996 Act.

According to learned counsel appearing for the respondent, the petitioner has not invoked the arbitration clause in the agreement executed between the parties on 12th June, 2020 and the petitioner has also not followed the 2-tier mechanism provided in the arbitration clause.

Learned counsel appearing for the petitioner submits that their notice dated 19th September, 2023 is a rolled-up notice for amicable settlement as well as for arbitration.

The Court is unable to agree to the contention of the petitioner for the following reason.

The arbitration agreement is contained in the agreement executed between the parties on 12th June, 2020 whereby the petitioner was to perform certain works of painting government schools in Andhra Pradesh. The petitioner has been referred to as the 'Applicator' in the agreement. The arbitration clause at Clause 21.1 of the said agreement provides for the parties using all reasonable efforts to settle disputes in respect of the agreement or interpretation thereof between themselves. If the parties fail to resolve the disputes by mutual discussion within 60 days, the disputes shall finally be settled by a sole Arbitrator under the provisions of the 1996 Act.

The notice dated 19th September, 2023, which the petitioner describes as the notice of invocation, does not refer to the arbitration clause and simply says that the petitioner is giving the respondent 15 days for amicable settlement of the dispute failing which the parties will apply before a competent legal forum. The respondent was also given 30 days from the receipt of the notice of amicable settlement to respond to the said notice, failing which the petitioner would initiate legal action against the respondent.

The notice has several lacunae in respect of what a notice under Section 11(5) of the Act is supposed to be. Section 11(5) requires a notice to have

certain trappings in terms of invocation of the arbitration agreement. It is essentially the precursor to the dispute settlement mechanism envisaged under the 1996 Act. First, the notice for invocation follows failure of the parties to reach a settlement for deciding on the mechanism of arbitration between them. Second, the notice requires the sender to nominate an Arbitrator of the sender's choice. Third, the sender must also give 30 days to the receiver of the notice to either agree to or disagree with the sender's choice of Arbitrator. None of these features are present in the notice dated 19th September, 2023.

In any event, the arbitration clause reflects that the parties will first exhaust 60 days for amicable settlement of the dispute between them and only thereafter initiate proceedings under the 1996 Act. There is no scope for the notice of invocation being a rolled-up notice of amicable settlement plus a notice under Section 21 since the arbitration agreement clearly reflects two stages of dispute resolution.

In any event, the notice is dated 19th September, 2023 and the present application was filed on 20th November, 2023. Therefore, the parties did not get an opportunity to explore the second phase of the dispute settlement mechanism after exhausting the 60 days for amicable settlement.

This Court is hence of the view that the notice of 19th September, 2023 is not an invocation notice in terms of the arbitration clause in the agreement. Needless to say, the petitioner will certainly have a chance of invocation after the petitioner exhausts the 2-stage procedure contemplated in the arbitration clause. The parties have not reached that stage as on date.

AP/817/2023 is accordingly dismissed.

There shall be no order as to costs.

(MOUSHUMI BHATTACHARYA, J.)

R.Bhar