

# Calcutta High Court

HON'BLE JUDGE(S): SHEKHAR B. SARAF , J

RAJINDER SINGH WALIA V. NABANITA SINGH

AP 537 of 2022, decided on 24/11/2022

**Arbitration and Conciliation Act (26 of 1996) , S.7, S.9— Arbitration agreement - Harmonious understanding of Agreement would lead to inference that while expenses incurred may be assessed by Architects, arbitration clause is not ousted - Such assessments can be submitted to arbitrator, but first arbitrator has to decide on validity of termination notices and contractual retractions of parties - Court found that contract was not one where time was of essence of contract - Certain amounts deducted vide termination notices which were clearly not contemplated in Agreement - Thereafter, attempts have been made to make commercial arrangements with third parties with respect to said premises - Prima facie case has been made out by petitioners with respect to validity of arbitration clause and for injunctive reliefs - Balance of convenience is in favour of petitioner as development work has progressed and termination of same would lead to irreparable loss to petitioners - In view of such facts, court granted interim relief.**

(Para 22, 23)

Case Referred :

Chronological Paras

AIR 2009 SC 2217 : 2009 AIR SCW 2925

Para No.( 13, 17, 20 )

AIR 2010 SC 488 : 2009 AIR SCW 7041

Para No.( 13, 17, 19 )

AIR 1963 SC 890

Para No.( 14, 16 )

AIR 1959 SC 1362

Para No.( 19 )

1942 AC 356 : (1942) 1 All ER 337 (HL)

Para No.( 19 )

**Name of Advocates**

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Debnath Ghosh, megnad Dutta, Ms. Debanjana De for Petitioner; A. C. Kar, Sr. Adv. T. K. Aich for Respondent.

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1. **ORDER:-**The petitioners in the instant application [being A.P. No. 537 of 2022] under Section 9 of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as 'the Act'] are partners in a partnership firm under the name of 'Kirat Construction', carrying on the business of developing properties.

2. The respondent No. 1 is the owner of the premises No. 2A, Hari Bose Lane, Police Station - Burtolla, Kolkata 700016 measuring more or less 6 cottahs, 9

chittacks 25 sq. ft. [hereinafterreferred to as 'the Premises']. Respondent No. 2 is the husband of respondent No. 1.

3. The petitioners have preferred this application praying for injunction on the Premises in the form of the following directions: (a) the respondents, his men, servants, agents be restrained from dealing with disposing off, alienating and/or creating any third party right, title or interest in the Premises; (b) the respondents, his men, servants, agents be restrained from giving effect or further effect to the cancellation and/or termination notices dated July 9, 2021 and October 25, 2021; (c)the operation of the notices dated July 9, 2021 and October 25, 2021 issued by respondent No. 1 be stayed.

### **Relevant Facts**

4. Respondent No. 1, being the absolute owner of the Premises, accompanied by respondent No. 2, approached the petitioners for developing the Premises.

5. The petitioners and respondent No. 1 entered into a development agreement dated August 25, 2009 [hereinafter referred to as 'the Agreement'] followed by a General Power of Attorney dated August 25, 2009 [hereinafter referred to as the 'GOA'].

6. The petitioners paid Rs. 65,00,000/- to the respondents via various cheques in pursuance of the Agreement.

7. Since a tenant, by the name of Snighdha Jana [hereinafter referred to as 'the tenant'] was already residing at the said premises, a tripartite agreement was entered into between the petitioners, tenant and respondent No. 1 [hereinafter referred to as the 'tripartite agreement'], vide which the tenantwas promised a total of 2500 sq. ft. in the Premises after development.

8.The petitioners spent a further amount of Rs. 24,15,000/- for developing the Premises, Rs. 5,00,000/- for the tripartite agreement and Rs. 25,00,000/- on sanction plan for construction on the Premises.

