

Debjit Sarkar and ors. Vs. Pratima Sarkar

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Court : Kolkata

Decided On : Jan-25-2012

Judge : Sanjib Banerjee

Appellant : Debjit Sarkar and ors.

Respondent : Pratima Sarkar

Judgement :

AP No.21 of 2012 IN THE HIGH COURT AT CALCUTTA Ordinary Original Civil Jurisdiction ORIGINAL SIDE DEBJIT SARKAR & ORS.-Versus PRATIMA SARKAR Appearance: Mr.Ayan Kumar Boral, Adv...For the petitioneRs.BEFORE: The Hon'ble JUSTICE SANJIB BANERJEE Date : January 25, 2012.

The Court : Despite the respondent not being represented after service, the present request under Section 11 of the Arbitration and Conciliation Act, 1996 is clearly not maintainable.

The petitioners cite the arbitration clause contained in a development agreement of July 5, 2000.

The clause reads as follows: If at any time and (Sic, any) dispute shall arise between the parties hereto regarding the construction or interpretation of any of the terms and conditions herein contained or touching these presents or determination of any liability of any of the parties under this agreement, the same shall be referred to the arbitration, incase the parties agree to the case, otherwise

to two-arbitrators one to be appointed by each of the parties in dispute and the same be deemed to be referred within the meaning of the Arbitration and Conciliation Act, 1996 or any statutory modifications there under in force.

It is, therefore, evident that the parties agreed to a mechanism for the constitution of an arbitral tribunal.

Without commenting on the legal efficacy of the mechanism that the parties agreed to, it was incumbent on either party seeking to invoke the arbitration agreement to call upon the other party to concur in the appointment of an arbitrator or the constitution of an arbitral tribunal.

In the present case the petitioners only complain that the respondent has taken steps in derogation of the development agreement, inter alia, by canceling the power of attorney executed in favour of one of the petitioners. It is the petitioners case that, in the circumstances, the petitioners were not called upon to request the respondent to concur in the appointment of an arbitrator.

The petitioners say that they were entitled to approach the Chief Justice or his designate directly without making a request to the respondent for constituting the arbitral tribunal.

In support of such contention, a judgment reported at 2009 (1) Cal LT (SC) 343 has been cited.

The judgment speaks of the authority of a Chief Justice or his designate to appoint an arbitrator notwithstanding the arbitration agreement requiring a particular mode of appointment, provided that the appointment by the Chief Justice or his designate is upon keeping the principles enunciated in Sub-section (8) of Section 11 of the 1996 Act in mind.

The judgment is no authority for any proposition that notwithstanding the arbitration agreement between the parties providing for a mechanism for securing the constitution of an arbitral tribunal, it would be open to either party to approach the Chief Justice or his designate without reference to the other.

Indeed, Section 11 of the 1996 Act is the default mechanism for the constitution of an arbitral tribunal.

Even if there is no agreement between the parties as to how an arbitrator would be appointed or an arbitral tribunal would be constituted, the jurisdictional precondition for invoking Section 11 mandates that the person making the request to the Chief Justice or his designate should have called upon the other party to the arbitration agreement for securing the constitution of the tribunal.

Since it is admitted position that the petitioner did not invoke the arbitration agreement or request the respondent for the constitution of an arbitral tribunal in this case, A.P.No.21 of 2012 is found to be not maintainable and is not entertained.

There will be no order as to costs.

Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.) A/s.

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