

OD-5

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

AP/59/2024

HAMID RASHID AND ANR
VS
SK JAMALUDDIN AND ORS

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 24th September, 2024

Appearance:
Mr. Jishnu Chowdhury, Adv.
..for the petitioner

The Court: The affidavit of service filed today be kept on record.

The present application has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996.

Despite service, none appears for the respondents. In the present case, the parties entered into a development agreement which contains an arbitration clause. The arbitration clause has a named Arbitrator.

The petitioner, pursuant to the said clause, approached the said Arbitrator. However, such person subsequently refused in writing, never taking up the arbitral proceeding at all. Thereafter, the present application has been filed for appointment of an Arbitrator.

Under Section 11(2), the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. In the present case, the parties had agreed upon a procedure for appointing an Arbitrator and had a named Arbitrator who, however, ultimately refused to take up the arbitration.

As per sub-section (5) of Section 11 of the 1996 Act, if there is no agreement referred to in sub-section (2), only then the party seeking the reference is required to make a request to the other party for appointment of an Arbitrator; upon 30 days having elapsed from the receipt of such request, if the same fails to elicit a response or a consent from the other party, an application under Section 11(5) can be filed before the High Court.

However, in the present case, the factual matrix does not fit sub-section (5) of Section 11 since there was an agreed procedure under Section 11(2) and, as such, sub-section (6) of Section 11 is applicable. The present scenario is one coming within the ambit of Clause (c) of sub-Section (6), inasmuch as the person who was agreed upon as an Arbitrator failed to perform his function as entrusted to him under the procedure. As such, the petitioner need not be relegated to a further prior exercise of issuing a request under Section 11(5) or wait for a further period of 30 days before making an application to the Court for such appointment.

Seen from another perspective, ingredients of Sections 14 and 15 of the 1996 Act are also applicable here, since the chosen Arbitrator of the parties withdrew from office, as contemplated under Section 14(1)(b) of the 1996 Act, leading to a situation where a substitution of the Arbitrator can be sought by one of the parties to the arbitration agreement under Section 15 of the 1996 Act.

Hence, there is no requirement to send back the petitioner for a further exercise of prior request under Section 11(5) of the 1996 Act. Since the petitioner already sought to invoke into the arbitration clause by appointment of the

chosen Arbitrator who has since refused, there is no impediment in referring the matter to a substituted Arbitrator.

That apart, the dispute now raised by the petitioner, as evident from its letter dated January 16, 2024 annexed at page 80 of the application, comes squarely within the ambit of the arbitration clause and is otherwise arbitrable.

Accordingly, AP/59/2024 is allowed, thereby appointing Mr. Tanmay Mukherjee [Mob:9874218610], a member of the Bar Association of this Court, as the sole arbitrator to resolve the disputes between the parties, subject to a declaration under Section 12 of the Arbitration and Conciliation Act, 1996 Act being obtained from the said learned Arbitrator. The learned Arbitrator shall fix his own remuneration in consultation with the parties and within the framework of 1996 Act, in particular the Fourth Schedule thereof.

(SABYASACHI BHATTACHARYYA, J.)