9. The petitioners constructed some portions of the ground floor and first floor of the building onthe Premises. These facts are also confirmed by the receiver's report which was taken on recordvide order dated November 4, 2022.

10. The respondent No. 1 vide two notices dated July 9, 2022 and October 25, 2022 terminated the Agreement and the GOA [hereinafter referred to as 'termination notices']. The petitioners contested the termination vide two notices dated August 12, 2021 and November 29, 2021.

11. The respondent No. 1 has stated in the termination notices that only Rs. 65,00,000/- were paid and substantial amounts due as per the Agreement were remaining. Since substantial time has passed, termination had to be effected. The respondent also deducted Rs. 15,00,000/- by way of damages for suffering loss and mental agony and 25% of the total price and offered a refund of Rs. 15,00,000/- to the petitioners.

### **The Submissions**

12. It is pertinent now to state the arguments put forth by counsels of both sides.

**13.** Mr. Debnath Ghosh, learned Advocate, appearing on behalf of the petitioners submitted the following arguments:

a) The petitioners have been ready and willing to perform their obligations under the Agreement, except the obligations whose execution has been waived and/or prevented by the respondents;

b) The petitioners have a right to specific performance of the contract and despite thirteen years already having been passed since the execution of the Agreement the right still subsists as time was not essence of the contract. Reliance has been placed on *N. Srinivasa v. Kuttukaran Machine Tools*

Limited ((2009) 5 SCC 182 : (**AIR 2009 SC 2217**)) to substantiate the point that there is a presumption in contracts relating to immovable property that time is not the essence of the contract. Irrespective of this contention, even after termination, the arbitration clause survives and interim safeguards must be granted;

c) The petitioners have also placed reliance on *Branch Manager, Magma Leasing and Finance Limited and Another v. Potluri Madhavilata and Another* ((2009) 10 SCC 103 : (**AIR 2010 SC 488**)) to argue that a right to take the claim to

arbitration subsists even if the contract comes to an end by its termination;

d) The respondent No. 1 has entered into agreements with third parties, which is evidence of mala fide intent and will subsequently frustrate their rights, leading to irreparable loss.

**14.** Mr. A.C. Kar, Senior Advocate, appearing on behalf of the respondents submitted the following arguments:

a) The petitioners reneged on their obligations by not paying the entire amount and a substantial period of time has passed, therefore the performance of the Agreement was barred and hence was terminated;

b) This court does not have jurisdiction under the Act as on account of non-encashment of any cheque issued by the petitioner, the Agreement under Clause 6, provides for refund after determination of costs and expenses incurred by the petitioner for carrying on the construction work. Such amounts have to be assessed by the Architects of the newly appointed developer and respondent no. 1. Clause 6 supersedes the arbitration clause since it is a prior clause. Reliance has been placed on *Ramkishorelal and Another v. Kamal Narayan* (1963 Supp (2) SCR 417): (**AIR1963 SC 890**) for the said proposition. Issues

15. Upon analysing the arguments put forth by both the parties, I am of the view that the following issues are required to be addressed by me to resolve the disputes between the parties:

a) Whether this court can exercise power under the Act in light of the arbitration clause?

b) If the answer to the former issue is in the affirmative, whether interim relief should be granted as per Section 9 of the Act?

### **Analysis**

**16.** Mr. A.C. Kar, Senior Advocate, appearing on behalf of the respondents submitted that clause 6 supersedes the arbitration clause. The Apex Court, in *Ramkishorelal and Another* (supra) held that where earlier clauses make absolute disposition of property, latter clauses which limit such disposition must be disregarded. However, the Court also avers that attempts

must be made to read

the two parts of the document harmoniously, if possible.

**17.** Mr. Debnath Ghosh, learned advocate appearing on behalf of the petitioners relied upon judgements to impress upon this court that the termination was de hors the contract for two reasons:

(i) the contract does not provide for deduction of amounts for mental agony and harassment and

(ii) time was not the essence of the contract. Reliance was placed on N. Srinivasa (supra) and Branch Manager (supra).

