

OD-8

ORDER SHEET

AP/24/2024

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

TREE HOUSE EDUCATION AND ACCESSORIES LTD.
Versus
HOLY TRUST SCHOOL

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : February 21, 2024.

Appearance

Mr. Yash Vardhan Deora, Adv.

Mr. Sakya Sen, Adv.

Mr. Gaurav Purkayastha, Adv.

Ms. Sushmita Choudhury, Adv.

The Court: This is an application for appointment of Arbitrator under Section 11 of The Arbitration and Conciliation Act, 1996.

The respondent takes a preliminary objection on the application being concerned with time-barred claims. Learned counsel appearing for the respondent places two documents including a balance confirmation as on 31st March, 2017 showing that the respondent owes Rs.56 lakhs to the petitioner. Counsel submits that Article 55 to the Schedule of the Limitation Act, 1963 would apply to the present case since the alleged breach occurred on 31st March, 2015. Counsel submits that the petitioner invoked the arbitration Agreement by way of a Notice under Section 21 of the Act on 9th August, 2023 after a delay of six years (from 31st March, 2017.)

Learned counsel appearing for the petitioner relies on the contents of the invocation Notice to urge that the petitioner made several verbal representations and requests to the respondent for repayment of the balance amount of Rs.56 lakhs but that the respondent did not take any steps with regard to the same.

The narrow compass of the dispute is whether the petitioner's claim for repayment or the Section 21 notice is time-barred. It is undisputed that the petitioner lent a sum of Rs.75 lakhs to the petitioner under the terms of the Memorandum of Understanding dated 25th March, 2011. The money was lent for the respondent to construct on a piece of land which was allocated to the respondent by the Bidhannagar Municipality. It is also undisputed that the respondent received Rs.75 lakhs from the petitioner but could not fulfil the terms of the MoU. This would be evident from a letter of the respondent dated 17th May, 2011 and a closing balance statement from 1st April, 2015 – 31st March, 2016 reflecting the amount of Rs.75 lakhs. The confirmation of accounts as of 31st March, 2017 shows a balance of Rs.56 lakhs which means that the respondent had repaid approximately Rs.26 lakhs from 31st March, 2016 – 31st March, 2017.

Further, apart from the preliminary objection raised on behalf of the respondent, the respondent has not put up any defence to the non-payment. The respondent's reply dated 26th August, 2023 to the petitioner's notice of invocation contains bare denials but more important, a dispute with regard to the jurisdiction clause of the arbitration agreement. The

respondent, even more significantly, proceeded to nominate its Arbitrator for resolution of the disputes arising out of the MoU.

Although learned counsel appearing for the respondent has relied on *Bharat Sanchar Nigam Limited and Anr. vs. Nortel Networks India Private Limited*, (2021)5 SCC 738 to urge the point of limitation, it would be clear from the said decision that the Supreme Court only excluded claims which are manifestly and ex facie 'time-barred' and 'dead'. Paragraph 45.1 of the Report makes it clear that the Supreme Court made an exception only to claims of the aforesaid kind; the Supreme Court in fact specifically uses the word 'only' in paragraph 45.1. Paragraph 47 of the said Report further reinforces the Supreme Court's view of time-barred cases being more of an exception, that too a rare exception, to the general rule of the question of delay being within the domain of the Arbitrator. In fact, *Nortel* further makes an allowance where there is even a vestige of doubt for the Arbitrator to decide the issue of delay.

The relevant paragraphs of *Nortel* further make it evident that the rejection of a claim brought to the referral Court under Section 11 of the 1996 Act can only be on the fact of 'deadwood' which would mean claims which are essentially non-arbitrable or time-barred to an extent where a party has no case at all for appointment of an Arbitrator. *Nortel* certainly does not deal with a case where the petitioner has a genuine and a bona fide case and there is no defence to the case on merits.

The petitioner's invocation notice clearly outlines the fact that the respondent availed of the loan but failed to live up to the terms and conditions of the MoU in terms of construction on the land in question. The

notice further reiterates that the petitioner made several verbal requests to the respondent for return of the money but that the respondent continued to give specific undertakings that it would make the constructions in phases. The undertakings given by the respondent are stated in the invocation notice. The letter records that the respondent undertook to refund the payment made to the respondent and agreed that the time limit for compliance would be at the petitioner's sole discretion. The notice clearly states that the petitioner waited for more than 12 years for the respondent to construct building on the land but that the respondent failed to obtain permission for the construction and hence violated the terms of the MoU.

The MoU contains an arbitration clause covering all disputes and differences between the parties arising out of the MoU. The arbitration clause further provides for the manner in which the dispute would be settled through arbitration. It is, therefore, significant that the respondent in its reply dated 26th August, 2023 proceeded to nominate its Arbitrator for resolution of the disputes.

It would be an unnatural construction of Section 11 of the 1996 Act or so-called time-barred claims where a party with a bona fide and a genuine claim is left in the lurch on the defence of the claim being barred by limitation in spite of the parties being in constant communication with each other for settlement of the claims. The party who has received the money, continuing to give undertakings in furtherance of the agreement but failing to do so, cannot be the beneficiary of such an unnatural construction given by the Court. Article 55 to the Schedule of The Limitation Act contemplates continuing breach of a contract. The respondent withholding the money

without due compliance of the MoU and failing to return the money to the petitioner for several years on one pretext or the other cannot now cannot argue the point of limitation particularly after having nominated its Arbitrator.

AP/24/2024 is accordingly allowed and disposed of by appointing Ms. Suchismita Chatterjee (Ghosh), counsel to act as the Arbitrator subject to the learned Arbitrator communicating her consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 24th February, 2024 along with the requisite details of the contact person of the petitioner.

All issues including the point of limitation will be kept open for adjudication in the arbitration.

The findings are only for the purpose of the present application.

(MOUSHUMI BHATTACHARYA, J.)