OCD –9

ORDER SHEET

AP-COM/537/2024

IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

DEBJANI MONDAL AND ANR.

VS

INDRANI NASKAR AND ORS.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date: 16th January, 2025.

Appearance:
Ms. Ajeyaa Choudhury,Adv.
Ms. Pooja Sah, Adv.
Mr. Pratik Dutta, Adv.
…. for the petitioner
Mr. Rohit Banerjee, Adv.
Mr. Arindam Paul, Adv.
…for respondent no. 1
Ms. Anikta Upadhaya Agarwal, Adv.
Mr. Raja Roy Chowdhury, Adv.
…for respondent no. 2

The Court:Affidavit in reply filed in Court is taken on record.

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996.

The petitioners are the sisters of the deceased respondent no. 1. The legal heirs and representatives of the respondent No.1,were substituted. The respondent no. 2 is the developer. The petitioners and the predecessor of the respondent nos. 1(a) to 1(c) i.e., late Amarendra Nath Naskar (brother) entered into a development agreement in 2007 with the respondent no. 2. In terms of the said development agreement, the petitioners were entitled to owners allocation along with Amarendra Nath. The petitioners allege that the owners allocation had not been provided by the developer. The petitioners contend that they had executed a registered power of attorney on August 17, 2007 in favour of Amarendra Nath and he was permitted to take all steps for the purpose of development of the said premises, on behalf of the petitioner. The contention is that the brother had assured that the development of the premises was progressing well.

The petitioners contend that all of a sudden, notices dated June 28, 2023 and July 6, 2023 were issued by the Income Tax Department, calling upon them to furnish details of their income for the financial year 2020-21. The petitioners were shocked to receive such notices. They were not aware of any income generated for the said year. The petitioners contend to have made enquiries and on considering the Annual Information Statements for the financial year 2020-21 maintained in the Income Tax Department,came to learn for that various units constructed in the premises had been sold to various third parties by several registered deeds. The petitioners confronted theirbrother regarding such sale and their brother maintained silence. On August 4, 2023, the petitioners made enquiries at the office of the Registrar of

Assurances and discovered that their late brother, purporting to act as a constituted attorney of the petitioners, had executed a second development agreement dated February 26, 2016. From the said deed, it would appear that the respondent no. 2 had taken over the development of the premises from Progressive Niketan Private Limited, the erstwhile developer. According to the petitioners, the development agreement was executed on 2016,by misusing the power given to late Amarendra Nath Naskar. It is alleged that Amarendra was not conferred any right to enter into other development agreement. The witnesses to the second development agreement were the children of late Amarendra. They have since been substituted in this proceeding. On relevant enquiry, it was found that two G+5 storied buildings had been constructed and several units had been sold to the third parties. Hence, dispute and differences arose and notice under Section 21 of the Arbitration and Conciliation Act was issued to both late Amarendra (deceased brother and constituted power of attorney holder) as also to the respondent no. 2. The petitioners contend that in the development agreement of 2016, there is an arbitration clause. The agreement had been signed by late Amarendra as the constituted attorney of the petitioners. The petitioners contend that the dispute is also with regard to the legality and validity of the second development agreement. Moreover, allocation was not made to the petitioners (owners allocation). Even if the deceased respondent no. 1 had been handed over such allocation, these are matters arising out of the development agreement of 2016. The challenge to the said development agreement, would also be an arbitrable dispute, covered by the arbitration clause.

Mr. Banerjee, learned advocate for the heirs of respondent no. 1 i.e., the respondent Nos. 1(a) to 1(c) submits that the application is not maintainable before this Court. The notice invoking arbitration was issued to the constituted attorney, with allegations against him. There were no allegations against the developer. Only disputes arising out of the development agreement would be subject to arbitration and not the dispute between the sisters and their attorney. Mr. Banerjee places the notice invoking arbitration in detail and submits that the proper remedy of the petitioners would be to file a suit for cancellation of the deed, subject to the laws of limitation.

Learned advocate for the respondent no. 2 does not oppose the application to the extent of the prayer for appointment of an arbitrator. However, the respondent no. 2 contends that the owner's allocation had been handed over long time ago and denies the claim of the petitioners against the developer.

Having regard to the rival contentions of the parties, this Court finds that in the development agreement of 2016, late Amarendra nath Naskar signed for self and on behalf of the petitioners. The arbitration clause is not in dispute. The notice invoking arbitration had already been issued. The clause provides that all the disputes and difference arising out of the said agreement, regarding the construction or interpretation of any of the terms and conditions or touching those presents or determination of any liability, would be referred to the sole arbitrator if both the parties agreed, and in the event of any disagreement, the same shall be referred to the arbitration of two arbitrators.

It appears that the petitioners, upon invoking the arbitration clause, had nominated a learned Arbitrator. The respondent no. 1 also suggested another arbitrator without accepting the arbitrability of the dispute.

Mr. Banerjee's contention cannot be accepted at this stage, solely on the ground that the referral Court cannot probe deeper and go beyond the existence of the arbitration clause.The fact that a notice invoking arbitration had been issued to the deceased respondent No.1 and the respondent No.2 is not in dispute. Moreover, the clause also provides that all disputes and differences out of the said agreement of 2016 including the liabilities of the parties would also be referred to arbitration. The arbitrability of the dispute and the contention raised by Mr. Banerjee can be raised before the learned Arbitrator. Moreover, Mr. Banerjee has annexed letters of the respondent no. 2 by which possession was allegedly handed over. They are at pages 12 to 15 of the affidavit-in-opposition. The confirmation receipt does not indicate signatures on behalf of the petitioners.

All observations are, prima facie, and the merits of the issues are to be decided by the learned arbitrator. Arbitrability of the disputes can also be raised before the learned Arbitrator. Both parties agree for reference to a sole arbitrator.

Under such circumstances, the application is disposed of by appointing Hon'ble Justice Jyotirmoy Bhattacharya (retired), former Chief Justice of this Court as the sole arbitrator to arbitrate the dispute. The learned Arbitrator shall comply with the provisions of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall be at liberty to fix his remuneration as per the Schedule of Arbitration and Conciliation Act, 1996.

All observations are tentative and the learned Arbitrator is free to decide all issues.

(SHAMPA SARKAR, J.)

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