

OD-11

ORDER SHEET
AP/164/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

PRAVIN CHACHAN
Vs
KALAMUNJ HOUSING PRIVATE LIMITED & ORS.

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 16TH May, 2025.

Appearance:
Mr. Krishnnendu Gooptu, Adv.
Mr. Kanakendu Chatterjee, Adv.
Ms. Moumita Sarkar, Adv.
Mr. Ranajit Ray, Adv.
...For the petitioner

Mr. Tapas Kumar Dey, Adv.
...For the respondent

The Court: Two interesting questions have been raised in the present application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act") – whether a prior notice under Section 21 of the Act was a mandatory pre-requisite for moving the application under Section 11, and what would be the implication of the requirement in the concerned arbitration clause for the 'Court' under the said Act to appoint an arbitrator.

The arbitration clause contained in the development agreement, which is relied on by the petitioner, provides that all disputes and differences between the parties thereto regarding the construction or interpretation of any of the terms and conditions therein contained or touching those presents or determination of any liability, shall be referred to the arbitration by the arbitrator, appointed by the "COURT" under the

provisions of the Arbitration and Conciliation Act, 1996 and/or Arbitration and Conciliation (Amendment) Act, 2015.

Learned Senior Counsel appearing for the petitioner argues that since there is no provision in the 1996 Act for the 'Court', as defined in Section 2 of the 1996 Act, to appoint an arbitrator, the said provision ought to be read as an intention of the parties to refer the dispute to arbitration. It is contended that in such a situation, there is no prior requirement for a notice under Section 21 of the 1996 Act. Learned Senior Counsel cites a decision in the matter of ***"Delhi Airport Metro Express Private Limited Vs Delhi Metro Rail Corporation"*** reported at **(2022) 9 SCC286** in support of the proposition that wherever the phrase "unless otherwise agreed by the parties" is used in various Sections of the 1996 Act, including Section 21, it indicates that it is open to the parties to agree otherwise than what the statutory provision in question provides for.

Learned Counsel appearing for the respondent opposes the application and contends that a notice under Section 21 of the 1996 Act is a mandatory prerequisite for a reference being sought under Section 11 of the 1996 Act. By placing reliance on the said provision, it is argued that the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Hence, it is implicit in the provision that a notice under the said Section is mandatory.

Learned Counsel cites a co-ordinate Bench judgment of the Bombay High Court in the matter of ***"M/s. D.P. Construction Vs. M/s. Vishvaraj Environment Private Limited"*** in an unreported judgment where

the learned Single Judge, inter alia, observed that unless there is a request for referring the dispute to arbitration in the context of Section 21, it cannot be said that arbitration has been invoked by a party. By relying on a judgment of the Hon'ble Supreme Court at **2021 5 SCC 705**, it was observed that in the context of the question of limitation, there has to be invocation of arbitration under Section 21 of the said Act. The mere fact that the parties have named the arbitrator would not imply that the parties have agreed to waive the requirement of notice contemplated under Section 21. The learned Single Judge went on to observe that the party to the arbitration agreement against whom a claim is made should know what the claims are.

Learned Counsel further argues that in the present case, no such prior notice was given and as such, the scope of disputes on which arbitration is sought cannot be ascertained.

Upon hearing Learned Counsel for the parties, it is seen from the provisions of Section 11 of the 1996 Act that the same is a self-contained provision. I do not find within the four corners of Section 11 any prerequisite being stipulated for a prior notice under Section 21 to be issued. In sub-Section (4) of Section 11, in a scenario where the appointment procedure in sub-Section (3) applies and a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so, a reference under Section 11 may be sought.

Under sub-Section (3), failing any agreement referred to in sub-Section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two appointed arbitrators shall appoint the third arbitrator, who shall act as the presiding arbitrator. As such, the situation

contemplated under sub-Section (4) requires a mandatory prior notice/request, only after 30 days from which an application under Section 11 can be made.

However, the conditions stipulated in sub-Sections (3) and (4) of Section 11 are not met in the present case.

The only other prerequisite stipulated in Section 11 for a prior request is in sub-Section (5), which provides that failing any agreement referred to in sub-Section (2), if the parties failed to agree on the arbitrator within 30 days from receipt of a request by one party from the other to so agree, an application under sub-Section (4) shall be made.

Sub-Section (2) of Section 11 provides that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

It is conspicuous that the present arbitration clause does not contemplate three arbitrators being appointed, as such, precluding the operation of sub-Section (3) and consequentially sub-Section (4) in connection therewith.

Sub-Section (5), on the other hand, only comes into operation if an agreement does not exist between the parties under sub-Section (2), which relates to a prior agreement on the procedure for appointing arbitrator. The said scenario is also not attracted in the present case, since in the arbitration clause in question, a specific procedure was provided for appointment of an arbitrator.

