

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
ORIGINAL SIDE
COMMERCIAL DIVISION

AP-COM/723/2025
M/S. KONE ELEVATOR INDIA PVT. LTD.
VS
OMAXE INFRASTRUCTURE AND CONSTRUCTION LIMITED AND ORS.

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 18th September, 2025.

Appearance:

Mr. Ankan Rai, Adv.
Mr. Ratnesh Kr. Rai, Adv.
Ms. Sakshi Kejriwal, Adv.
...for the petitioner.

1. Despite service, none appears on behalf of the respondents. The respondent no.1 had refused to accept the service. Initially, the respondent nos. 2 to 4 were represented by a learned Advocate who has since refused to appear upon request made by the learned Advocate for the petitioner.
2. Under such circumstances, the matter is taken up ex-parte in view of the proper service upon the respondents.
3. It is submitted by Mr. Rai, learned Advocate for the petitioner that the application may be restricted to the respondent nos.1 and 4 and the names of the respondent nos. 2 and 3 be expunged. Such prayer is allowed. The names of the respondent nos. 2 and 3 be deleted from the array of respondents. Necessary steps be taken.

4. The petitioner prays for appointment of a learned arbitrator in terms of the dispute resolution clause in the agreement dated July 7, 2016, which was further amended on July 31, 2017.
5. According to the petitioner, the respondent No.1 had engaged the petitioner to supply elevators which were to be installed within the premises of respondent no.4. It is contended that although the respondent no.4 was not a signatory to the agreement, it was involved in the performance of the underlying contract which contains the arbitration clause. Records have been disclosed to indicate that the respondent no.1 had been removed by the respondent no.4 in the midst of supply of the elevators and the petitioner and respondent no.4 were directly negotiating. Finally, all the elevators required by the respondent no.4, had been installed and payments were also made by the respondent no.4.
6. According to the petitioner, the work was completed, sometime in February 2019 and the defect liability clause required the petitioner to rectify, amend or replace any defective part. The respondent no.4 requested for rectification of certain defects which were allegedly carried out by the petitioner on August 20, 2019. The final tranche, being 35% of the total amount which was payable by the respondent No.4 as balance consideration, was claimed by a bill dated May 27, 2019. The respondent no.4 refused to pay the said amount, on December 4, 2019, on the ground that the petitioner had been engaged by the respondent no.1 and not by the respondent no.4. As the dispute resolution clause

provides that the parties shall negotiate first and try and settle the dispute amicably, the petitioner approached the respondent no.1 for amicable settlement, by a letter dated December 6, 2019. The respondent no.4 refused to entertain any further correspondence from the petitioner and by a letter dated September 29, 2021, refused to pay the money on the ground that there was no privity of contract between the petitioner and respondent no.1. Thus, disputes arose and the notice invoking arbitration was issued on October 12, 2023. Neither the respondent no.4 nor the respondent no.1 replied to the said notice invoking arbitration. The petitioner has now approached this Court for appointment of an arbitrator.

7. The Dispute Resolution Clause provides that, in the event of dispute or difference arising out of or in connection with the agreement, the parties would attempt to resolve the dispute by consultation between themselves and upon failure of the mutually agreed consultation, the dispute and difference will be referred to arbitration of a sole arbitrator to be appointed by the petitioner. As the petitioner is a party to the proceeding and the law prohibits appointment of an arbitrator unilaterally by any party to an agreement, the petitioner has rightly approached this Court for appointment of an arbitrator.
8. Secondly, on the question whether the application is defective on the ground of mis-joinder of the respondent no. 4, this Court is of the view that the records, prima facie, reveal that the respondent no.4 was involved in the process of installation of the elevators and in the process

of performance. Payments were also made by the respondent no.4, directly to the petitioner.

9. Under such circumstances, the issue of misjoinder or whether the proceeding or the claim of the petitioner could be enforced against the respondent no.4 and the respondent No. 1, will have to be decided by the learned arbitrator on evidence.
10. The validity of the claim of the petitioner is again a triable issue and as such, the same can be decided by the learned arbitrator. The issue of limitation also, prima facie, appears to be in favour of the petitioner inasmuch as, in my prima facie view, the petitioner is entitled to the protection given by the Hon'ble Apex Court for exclusion of the period between March 15, 2020 to February 28, 2022 in computation of the period of limitation in filing any application under the Arbitration and Conciliation Act. Admittedly, the invocation was made on October 12, 2023. However, this issue is also open for adjudication by the learned arbitrator.
11. Accordingly, the application is allowed, leaving all questions with regard to jurisdiction of the learned arbitrator, arbitrability of the issue, limitation and validity of the claim open, and to be raised before the learned arbitrator.
12. The application disposed of by appointing Justice Nadira Patherya, former Judge of this Court as the learned arbitrator, to arbitrate upon the disputes between the parties. This appointment is subject to compliance of Section 12 of the Arbitration and Conciliation Act, 1996.

The learned Arbitrator shall fix his/her remuneration as per the Schedule of the Arbitration and Conciliation Act, 1996.

13. As submitted by Mr. Rai, the arbitration will proceed against the respondent nos.1 and 4.

(SHAMPA SARKAR, J.)

B. Pal/S. Mandi /S.Kumar