

OD 11 & 12

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP/56/2024

DEBASHIS GHOSAL AND ANR.
VS
CANOPY PROJECTS PRIVATE LIMITED

WITH

AP/80/2024

AYESHA SETH
VS
CANOPY PROJECTS PRIVATE LIMITED

BEFORE:

The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA

Date: 6th August, 2024.

Appearance:
Mr. S. Sen, Adv.
Mr. Malay Kumar Seal, Adv.
. . .for the petitioner.

Mr. Pranit Bag, Adv.
Mr. Prithwish Roy Chowdhury, Adv.
. . .for the respondent.

The Court: Affidavits in opposition and affidavits in reply filed in Court today be kept on record.

Both the matters are taken up together because the two form part of the same set of transactions.

The dispute arises out of two agreements for sale between the parties. Each of the agreements contain a similar arbitration clause which covers the disputes now sought to be raised by the petitioner.

Learned counsel for the respondent raises an objection to the application primarily on the ground that the claim of the petitioner, which gives rise to the dispute, is palpably barred by limitation and, as such, should be considered as “dead wood”. Thus, reference to arbitration shall be futile and as such the application ought to be dismissed.

Upon hearing learned counsel for the parties, it transpires that the issue of limitation is not so *ex facie* palpable that it would prompt the Court taking up an application under Section 11 of the 1996 Act to hold it to be “dead wood” and reject such application.

The respondent primarily relies on certain clauses of the agreements. Clause 4.2 stipulates that the development and allotment, possession of the said scheme of plots shall be under two phases, the last of which was to be completed latest by December, 2007.

Clause 6.4 of the agreement provides that the present respondent/developer and/or its nominated persons were to complete the construction of the unit in question within a period of three years from the date of sale and purchase of the scheme of plot.

The date of the agreements was August 1, 2006 and as such, the said stipulated timelines have long lapsed.

The respondent thus seeks to rely on such inaction on their own part, thereby taking advantage of their own wrong, to seek to nip the present reference

at the bud. It argues that the petitioner ought to have made its claim within the limitation period, which commenced latest on the expiry of the said three years.

However, there are several reasons why such contention cannot be accepted as conclusive at this stage.

First, from the annexures to the application, I find that negotiations have been going on between the parties, which is reflected in the correspondence between them over the years.

As such, it cannot be said that the chapter of the claim of the petitioner was conclusively closed at any point of time by specific repudiation to comply with the agreements on the part of the respondent.

Rather, in its letter dated October 25, 2021, annexed to the applications, the respondent categorically expressed its readiness and willingness to act in terms of the agreements between the parties. Thus, in the absence of repudiation on the part of the respondent specifically, it cannot be conclusively said that the claim of the petitioner is *ex facie* barred by limitation.

However, all said and done, the Court, sitting in an application under Section 11 of the 1996 Act, cannot conclusively decide the issue of limitation either way, more so since the same, in the present case, is a mixed question of fact and law which is arguable before the Arbitrator.

In such view of the matter, as the dispute falls within the ambit of the arbitration clause and the issues are otherwise arbitrable and the Court is of the opinion that the question of limitation cannot be conclusively decided at this stage, there cannot be any impediment in appointing an Arbitrator to resolve the disputes.

Accordingly, AP 56 of 2024 and AP 80 of 2024 are disposed of by appointing Justice Toufique Uddin (retired), as the sole Arbitrator to resolve the dispute between the parties, subject to obtaining a disclosure from the learned Arbitrator under Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall fix his own remuneration in consultation with the parties, within the confines of the Arbitration and Conciliation Act, 1996 read with its Schedules.

It is made clear that the issue of limitation has not been decided conclusively by this Court, as it cannot do in law, and is left open for the learned Arbitrator to decide upon being raised by the parties.

It is also made clear that the learned Arbitrator shall decide the disputes between the parties arising out of both the agreements in question in the two applications which are being thus decided.

(SABYASACHI BHATTACHARYYA, J.)