

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

Present :

Hon'ble Justice Moushumi Bhattacharya

A.P - 648 of 2023

M/s. U.S. Infra Developers Private Limited

Vs.

Rina Singh Alias Reena Singh and Ors..

For the petitioner : Mr. Souradeep Banerjee, Adv.
Ms. Sanjana Sinha, Adv.

For the respondent nos. : Mr. Saunak Sengupta, Adv.
1 and 2 Ms. Mandeep Kaur, Adv.

For the respondent nos. : Mr. Rajeev Kumar Jain, Adv.
3 and 4 Ms. Laila Khatun, Adv.
Ms. Sreyasi Chatterjee, Adv.
Ms. Reitambhara P, Adv.

Last heard on : 22.01.2024

Delivered on : 22.02.2024.

Moushumi Bhattacharya, J.

1. The petitioner prays for appointment of an arbitrator in this application under section 11 of The Arbitration and Conciliation Act, 1996.

2. The petitioner is a Developer and the respondents are the owners of an immovable property situated at Dalimtala Lane, Kolkata. The petitioner was to develop the property described in the Agreement and the developed property was to consist of both the Owners' as well as the Developer's Allocations. The petitioner claims to have done substantial work in terms of the Agreement. The petitioner also claims to have made payment of Rs. 32 lakhs towards refundable security deposit to the respondents. The respondents terminated the Development Agreement on 12.2.2019. The petitioner claims that the respondents however waived the termination and allowed the petitioner to continue performing the Agreement. The petitioner invoked the arbitration clause in the Agreement by a Notice dated 28.4.2023 under section 21 of the 1996 Act. The respondents refused to agree with the petitioner's nomination of an arbitrator and the present application was thereafter filed on 24.8.2023.

3. Learned counsel appearing for the respondent Nos. 3 and 4, namely Sunita Jaiswal and Binod Kumar Jaiswal, takes 3 preliminary objections to the maintainability of the application.

4. The first of such objections is the absence of a proper Notice under section 21 of the Act. The second is that the application is barred by the law of limitation and third that there can be no specific performance of an unregistered Agreement in respect of an immovable property in view of section 49 of the Registration Act, 1908.

5. With regard to the first objection, counsel submits that the Notice dated 28.4.2023 was admittedly served only on the respondent no. 4 and the petitioner caused another notice to be served on the respondent nos. 1

and 2 on 4.7.2023. Counsel submits that section 21 of the Act requires the Notice to be served on all the parties to an arbitration agreement. It is also submitted that the respondents replied to the Notice of invocation and clearly spelt out that there was no live dispute between the parties and that the petitioner had also failed to describe the nature of the dispute in the invocation Notice. Counsel relies on sections 3, 4, 21 and 43(2) of the 1996 Act in support of his contentions.

6. Counsel submits that the Agreement dated 12.11.2011 was terminated by the Notice dated 12.2.2019 and the petitioner replied to the Notice of termination on 6.3.2019. According to counsel, the cause of action admittedly accrued on 12.2.2019 while the present application was filed in August, 2023 after more than 4 years from the accrual of the cause of action. Counsel relies on Article 54 of The Limitation Act, 1963 to say that the prescribed period of limitation for specific performance of a contract is 3 years and that the time would start to run from the date when the petitioner had notice of the termination.

7. Counsel relies on section 49 of The Registration Act, 1908 to urge that there can be no specific performance of a contract in respect of an immovable property. It is submitted that the Development Agreement is an unregistered document which was required to be registered under section 17 of The Registration Act, post termination.

8. Counsel also urges that the petitioner has suppressed the fact of the petitioner being struck off from the records of the Registrar of Companies, West Bengal as well as other documents including the petitioner's reply to the letter of termination issued by the respondents.

9. Learned counsel appearing for the respondent nos. 1 and 2 objects to the section 21 notice on the ground that the contents of the said notice are not sufficient. According to counsel, the petitioner had merely stated that the respondents have repudiated the Agreement. The other submissions made by counsel are on the merits of the matter.

10. Learned counsel appearing for the petitioner opposes the points taken on behalf of the respondent nos. 3 and 4 on the maintainability of the application. Counsel relies on service of the Notice under section 21 on the respondents on various dates and the fact that the respondent nos. 1,2 and 4 have received the Notice at their Kolkata and Allahabad addresses, respectively. It is also submitted that the respondents cannot complain of non-service once the respondents have participated in rejecting the petitioner's nomination of arbitrator. Counsel submits that the petitioner's cause of action is not barred by limitation since the Agreement is for development of an immovable property where time was not of the essence. It is also submitted that the termination of 12.2.2019 was waived since the parties continued to perform the Agreement and that the Agreements for sale were executed with third parties even as late as on 19.3.2020.

