OCD-21

ORDER SHEET

AP-COM/50/2024

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

SRI SIBANATH BHATTACHARYA
VS
M/S. AKSHYA DAIRY PRODUCTS PVT. LTD. AND ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date : 8th July, 2024.

Appearance:
Mr. Arnab Mukherjee, Adv.
Mr. Souparna Pain, Adv.
Mr. Ishan Bhattacharya, Adv.
..for the petitioner

Mr. Mohit Gupta, Adv.
Mr. Gopal Ram Sharma, Adv.
..for the respondent no.1

The Court: Learned counsel for the petitioner contends that the present challenge is against an interim award directing the petitioner to refund the security deposit paid in terms of agreement between the parties, which is bad in law and ought to be struck down.

The first ground taken by the petitioner is that the agreement between the parties dated July 12, 2018 contemplated that a prior notice of termination had to be given in writing, to be sent by the registered post or fax. In the present case, only a 'WhatsApp' communication was made on social platform, which does not comply with the relevant provision, i.e., Clause 11, which stipulates the mode of service of notice.

As such, it is argued that the termination of the jural relationship between the parties itself being illegal, the refund of security deposit clause could not be invoked by the claimant at all. Hence, the interim award directing such refund is unlawful and perverse, being contrary to the agreement.

It is further argued that the learned Arbitrator did not take into account the defence of the petitioner that all dues between the parties had been mutually adjusted. Two documents were produced by the petitioner to indicate that the parties had agreed that there were no further dues. However, there were other dues in lieu of loss also claimed by the petitioner, without adjusting which the entire security deposit was directed to be refunded.

Such a direction at the interim stage, without proper adjudication on the issues involved as framed by the Arbitrator himself, is also perverse and ought to be set aside.

Learned counsel for the petitioner places heavy reliance on the purported no-objection certificates regarding the adjustment of dues, annexed at pages 43 and 44 of the present application, on such count.

It is further argued that no notice under Section 21 of the Arbitration and Conciliation Act, 1996 was also given.

Learned counsel appearing for the respondent no.1 submits that the learned Arbitrator was appointed under Section 11 of the 1996 Act and as such, the issue regarding non-service of notice under Section 21 cannot be re-opened at this stage at all.

On merits, learned counsel contends that in any event, the agreement was for a period of two years which has long elapsed. Even otherwise, the respondent no.2, who is only one of the partners, came up before the Arbitrator and took an objection as to non-compliance of Clause 11 of the agreement, which envisages the modality of service of notice.The partnership firm itself has not contested the fact that the notice was actually served upon the partnership firm.

That apart, it is argued that the learned Arbitrator took into consideration the arguments of the parties and specifically observed, relying on certain judgments, that there was no scope or provision for adjustment of the claimed dues of the present petitioner with the security deposit, the entirety of which has to be refunded upon termination of the contract.

Since the contract was terminated by a notice dated September 20, 2018, it is submitted that the purported NoCs relied on by the petitioner have no germane bearing, being of prior dates than the termination notice itself.

Learned counsel for the respondent no.1 further contends that the impugned interim award does not suffer from any irregularity or illegality coming within the ambit of Section 34 and as such, the present challenge ought to be turned down.

The first issue which has been raised by the present petitioner, who is the respondent no.2 in the arbitral proceeding, is that no proper notice of termination was served.

The respondent no.2 has stated in his pleadings in connection with the application under Section 31(6) of the 1996 Act that the claimant had terminated the agreement by sending SMS and/or WhatsApp messages which is inappropriate and illegal according to Clause 11 of the agreement because as per the said Clause, the notice is to be delivered in person and/or by registered post and/or by facsimile transmission.

The respondent no.2, again, in his statement of defence in the main arbitral proceeding, has stated in paragraph no.37 that he has "no knowledge" regarding the letter sent by the claimant on September 20, 2018 (the termination notice).

In the interim award challenged before this Court, the learned Arbitrator has recorded that the respondent no.2/petitioner pleaded that the notice was not in consonance with Clause 11.

Hence, what is to be noted is that the service of notice itself in terms of Clause 10.1(b), which is a *sine qua non* of the termination of the agreement, has not been disputed on merits. What has been disputed is the modality of service, which according to the present petitioner, is not in consonance with Clause 11.1.

It is arguable and shall definitely be decided by the learned Arbitrator finally in the arbitral proceeding as to whether the service of notice was only by SMS and/or WhatsApp message and if so, whether the same comes within the broad purview of Clause 11.1. It is also to be considered by the learned Arbitrator as to whether such technical objection can vitiate the service of the notice itself. However, these questions are best left for the Arbitrator to decide conclusively in the arbitral proceeding and it would be premature for this Court to enter into a consideration of the merits of the same.

Be that as it may, the learned Arbitrator found sufficient *prima facie* case of the agreement having been terminated and in any event, since more than two years after the inception of the agreement has elapsed, the agreement is no longer in force.

Thus, it cannot be said that the interim award directing refund of security deposit is so perverse that it shocks the conscience of the Court or is against the fundamental policy of Indian law and/or patently perverse so as to set aside the same within the limited conspectus of Section 34 of the 1996 Act.

Insofar as the claimed adjustment of the petitioner's dues is concerned, the no-due certificates purportedly produced by the petitioner do not have any direct bearing on the issue at hand, since the interim award only directed the security deposit to be refunded. The learned Arbitrator, upon full consideration of the decisions cited by the parties, came to a plausible finding that the security deposit cannot be adjusted with any claim. In fact, a plain reading of the agreement does not show that there is any provision of such adjustment with the security deposit.

Hence, even if the no-due certificates were issued, it is doubtful as to whether the same have any bearing on adjustment with the security deposit. Moreover, the claimant/present respondent no.1 has raised an arguable issue as whether if the no-due certificates, if at all true, were issued prior to the termination itself, those can vitiate the termination or raise a claim in favour of the present petitioner.

Hence, on a comprehensive perusal of the interim award and the surrounding circumstances, this Court is of the opinion that none of the grounds as stipulated in Section 34 of the 1996 Act have been made out by the petitioner for setting aside the impugned interim award.

Accordingly, AP-COM/50/2024 is dismissed, thereby affirming the interim award dated December 15, 2023 of the learned Arbitrator.

No order as to costs.

(SABYASACHI BHATTACHARYYA, J.)

R.Bhar/bp