As such, there is no prior requirement in the present case for a notice/request to be served before moving the High Court under Section 11. As rightly contended by learned Senior Counsel for the petitioner, the

present situation is governed by sub-Section (6) of Section 11, which provides that where an appointment procedure is agreed upon by the parties, but a party fails to act as required under that procedure, the appointment shall be made, on an application of the party, by this Court, in a case as the present one.

It is conspicuous that sub-Section (6) does not stipulate any prerequisite of a prior notice/request for appointment of arbitrator, as opposed to sub-Sections (4) and (5) of Section 11. Thus, in the present case, it is the pleadings in the application under Section 11 which are required to be looked into to ascertain the scope of the dispute between the parties.

The judgment of the Bombay High Court cited by the respondents is not applicable in the present case, since the provisions of Section 11 (6) do not require a prior notice. The consideration in the judgment of the learned Single Judge of the Bombay High Court was more around the starting point of limitation and in such context, the requirement of a notice under Section 21 of the 1996 Act. Moreover, the Bombay High Court was considering a situation where the parties had agreed to an arbitrator in the arbitration agreement itself, in which case it was held that mere agreement on the arbitrator did not dispense with the requirement of a prior notice under Section 21 of the 1996 Act.

The question which has fallen before this Court was not under consideration before the Bombay High Court. Rather, the ratio laid down in ***Delhi Airport Metro Express Private Limited (supra)*** is applicable. Also, read in conjunction with the object and purpose of the 1996 Act, it is well-settled that the Court shall interfere with the process of arbitration as little

as possible and it will be the endeavour of the Court to facilitate arbitration, rather than throwing a spanner in the wheels of the arbitral process.

The Hon'ble Supreme Court, in unambiguous terms, held therein that if there is an agreement between the parties, the arbitrator shall be bound by the same and where in Sections of the 1996 Act, the phrase "unless otherwise agreed by the parties" is mentioned, it is open to the parties to agree otherwise than what the statutory provision in question provides for.

In the case at hand, a process of appointment of arbitrator was agreed between the parties, being an appointment by the Court, which, having failed, sub-section (6) of Section 11 of the Act comes into play, for which no further prior request is necessary.

The other question which remains to be considered is, in the teeth of the arbitration clause in the present case providing that the appointment has to be done by the 'Court' within the contemplation of the 1996 Act, whether the parties should have complied with such formality first.

Section 2(1)(e) of the 1996 Act stipulates that in case of domestic arbitrations, the expression 'Court' means "the principal civil court having original civil jurisdiction in a district". However, throughout the 1996 Act, there is no scope of the appointment of an arbitrator at the first instance by the 'Court' as contemplated in the said Act. The invocation of jurisdiction of the 'Court' under the said statute comes into play only if there is a question of substitution of arbitration under Section 29A or any other similar provision in the 1996 Act, which can happen only after an arbitrator has already been appointed previously.

It is only Section 11 of the Act which permits a Court of any sort to appoint an arbitrator. Section 11, however, as opposed to the expression “Court”, uses the expression “Chief Justice of the concerned High Court”. It is to be kept in mind that there is a gulf of difference between the Chief Justice of the concerned High Court and a ‘Court’ under Section 2(1)(e), that is, the principal court having original civil jurisdiction in a district.

Thus, the second limb of the arbitration clause in the present case, which requires a ‘Court’ to appoint an arbitrator, being not sanctioned within the four corners of the statute, is unworkable. Such unworkability militates against the intention expressed in the first part of the parties to submit themselves to arbitration in case of a dispute, since if the appointment by a ‘Court’ is insisted upon, the entire arbitration clause will be rendered inoperative.

As discussed earlier, the object of the 1996 Act is to further the cause of alternative dispute resolution by resorting to the arbitral mechanism. To carry forward such object, the second limb of the arbitration clause in the instant case should be read down, to give way to the core intention of the parties expressed in the first limb of the clause to subject themselves to arbitration. Construed in such fashion, the arbitration clause clearly provides that the disputes as raised in the present application are squarely covered by the said clause and as such there is no impediment otherwise to refer the matter to arbitration.

The scope of the dispute can readily be inferred from the averments made in the application under Section 11 itself for the respondent to

apprise itself of such ambit of the dispute raised, without there being any prior requirement of a notice under Section 21 of the 1996 Act.

Hence, AP/164 of 2024 is allowed on contest, thereby appointing Mr. Arindam Banerjee, learned Senior Advocate who is a practitioner of this Court, as the arbitrator to resolve the dispute between the parties, subject to a declaration under Section 12 of the 1996 Act being obtained from the said learned Arbitrator.

The remuneration of the arbitrator and the procedure to be followed in the arbitral proceeding shall be decided between the learned Arbitrator and the parties in accordance with the provisions of the 1996 Act.

(SABYASACHI BHATTACHARYYA, J.)

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