11. Counsel submits that non-registration and inadequacy of a stamp cannot be a ground to object to appointment of arbitrator under section 11 of the 1996 Act. According to counsel registration is not relevant inasmuch as the petitioner is seeking specific performance of the Agreement. It is further submitted that the arbitration agreements are not required to be registered.

12. The decision of the Court is articulated in the form of the captioned objections.

The 1st objection – infirmity of the Notice issued under section 21 of the Act.

13. The facts relevant to this issue are as follows :

- i) The notice under section 21 was issued on 28.4.2023;
- ii) The Notice was served on the respondent no. 4 on 1.5.2023;
- iii) The petitioner attempted service on the respondent nos. 1, 2 and 3 but the item was returned on 29.4.2023 as “addressee left”.
- iv) The petitioner served the Notice on the respondent nos. 1 and 2 on 4.7.2023 at their Allahabad address.
- v) The Notice was received by the respondent no. 1 on 10.7.2023.
- vi) The Notice was received by the respondent no. 2 on 12.7.2023.

14. Therefore, the only issue is with regard to the respondent no. 3 not being found at the Kolkata address. However, the Kolkata address where service was effected is the address mentioned in the Development Agreement and also in the cause title of the present application. The respondent no. 3 is also being represented in the present application.

15. In any event, the issue with regard to service on the respondent no. 3 was cured on 22.5.2023 when the respondent nos. 1-4 replied to the invocation Notice dated 28.4.2023. The same learned advocate responded to the invocation Notice on behalf of all the four respondents by the letter dated 22.5.2023. This letter also shows that the address of the learned

advocate is connected to learned counsel who is representing the respondent nos. 3 and 4.

16. Even otherwise, the respondent no. 3 has been represented in this proceeding from the very beginning and the entire objection of the respondents is negated by the letter of 22.5.2023 which was a reply to the invocation Notice on behalf of the four respondents. After all, a party appearing in a proceeding cannot be permitted to argue that it has not received notice of that proceeding : Ref. *Kamalabai Bhaskar Mule vs. Special Land Acquisition Officer (No. 1); 2020 SCC OnLine Bom 730*.

17. The legal position of section 11 of the 1996 Act needs to be reiterated in this context. Section 21 of The Arbitration and Conciliation Act, 1996 does not specifically mention the word “notice”. It simply states that the arbitral proceedings in respect of a particular dispute shall commence on the date on which a “request” has been made for referring the dispute to arbitration and the request has been received by the respondent. Hence, section 21 only requires a “request” to be made and communicated to the respondent.

18. Section 11(6) carries forward the “request” to a situation where the parties fail to adhere to the appointment procedure and a party thereafter requests the Supreme Court or the High Court to take necessary steps for appointment of the Arbitrator.

19. In the present case, the request under section 21 was duly communicated and the respondents also replied to the request. Nothing further is required for commencement of the arbitral proceeding or for carrying the request to the Court for appointment of an arbitrator. Order III

Rule 5 of The Code of Civil Procedure, 1908, may be relevant in this context under which any process served on the pleader who has been duly appointed to act for any party in Court shall be presumed to be duly communicated and made known to the parties whom the pleader represents: Ref. *Nilkantha Sidramappa Ningashetti vs. Kashinath Somanna Ningashetti*; AIR 1962 SC 666. The decision of the Delhi High Court in *State Black Sea Shipping Company vs. Viraj Overseas Pvt. Ltd.*; 2003 (70) DRJ 6 was under the provisions of the Companies Act, 1956; the decision in *Monika Oli vs. M/s. CL Educate Ltd.*; O.M.P. (Comm) 370/2022 - Single Bench decision of the Delhi High Court - is distinguishable on facts. In that case there was also no reply to the section 21 Notice. The respondents' argument of the invocation Notice being devoid of necessary particulars is hence not acceptable.

20. Moreover, the invocation Notice clearly delineates the dispute between the parties in relation to the subject matter of the Development Agreement. The Notice also narrates the subsequent facts with regard to the disputes and differences which arose between the parties. Technicalities should be avoided in interpreting such a notice: Ref. *Universal Consortium of Engineers Pvt. Ltd. vs. Kanak Mitra*; AIR 2021 Cal 127.

21. The first objection, that is, with regard to the alleged infirmity of the section 21 Notice, is thus answered in favour of the petitioner.

The 2nd objection - the Petitioner's cause of action is barred by Limitation

22. The Agreement is for development of immovable property where time cannot be of essence in the contract. A 3-Judge Bench of the Supreme Court

in *M/s. Hind Construction Contractors vs. State of Maharashtra*; (1979) 2 SCC 70, quoted Halsbury's Laws of England with regard to building and engineering contracts where the Supreme Court emphasized that

"Where time has not been made of the essence of the contract or, by reason of waiver, the time fixed has ceased to be applicable, the employer may by notice fix a reasonable time for the completion of the work and dismiss the contractor on a failure to complete by the date so fixed."

