

OC-6

AP-COM/472/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION

M/S EMARATI PROJECTS AND ORS
VS
SK. RAFIK ALI ALIAS SEKH RAFIK AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 10th February, 2025.

Appearance:
Mr. Sourajit Dasgupta, Adv.
Mr. Aditya Tiwari, Adv.
. . .for the petitioners.

Ms. Hashnuhana Chakraborty, Adv.,
Mr. Sutanu Karmakar, Adv.
Mr. Souvik Das, Adv.
. . .for the respondents.

The Court: This is an application for appointment of a learned Arbitrator on the ground that the Memorandum of Understanding (MoU) contained an arbitration clause for settlement of the disputes arising out of the said MoU. The parties entered into on April 12, 2018. Rights, obligations and liabilities were created for each party in the MoU. The petitioners contend that the respondents tried to interfere with the construction, whereas, the respondents contend that an amount of Rs.7 crores has been invested and the petitioner has failed to construct the building. The petitioners have also claimed damages. The respondents were intending lessees in respect of the part of the premises which were to be constructed.

Ms. Chakraborty, learned advocate for the respondents submits that the application should be dismissed on the ground that the dispute resolution clause had not been followed. The invocation was not proper. Prior to invocation of arbitration, the parties were required to settle the disputes and differences amicably. Failing which, an independent person as a negotiator should be appointed to settle the dispute. Only upon failure of such process, the parties could seek appointment of an Arbitrator. It is submitted by Ms. Chakraborty that the records do not reveal that, any attempt at an amicable settlement had ever been made by the petitioners.

Mr. Dasgupta, learned advocate for the petitioners submits that the petitioners had approached the civil court under Section 9 of the Arbitration and Conciliation Act, 1996, (hereinafter referred to the said Act), for an injunction. The said application was transferred to the Court of the learned Commercial Court at Rajarhat and was ultimately dismissed for default. Thereafter, a notice was issued to the respondents by invoking the arbitration clause. The respondents did not reply to such notice. According to Mr. Dasgupta, the very fact that the petitioners had approached the civil court for an injunction and then invoked the arbitration clause, were sufficient indication to the respondents, that a dispute had been raised. During the period mentioned hereinabove, the respondents could have offered to settle the dispute amicably or by negotiation. Even upon receipt of the notice under Section 21 of the Arbitration and Conciliation Act, 1996, the respondents remained silent. No approach had been made for holding meetings and discussions. Under such circumstances, any

attempt to negotiate at this stage, would be an exercise in futility and further waste of time.

Heard learned advocates for the respective parties.

The dispute resolution clause provides for amicable settlement and thereafter negotiation by a mutually acceptable party. Upon failure of such mechanism, the parties agree to refer the dispute to arbitration. This Court is ad idem with Mr. Dasgupta that, the litigation initiated by the petitioners under Section 9 of the said Act was ample notice to the respondents and they could have come forward with the proposal either for amicable settlement or negotiation. The respondents did not respond. Thereafter, the notice invoking arbitration was also issued. The respondents remained silent.

Under such circumstances, this Court is of the view that any further attempt at negotiation would be an empty formality. The dispute was going on from the time the petitioners approached the civil court for an injunction. The conduct of the respondents do not reveal that they had any intention to settle the disputes by negotiation or at least they were of the belief that the dispute could be resolved either amicably or by negotiation.

The Hon'ble Apex Court in the case of ***Demerara Distilleries Private Limited and Another versus Demerar Distillers Limited*** reported in ***(2015)13 SCC 610***, held that, if from the elaborate correspondence between the parties which were brought on record, it was revealed that any attempt of further negotiations or amicable settlement would be an empty formality. This court is of the view that, the fact that the petitioners had attempted to obtain an injunction

against the respondents and thereafter issued a notice invoking arbitration, go to show that much time has elapsed since the dispute cropped up and none of the parties had met across the table either for amicable settlement or for a negotiation. Even the respondents did not respond to the notice invoking arbitration where all the disputes arising from the memorandum of understanding had been elaborately enumerated by the petitioners. It is therefore, difficult to hold that the disputes should not be referred to arbitration, when the arbitration clause can be legitimately invoked.

Thus, in my view, sending the parties back for negotiation or an amicable settlement will be a futile exercise and the same shall cause unnecessary delay. The issues which have been raised by Ms. Chakraborty on the merits of the claim and on the return of investments made by the respondents, are arbitrable. The other issue raised by Ms. Chakraborty with regard to the validity of memorandum of understanding on the ground that the same was insufficiently stamped, can also be raised before the learned arbitrator at the appropriate stage and necessary orders can also be prayed for.

The clause relating to settlement of disputes amicably or by the negotiation, are directory in nature. Parties, who have already entered into an arbitration agreement, cannot be restrained from approaching the referral court only on the ground that the parties, in good faith, had agreed to attempt to resolve the dispute amicably or by intervention of a negotiator. Both negotiation and conciliation are non-binding procedures. It is not the submission of the respondents even today, that they are willing to resolve the dispute by way of

discussions and negotiations. Thus, such objection of the respondents, at this stage, is unacceptable. The existence of the pre-arbitral resolution clause cannot be a bar to invoke an arbitration agreement.

In the decision of ***N. J. Garments Pvt., Ltd., vs. Capitalgram Marketing and Technology Pvt. Ltd*** reported in ***2024 SCC Online Delhi 5474***, the Delhi High Court held that the arbitration clause which envisaged negotiation between the parties before a dispute was referred to arbitration, should be realistically interpreted. Where the parties joined issues on the entitlement for one to the claim of another and the notice under Section 21 of the said Act was either not responded to or refuted, it would be a futile exercise to relegate the parties to negotiation.

Therefore, in my opinion, under the facts narrated above, this court holds that the application filed by the petitioner is premature. Moreover, an agreement to resolve the dispute by an independent negotiator, result of which will not be binding, is an option which the parties could have resorted to. Yet, an application under Section 11 cannot be rejected solely on the ground that pre-trial steps proceeding the arbitration clause not having been resorted to, reference to arbitration was either improper or premature. The jurisdiction of the referral court is limited to examination as to the existence of an arbitration clause and proper invocation of arbitration in terms of Section 21 of the said Act.

Under such circumstances, the Court appoints Mr. Debnath Ghosh, learned Senior Advocate, member of the Bar Library Club as the Arbitrator, to arbitrate upon the disputes. This order is subject to compliance of Section 12 of

the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his own remuneration as per the provisions of the Arbitration and Conciliation Act.

All points are left open to be urged before the learned Arbitrator.

AP-COM/472/2024 is, accordingly, disposed of.

(SHAMPA SARKAR, J.)

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