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ORDER SHEET
AP-COM/834/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

AMARNATH MODI
VS
BEDIKA AGARWAL AND ANR.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 4th October, 2024.

Appearance:
Mr. Deepnath Roy Choudhury, Adv.
Mr. Debraj Sahu, Adv.
Ms. Jyoti Rauth, Adv.
Mr. Hareram Singh, Adv.
Ms. Swagata Ghosh, Adv.
...for the petitioner

Mr. Suddhasatva Banerjee, Adv.
Ms. Akanksha Mukherjee, Adv.
Mr. Abhishek Kabir, Adv.
...for the respondents.

The Court: Learned counsel for the petitioner submits that in course of transactions between the parties, an agreement was arrived at for settlement of accounts which contains an arbitration clause, on the strength of which the present application under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed. The petitioner relies on an agreement which is captioned as one for settlement and release. In Clause 3, sub-clause A thereof, it is stated that the second and third part (respondents herein) jointly and/or severally will pay *a* *sum* (emphasis supplied) to first part (the present petitioner) within 24 months from the agreement date and *such sum* (emphasis supplied) will also bear interest of 12% per annum on *such sum* (emphasis supplied) which must be paid by the 10^{th} day of each succeeding month.

In sub-clause B of Clause 3 of the agreement, it is mentioned that all the parties to the agreement by a separate letter but within 20 days of agreement date will make *such sum* (emphasis supplied) defined and specific and such letter must be specifically signed by each part, which will form the part and parcel of the agreement.

On the basis of the expression "such sum", sub-clause D of Clause 3 provides the particulars of a specific bank account which the respondents declared to be their bank account.

Again, sub-clause F incorporates that the first part (petitioner) will withdraw/transfer/remit 30% of each inward fund credited to "any bank account" of the respondents and/or as stated thereinabove and the second part will also withdraw/transfer/remit 70% of each inward fund credited from the "aforesaid bank account".

Thus, the entire premise of the agreement is a vague, nebulous and unquantified amount, to be specified on a future date, and the entire rights of the parties flow on the basis of the said unspecified amount.

Learned counsel for the respondents, while controverting the prayers of the petitioner made in the application, submits that there has been no consensus between the parties, within 20 days of the agreement or otherwise, regarding the sum, if any, payable to the petitioner by the respondents. As such, it is contended that there cannot be any invocation of the arbitration clause in respect of such an agreement.

Learned counsel for the petitioner hands over a printout of a purported email by the respondents dated September 25, 2024, which contains an offer of settlement at a particular specified sum. Learned counsel for the petitioner seeks to project such email as the basis of the present application.

However, upon consideration of the email in conjunction with an order dated September 24, 2024 passed by this Court, it is evident that since, on the submission of the parties, it was recorded by this Court on September 24, 2024 that there is a chance of settlement between the parties, pursuant to the said recording, an offer was merely advanced by the respondents by way of the said email for a proposed settlement on the very next date, that is, on September 25, 2024. However, there is nothing on record to indicate that such offer of settlement was ever accepted by the petitioner or that the said offer culminated in a concluded contract between the parties.

More importantly, a post-facto offer cannot retrospectively qualify as cause of action for the application, since on the date of presentation of the application under Section 9 of the 1996 Act, the email was not even in existence.

In any event, the purported email has no connection with the agreement in question, since the same merely comprises of a subsequent offer which was never accepted at any point of time by the petitioner.

Insofar as the agreement, which is the sole premise of invocation of the arbitration clause for the purpose of the Section 9 application, is concerned, I find that no sum has been specified or disclosed, around which the entire superstructure of purported rights and liabilities of the parties have been created in the agreement. In view of such superstructure being without any plinth at all but the rights and liabilities under the agreement being based on thin air, since there is no specified sum which could be the subject matter of the agreement between the parties and as there is no consensus regarding such sum arrived at between the parties subsequently, there cannot be any "dispute" existing between the parties for the purpose of reference to arbitration.

Even *prima facie,* the petitioner has failed to make out a case for reference of the dispute to arbitration or to establish that there is a valid agreement between the parties which contains an arbitration clause for the purpose of reference. The arbitration clause is a part of an agreement which does not disclose the amount around which all the rights and liabilities have been carved out in the agreement. As such, I find that no cause of action has been disclosed in the Section 9 application.

In paragraph no.6 of the Section 9 application, for the first time, a sum has been quantified by the petitioner to be due from the respondents to the petitioner. However, the said allegations are being made for the first time in the Section 9 application, which is neither a statement of claim before an Arbitrator nor a part of the pleadings in an original suit or any legal action. The agreement containing the arbitration clause nowhere quantifies the sum which is the focal point of the purported dispute.

An application under Section 9 is merely in aid of protection of property which is prospectively or currently the subject matter of arbitration, and cannot be construed as an original pleading.

In the present case, since I do not find any valid agreement between the parties regarding any specified sum, there is no scope of invocation of the arbitration clause contained in such non-existent agreement between the parties, which agreement, in the absence of any quantified sum in dispute, is not justiciable in the eye of law. Hence, there is no scope of grant of relief to the petitioner under the present application in its present form under Section 9 of the 1996 Act.

The only right which still might have been claimed by the petitioner could perhaps be elicited from sub-clauses F and K of Clause 3 of the agreement. However, as the agreement is styled as one for “settlement and release”, the said right regarding the withdrawal 30% of each inward fund credited to bank account has to be linked with a particular base debt, which is absent in the present case. In paragraph 10 of the application, the petitioner alleges that the arrangement of withdrawal of 30% by the petitioner from each inward fund has to continue till the actual realisation of the entire due amount. However, the “due amount” does not find place in the parent agreement and as such, cannot be the basis for grant of relief to the petitioner.

Conspicuously, even in sub-clause F, the parties have interchangeably used the expressions “any bank account” and “aforesaid bank account”. Thus, the parties, in the same breath, have once referred to an arrangement regarding the particular bank account referred to in sub-clause D of Clause 3 whereas on the other hand, they have spoken about 30-70 sharing ratio being in respect of “any” bank account of the respondents. Thus, the agreement itself is, at least at first blush, self-contradictory and does not disclose a clear cause of action. In view of the above, there is no scope of grant of any relief to the petitioner under Section 9 of the 1996 Act.

Accordingly, AP-COM/834/2024 is dismissed on contest without, however, any order as to costs. Needless to say, in the event the matter is ultimately referred to arbitration, the arbitral tribunal shall decide all issues between the parties without being unnecessarily influenced by any of the observations made hereinabove.

(SABYASACHI BHATTACHARYYA, J.)

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