23. In the present case, time was extended by the conduct of the parties which goes to show that time, was indeed, not the essence of the contract. Moreover, the termination dated 12.02.2019 was waived once the parties continued to perform the Agreement. Although the respondents say that the Agreement was not continued beyond 12.02.2019, the Minutes of Meeting executed after September, 2019 reflect that the parties agreed on area allocation. Agreements for sale were also executed with 3rd parties as late as on 19.03.2020 referring to the petitioner as the "Developer" in respect of the property. These factors additionally show that the respondents waived the termination dated 12.02.2019. Even if the petitioner's pleading of the petitioner continuing the Agreement even after December, 2022, when the respondents refused to perform the agreement is taken as correct, Article 54 of Schedule I to the Limitation Act, 1963 would give the petitioner 3 years from December, 2022 to claim specific performance of the Agreement.

24. The legal position with regard to section 11 should also be stated. Dismissal of a section 11 petition on the ground of stale claims or "deadwood" must cross the high threshold where the Court must be satisfied, *ex facie*, that the claims are barred by limitation. The Supreme Court found such cases to be limited in number, namely, where there is not

even a vestige of doubt that the claim is *ex facie* time-barred or that the dispute is non-arbitrable. The Supreme Court goes on to hold that the rule is to refer the dispute to arbitration where there is even the slightest doubt in respect to the delay in filing of the section 11 application : Refer *Bharat Sanchar Nigam Limited vs. Nortel Networks India Private Limited*; (2021) 5 SCC 738. *Manish Todi v. Pawan Agarwal*; AP 555 of 2023, a judgment pronounced by this Court in AP 399 of 2023, proceeded on a different set of facts. In that case, there was no dispute on the date of accrual of the cause of action.

The 3rd objection : Section 49 of The Registration Act, 1908 constitutes a bar in respect of specific performance of a contract of immovable property

25. The contention of the respondents with regard to non-registration and inadequacy of stamp is certainly not a ground for opposing appointment of an arbitrator in an application under section 11 of the 1996 Act. Moreover, the petitioner's case would be covered by the *proviso* to section 49 of the said Act which clearly mentions that specific performance of an unregistered document is permissible.

26. Section 49 of The Registration Act, 1908, provides that a document required by section 17 to be registered shall not affect any immovable property or confer any power to adopt or be received as evidence of any transaction affecting such property or conferring such power, unless the document is registered. Section 17(1) provides for a list of documents to be registered. The *proviso* to section 49 makes room for an unregistered document affecting immovable property to be received as evidence of a

contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument.

27. While the respondents say that the exception contained in *proviso* to section 49 is restricted only to collateral transactions, the word “or” in between the two parts of the *proviso* makes it clear that the first part can also be applicable in certain cases. In *Paul Rubber Industries Private Limited vs. Amit Chand Mitra*; 2023 SCC OnLine SC 1216, the Supreme Court relied on *K.B. Saha and Sons Private Limited vs. Development Consultant Limited*; 2008 8 SCC 564 to summarize the position in law.

28. In the present case, the argument on section 49 of The Registration Act, 1908 is one which can well be adjudicated by the arbitrator.

29. Notwithstanding the aforesaid, the fact that the party herein executed the Development Agreement on 12.11.2011 is not in dispute. The dispute revolves around the termination of the said Agreement. This dispute would also be evident from the respondents’ reply dated 22.05.2023 to the invocation notice wherein the respondents denied the existence of any arbitral dispute on the ground that the Development Agreement had been cancelled.

30. In any event, the Court is of the firm view that the point of the alleged non-registration or inadequacy of stamp cannot be a ground to resist an application for appointment of arbitrator.

31. The objections with regard to limitation and section 49 of The Registration Act, 1908 are both answered in favour of the petitioner.

32. The primary objections raised on behalf of the respondents are accordingly rejected.

33. The contentions made on behalf of the respondent nos. 1 and 2 are rejected on the same ground, i.e., that the invocation notice was served on all the respondents. The contents of the notice also indicates that the petitioner gave sufficient particulars of the dispute to all the respondents. It is not necessary that an invocation notice be akin to a statement of claim or a counter claim in an arbitration. It is enough if the party sets down the dispute between the parties with reference to the Arbitration Agreement and the grounds of its invocation. In *Alupro Building Systems Pvt. Ltd. vs. Ozone Overseas Pvt. Ltd.*; 2017 SCC OnLine Del 7228, the learned Single Judge of the Delhi High Court explained the necessity of section 21 notice to be sufficiently clear in terms of the dispute and the claim. The section 21 notice in the present case is neither insufficient nor vague.

34. AP 648 of 2023 is accordingly allowed and disposed of by appointing Mr. Ranjan Deb, Senior Counsel, to act as the Arbitrator subject to the learned Arbitrator communicating his consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date. This order is to be communicated to the learned arbitrator within 7 days from the date of this judgment.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)