**18.** The petitioners also contended that despite termination of the contract, the dispute has to be referred to arbitration and interim relief should be granted.

**19.** The relevant portion from Branch Manager (supra) is extracted below wherein the Apex Court held:

"14. The statement of law expounded by Viscount Simon, L.C. in Heyman [1942 AC 356 : (1942) 1 All ER 337 (HL)] as noticed above, in our view, equally applies to the situation where the contract is terminated by one party on account of the breach committed by the other particularly in a case where the clause is framed in wide and general terms. Merely because the contract has come to an end by its termination due to breach, the arbitration clause does not get perished nor is rendered inoperative; rather it survives for resolution of disputes arising "in respect of" or "with regard to" or "under" the contract. This is in line with the earlier decisions of this Court, particularly as laid down in Kishorilal Gupta [AIR 1959 SC 1362 : (1960) 1 SCR 493]"

**20.** The Apex Court's observations in N. Srinivasa (supra) are extracted below:

"31. As noted herein earlier, one of the main issues for the purpose of deciding the application for injunction was whether time was the essence of the contract or not. By the impugned order, the High Court had failed to appreciate that in the contract relating to immovable property, time cannot [Ed.: The complete legal position as to time being of the essence in contracts for sale of immovable property is stated in para 27.] be the essence of the contract. In any event even

in such a case the arbitration clause would survive and the dispute would be required to be resolved. That being the position, pending disposal of the arbitration proceeding, interim measure to safeguard the interest was required to be taken."

### **Conclusion**

21. Relevant clauses of the Agreement are extracted below for proper determination of the said dispute:

"6. It may be mentioned that if any of the aforesaid cheques issued by the Developer in favour of the owner and/or her nominated person namely Arjun Singh upto the month of November is not encashed due to any reason whatsoever then the owner shall be at liberty to stop the work and if within 15 days from the date of stop of work, the amount is not paid then the owner shall be at liberty to complete the said work either by herself or by deputing new constructor and in such event the owner shall refund the money received today or to be received in the meantime from the Developer herein after deducting 25% of the total sale price. The cost and expenses incurred by the Developer in the meantime for carrying on the construction work shall be paid by the owner after handing over the said project to any new Developer. The amount of such expenses to be assessed by the Architects of the Developer and the Owner engaged and/or to be engaged in the said project"

"22. Any dispute arising as between the Owner and the Developer regarding any matter in respect of the development of the said property shall be referred to Arbitration as per provision of the law in this regard."

**22.** A harmonious understanding of the Agreement would lead to an inference that while the expenses incurred may be assessed by the Architects, the arbitration clause is not ousted. Such assessments can be submitted to the arbitrator, but first the arbitrator has to decide on the validity of the termination notices and contractual retractions of the parties.

**23.** Prima facie, I find that the contract was not one where time was of the essence of the contract. Even if it were, it is a determination that the arbitrator

has to make. What is undisputed though is that there are certain amounts deducted vide termination notices which are clearly not contemplated in the Agreement. Thereafter, attempts have been made to make commercial arrangements with third parties with respect to the said premises. In my view, a prima facie case has been made out by the petitioners with respect to validity of the arbitration clause and for injunctive reliefs. Furthermore, balance of convenience is in favour of the petitioner as development work has progressed and termination of the same would lead to irreparable loss to the petitioners.

24. In light of the above, Issue No. 1 and Issue No. 2 are decided in the affirmative. Interim reliefs are granted in terms of prayers (a), (b) and (c) of the notice of motion. The interim orders shall continue for a period of 8 weeks from date or until further orders, whichever is earlier.

25. Accordingly, affidavit-in-opposition is to be filed within five weeks from the date of this order and affidavit-in-reply, if any, two weeks thereafter.

26. Urgent Photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

**Order Accordingly**