

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

AP/115/2024

ATANU KUMAR GOSWAMI
VS
BUDDHADEV MAJI AND ANR

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date : 12th August, 2024

Appearance:
Mr. Susmita Pal, Adv.
...for petitioner.

Mr. Abhilash Chatterjee, Adv.
...for respondent no. 1.

The Court:- Learned Counsel for the petitioner argues in support of the application under Section 11 of the Arbitration and Conciliation Act 1996. It is pointed out that by a notice dated June 14, 2024, which was received by the respondent on June 18, 2024, the arbitration clause in the agreement between the parties was invoked. Although the application under Section 11 was filed after only about seven days thereafter, it is contended that the intention of the petitioner to invoke the arbitration clause was sufficiently expressed in the notice under Section 21. That apart, the language of Section 11(4) of the 1996 Act permits the appointment to be made by the Court if the mandatory statutory period of 30 days after the request being made is over before the date of passing of the order of appointment by the Court, irrespective of the date of filing of the application.

It is further argued that it is evident from previous minutes of meetings between the parties, which are annexed to the present application, that there were certain disputes between the parties. Thus, the reference to arbitration and

the mention of the expression “dispute” in the notice dated June 14, 2024 was sufficient for both parties to understand the contours of the dispute. As such, it is submitted that the technical objection as to non-expiry of 30 days after the request, taken by the respondent, should be turned down.

In support of her submission, learned Counsel for the petitioner cites *SBP & Co. vs. Patel Engineering Limited and another* reported at (2005) 8 SCC 618.

While controverting such submissions, learned Counsel for the respondent cites *Arif Azim Company Limited versus Aptech Limited* reported at (2024) 5 SCC 313 for the proposition that the date of commencement of the cause of action for filing an application under Section 11 is the expiry of 30 days from the date of notice by one party to the other for appointing Arbitrator. By necessary implication, it is argued that the date on which the application could be filed in the present case had to be after the expiry of 30 days, which was not done.

Learned Counsel for the respondent next cites *D.P. Construction versus Vishvaraj Environment Pvt. Ltd.* reported at 2022 SCC OnLine Bom 1410 where a learned Single Judge of the Bombay High Court held, inter alia, that the notice invoking arbitration ought to be absolutely clear with reference to the arbitration clause and with the clear intent of calling upon the rival party to proceed for appointment of an arbitrator and referring the disputes to arbitration.

Upon a careful consideration of the language of Section 11(4) of the 1996 Act, this Court is of the opinion that the use of the expressions “appointment” and “application” therein are intended to be simultaneous. Unlike certain other statutes, where the defect of prior temporal moratorium would get cured after expiry of the period during pendency of the proceeding, even if the same is filed earlier, depending on the language of the Statute concerned, in section 11(4) of

the 1996 Act, the time which is required to be elapsed before the application is made and that before which the appointment cannot be made are to be juxtaposed.

The language of section 11 (4), if carefully considered, clearly indicates that the appointment shall be made “on application of the party”. Thus, filing of an application is a pre-requisite of the appointment. Hence, it cannot be said that an application can be made prior to the expiry of 30 days, since in such an event, an absurd proposition would automatically follow that an appointment can also be made prior to 30 days. Technically, the application, if defective at the inception, could not be cured by mere delay on the part of the Court in taking up the application. If the application is permitted to be filed prior to 30 days and is taken up on the date of filing and an order passed, the appointment itself would be unlawful. Thus, by necessary implication, if the appointment cannot be made before expiry of 30 days from the receipt of a request, the application cannot also be made before the expiry of such time.

“Dispute”, as contemplated in Section 21 of the 1996 Act, which has to be read into Section 11 as well, refers to a “particular dispute”. Thus, a notice under Section 21 has to clearly disclose the specific contours and outlines of the dispute. Although a Section 21 notice and/or a notice for the purpose of Section 11 need not be a compendium of the entire pleadings which are to be taken by way of a statement of claim later before the arbitrator, the broad outlines and the general terms of the dispute must be disclosed clearly in the notice contemplated under Section 21 as well as Section 11 of the 1996 Act in order to give an opportunity to the respondent to meaningfully respond to the same. It may very well be that depending on the nature of the dispute raised, the

respondent may choose either to have an arbitration or not to agree to the appointment of an arbitrator. Thus, it is very important that in a notice under Section 21 Of the 1996 Act, the dispute has to be clearly enumerated, at least with regard to its broad outlines.

Insofar as *SBP (supra)* is concerned, the same lays down the broad propositions governing an arbitral proceeding; in particular, an application under Section 11 of the 1996 Act. Although applicable in general terms, the said decision does not, in any manner, have a direct and specific bearing on the dispute at hand.

With regard to the judgment in the matter of *Arif Azim (supra)*, the respondent has a point in arguing that the date of commencement of making the application under Section 11(6) has been taken to be the expiry of 30 days after the receipt of the request. However, the said judgment also does not squarely deal with the issue at hand, since it was rendered in the different context of exploring the limitation for filing an application under Section 11. The said judgment was not on the issue of distinction being sought to be drawn between the date on which an appointment can be made and on which an application can be filed.

Insofar as the judgment of the Bombay High Court is concerned, in the said case, the learned Single Judge of the Bombay High Court laid down that the notice invoking arbitration ought to be absolutely clear with reference to the arbitration clause and the clear intent of calling upon the rival party to proceed for appointment of an arbitrator and referring the disputes to arbitration. Although the intention to refer the dispute to arbitration is clear from the notice in the present case, the dispute sought to be raised by the petitioner is not at all

clear or even obliquely referred to in the said notice. The text of the notice, in its exact form, is set out below;

“Please take notice that a dispute has been arising between the partners of the partnership firm namely M/s. Tara Maa Kisan Seva Kendra and various request were made to you to resolve the dispute but all in vain.

I, therefore, request you to appoint a person as an arbitrator to adjudicate and settle the dispute between the partners of the aforesaid Partnership firm failing which I would have no other alternative but to advise my client to file an application under Arbitration and Conciliation Act 1996 act without any further delay.”

Thus, it is evident that neither any dispute worth the name was sought to be referred to arbitration, nor any opportunity was given to the respondent to meaningfully respond to a request for appointment of an arbitrator with regard to a particular dispute.

That apart, the minimum period of 30 days as stipulated in Section 11 of the 1996 Act, between the receipt of the request by the respondent and the filing of the application under Section 11, was not given in the present case, thus rendering the application non-maintainable *ab initio*. Hence, the application under Section 11 fails on both the above grounds.

Accordingly, AP 115 of 2024 is dismissed on contest, however, without any order as to costs.

It is made clear that nothing in this order shall prevent the petitioner from issuing a fresh notice under Section 21 of the 1996 Act, clearly enumerating the disputes sought to be referred to arbitration and seeking an appointment of arbitrator, preferably referring to the arbitration clause in the contract between the parties. Nothing in the above order shall also preclude the petitioner from making a fresh application under Section 11 of the 1996 Act after leaving the

statutory period of 30 days post-receipt of such fresh notice by the respondent,
as contemplated in Section 11 of the 1996 Act.

(SABYASACHI BHATTACHARYYA, J.)

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